MR. NICHOLAS :

May it please Your Lordships. My Lord, at the beginning of his Address, my learned friend Mr. Trengove stated, the reference is page 18329, that it was not necessary to argue the law of treason because this had been done to a very great extent. He proposed however, to state very briefly the law as the Crown sees it, and in the course of that statementhe referred to the nature of an overt act of treason in a number of different ways. He said at page 18369, "an overt act of high treason is committed by a person who with hostile intent does any act whatever its nature in pursuance of that intent". Then at page 18370 : "Any act manifesting the criminal intention of the party". And on the same page : "Any act . . . . . or means whatever, done, taken, used or assented to for the purpose of effecting the traitorous intention". Then at 18371 he said : "If the intent is hostile, if an act is committed in execution of that state of mind, then it becomes an overt act, however innocent it might otherwise have been". He illustrated at page 18387 by saying where a sitdown strike is organised with the intention of coercing the government, the intent rendered the act unlawful. At page 18401 he states flatly, violence is not a necessary element of treason.

My Lord, the Defence have contended throughout that it is not correct that in our law any act, however, innocent is an overt act of treason.

If, to use some of the expressions used by my learned friend, that act is done in pursuance of a hostile intent, or for the purpose of affecting a traitorous intention, or in the execution of a hostile stateof mind. We submit, and Your Lordships have held, that an overt act is one which manifests the hostile intention, and tends towards the accomplishment of the criminal object. That is the holding of Your Lordship the Presiding Judge, at pages 12 and 13 of the Judgment on the Exception. Your Lordship said at page 12 : "The Appellate Division in Rex against Leibbrandt and Others, 1944 A.D. at page 284, approved of the definition of an overt act given by Lord Chief Justice . . . . . in Rex against Thistlewood, State Trials, at page 685. In his charge to the jury the Lord Chief Justice inter alia said, 'I have already intimated that any act manifesting the criminal intention and tending towards the accomplishment of the criminal object, is in the language of the law, an overt act'. It was obvious that overt acts may be almost infinitely various, but in cases where the criminal object has not been accomplished, the overt acts have frequently consisted of meetings, consultations and conferences about the objects proposed and the means of its accomplishment. Agreements and promises of mutual support in the assistance and distance (?), incitement to others to become parties to it, engaged in the scheme and so on.'" Then Your Lordship quoted from Lord Reading (?) and his charge in the Caseman (?) case, "overt acts are such acts as manifest a criminal intention and tend towards the

accomplishment of the criminal object. They are acts by which the purpose is manifested, and the means by which it is intended to be fulfilled".

Now My Lord, it is the Defence submission that acts which manifest a hostile intention are acts of a particular kind or character or quality, and that that kind or character or quality appears from an examination of the term "hostile intent" and of the word "manifest". So far as hostile intent, My Lord, is concerned, that is an intent which is peculiar to the law of treason. Of course it is trite that in most criminal cases, most criminal offences, some intent is necessary, intent being the state of mind which accompanies an act and imparts to it its legal effect. And by intent, as understood in the law, an intention to bring about certain consequences by means of an act. It is repeated, My Lord, in a number of textbooks, the term "intent" or "intention" has reference to the consequences which are aimed at by a voluntary act or omission. Intention is the purpose of design with which an act is done. But in law, My Lord, intention must be distinguished from a motive and from desire. The question was considered by the Appellate Division in the case of Rex against Peverett (?), which is reported in 1940 A.D. 213. That was a case in which the Accused was charged with attempted murder in consequence of an attempted execution of a suicide pact, with a woman. And His Lordship Mr. Justice Watermeyer said at page 218 : "With regard to the first . . . . . of the argument,

there is no doubt that the Accused . . . . . with the concurrence of Mrs. Saunders made the arrangement by means of which poisonous gas was led into the enclosed body of the car. His purpose of leading poisonous gas into the car was to enable them both to enable the poisonous gas, and their breathing of the poisonous gas was in turn the means whereby their death was to be . . . . . He was therefore responsible in law for the result of these actions, namely the unconsciousness and illness (?) of Mrs. Saunders which very nearly ended in her death. The fact that Mrs. Saunders was free to breathe the poisonous gas or not as she pleased cannot free the Accused from criminal responsibility for her unconsciousness and illness, because she told him of her suicidal purpose and he knew that in the course of events compensated by him, she would remain . . . . . and would breathe the poisonous gas and die. His acts therefore were a means to that end, and so closely connected with it, as to be more than mere acts of preparation for that ehd.
With regard to the second branch of the argument, it was contended that inasmuch as the Accused had no wish or desire to cause the death of Mrs. Saunders, intent to kill was lacking, and therefore he was not guilty of attempted murder. It is true that the Accused was reluctant to cause the death of Mrs. Saunders and in that sense did not desire it, but it does not follow that he did not intend to cause her death. In law desire must be distinguished from intention. The consequences that a man contemplates or expects to

result from his acts are the consequence which he intends. That - But as Austin points out in Lecture 19, such consequences may not always be desired. So a desired consequence is usually an intended one, and an intended consequence is not always a desired one. In the present case it is clear that the Accused contemplated and expected that as a consequence of his act, Mrs. Saunders would breathe the poison gas anddie. In the eyes of the law, therefore he intended to kill her, however little he may have desired her death."

And in a treason case, the case of Straub (?) which is reported in 1948, Volume I of the South African Law Reports, page 934, a decision of the Appellate Division, Chief Justice Watermeyer - I read from page 940 : "It is argued that the appellant, so far from being animated by hostility towards the Union was animated by a desire to benefit the Union by furthering what in his judgment were its best interests. He thought the best interests of the Union lay in taking no further part in the war, and consequently his purpose was to persuade the people of the Union to bring about a change in government by constitutional means and thus put a stop to the war with Germany by the exercise of their legitimate right (?). The Special Court is not satisfied that this was his real or only purpose, but if it was, the ultimate end which the Accused desired to bring about was the motive for his conduct, and was not the decisive or only factor to be taken into consideration in determining whether hostile intent accompanied the performance of the act

complained of. I agree with that view. Though the ultimate end which an actor has in view is often spoken of as his motive, it is perhaps more correct to say that the desire or wish for that end was his motive, because it is the desire or wish which moved him to act. But if in yielding to that desire, he takes - the actor takes steps to achieve his ends, which as a reasonable man he must know or foresee are likely to cause some forbidden effect, other than the one desired as his ultimate end, then in law he intends that effect and is responsible for it. The requirements for the definition of treason, ... actions complained of must have been done with hostile intention against the state, does not mean that the Accused must have been animated by feelings or hatred or illwill towards the state, but merely that he was intentionally antagonistic towards it."

I submit, My Lord, that it is clear that when His Lordship uses the word "antagonistic", he doesn't use it in any loose sense, but he uses it in the sense of being an antagonist or an enemy. "In time of war if the public of one state intentionally gives direct assistance to the enemy in his war effort, he must necessarily in ordinary circumstances act with hostile intent towards his own country, because he must know as a reasonable man that such assistance to the enemy is an act which tends to hamper the cause of his own country in however small a measure, and therefore is an act hostile or antagonistic towards it in the cause for which it is fighting. He therefore

intends to do a hostile act, and consequently act with hostile intent".

My Lord, it has been said many times that in treason the criminal intention is the animus hostilis or the hostile intent. But the submission is, My Lord, that there is no magic surrounding that word, that it is merely the specific intent which is requisite in the case of treason. In most crimes some specific intent is requisite. It is requisite that the Crown should establish the purpose with which the actus reus was done. In murder the requisite intent is the intent to kill. In theft the requisite intent is the animus furandi, the purpose of depriving another of his rightful (?) property. In fraud the requisite intent is the intent to deceive. And in treason, the requisite intent is the hostile intent, the intention to act in a hostile manner as an enemy towards the state. The intention, the purpose of overthrowing or coercing the government by force. My Lord, Your Lordship has had frequent references to the authorities which say that hostile intent is the hallmark of perduellio as distinguished from lesser offence against majestas. ??

MR. JUSTICE BEKKER :

Is the overthrowing of the state by force then - force in what sense?

MR. NICHOLAS :

Force in the physical sense. Violence. References, My Lord - there is Erasmus, 1923 A.D. 73 at p.80; and By His Lordship Mr. Justice Kotze at page 87. Viljoen, 1923 A.D. p.90 at page 92. And the illustrations

of hostile intent which appear from the decided cases, are an intention to assist a foreign enemy, an intention to overthrow the state, an intention to coerce the government authority of the country by force, the intention to treat the government as an enemy, the intention to commit an act of hostility towards his own country. We will emphasise, My Lord, that hostile intent connotes a particular purpose or design, namely a purpose of design to overthrow the state by force, to coerce it by force, or to assist its enemy. And hostile intent is not the same as feelings of hatred or illwill.

We submit, My Lords, that the fact that a man has spoken frequently in terms of hatred or ill-will, of his rulers or of the Constitution, does not mean in any way that he has a hostile intent, that he has a purpose of design to subvert the government or to coerce it by force. In the same way the fact that one man has expressed his hatred or another, has spoken of him in terms of loathing and detestation, does not mean that he has an intent to kill that other man, has formed a purpose or a design to murder him. The fact that a man has a desire for a thing, has a strong wishto possess it, does not mean that he has an animus furandi.

MR. JUSTICE RUMPFF :

That hasn't been argued, I think, at all.

MR. NICHOLAS :

There are suggestions, My Lord, in the

the argument of my learned friend that the accused have stated frequently that they don't like this state, and he appears to equate that with hostile intent.

MR. JUSTICE RUMPFF :

All the references which you make obviously are very apposite. An expression towards - of hatred towards the state isn't hostile intent, but it may indicate, together with other facts, a hostile intent.

MR. NICHOLAS :

My Lord, the submission will be ...

MR. JUSTICE RUMPFF :

The same way - the same manner when a man is charged with murder, of killing a person, the question of murder - the question of intent may depend on what he had expressed about the deceased before.

MR. NICHOLAS :

Where an act has been committed, My Lord, where an act of murder has been committed, then it is certainly relevant to give evidence in regard to the question of the intent with which the act is committed, that that man expressed feelings of detestation and loathing and hatred. But in this case, My Lord, the Crown does not allege that any act, such as an act of murder, has been committed. The Crown takes the standpoint, it says you begin by asking, has there been a hostile intent.

MR. JUSTICE RUMPFF :

It says that there has been a

c

conspiracy, and that is the same as an act of murder on your argument.

MR. NICHOLAS :

Yes, My Lord, I will come to the question of conspiracy. But the Crown says the starting point in this case is to see whether thereis the hostile intent, and it has said in order to show that there is a hostile intent, look at the expressions of the Accused, that proves that they have a hostile intent. We submit, My Lord, that it proves nothing of the kind. Anymore than in the case where no assault has been committed, the fact that a man expresses himself in strong terms about another shows that he had an intent to murder. We submit, My Lord, that a man with a hostile intent is a man with a particular purpose or aim, not a man with particular emotions (?) or attitude. And a man, without such a purpose, and intent is a purpose which must be proved - a man who without such a purpose has strong feelings or views or attitudes towards the state, does not ipso facto have a hostile intent.

My Lord, so far as the word "manifest" is concerned, the dictionary meaning of the word manifest is to show plainly, to eye or mind, to prove, to be evidence of and to display. My Lord, the effect of that word and the requirements of manifestation of a particular intent was discussed by Maasdorp J.A. in the case of Rex against NdHovu, 1921 A.D., p.485. I refer to His Lordship's Judgment on pages 494 to 496. The question in that case was

whether an incitement amounted to an attempt and the nature of an attempt generally. And His Lordship said at the bottom of page 494 :

"Then again an attempt is made to arrive at a solution of a question, what is an attempt, by drawing a distinction between such acts as are said to be preparatory to the commission of a crime, and those which in their nature are actual attempts to commit the crime. This distinction will in practice afford no sure guide because of the difficulty experienced in any particular case positively in fixing ? . . . . . a point in a series of of acts at which the one set of acts ends, and the other set of acts commences. Nevertheless this is a point of view which may throw some light on the question and consequently on its solution. In the same way the efforts made by a Court of law and our jurists to apply general rules to particular cases, undoubtedly leads to a further development of the principles involved. And a study of the opinions of our writers and the decisions of the Courts, although it may not remove difficulties in the determination of particular cases, will at least . . . . . to regard them from the right point of view". And then His Lordship says : "When we turn to the Roman Law on the subject, and the Roman Dutch Law, we should guard ourselves against errors by carefully studying the law applicable to particular crimes in this respect.

It is well established in our law that when the intention to commit a crime conceived in the mind of a man, but not manifested by some outward act, is not in

itself a crime, unless an attempt to commit a crime, although not followed by the actual perpetration of that crime, is in itself a . . . . . crime." And then His Lordship says : "But it mustbe remembered that in Roman Law, in the case of some atrocious crimes, the will was taken for the deed, and the intention to commit the crime manifested by some outward act, amounted to the actual commission of the crime and was severely punished. When in such cases an act is mentioned by our writers as being sufficient evidence on which to convict a person, it is not on the ground that such act amounts to an attempt, but.." - I have added the word "but" here, My Lord, because it seems as though it has been omitted - ".. when an act in such cases is mentioned by our writers as being sufficient evidence on which to convict a person, it is not on the ground that such act amounts to an attempt, but that it is sufficient to prove the intention, which is in itself a crime in the case then under discussion. Then again we find instances where in dealing with attempt it is said that the proximate act is punished as severely as the crime. In those cases it is not meant that no act before the proximate act should be regarded as an attempt, that the proximate act is really a . . . . . of the crime itself and it deserves the same punishment, whereas earlier acts, although they may also be attempts are more leniently dealt with."

Voet 48;8:4 says in the case of murder, one of the cases of atrocious crime mentioned in the Digest, : "The intention is looked at in the Roman Law

and not the ultimate result, and this is the case also in other serious offences, and especially under the Lex Cornelia, the malicious intent is taken for the deed, that is the intent to kill is taken for the actual killing, provided that some act is proved which is done with the object of carrying out the intention."

The same view is expressed by Bynkershoek, where he says that the intention only to commit a crime is not punished except in the case of certain crimes which are specially mentioned in the civil law, and in the case of those crimes the will to commit the crime is punished as well as the crime itself. He mentions parricide and other crimes,adding that there would have been no necessity for such laws if the rule held good in all cases.

Van Leeuwen, Censura Forensis, says that the intention is not held for the crime itself, nor is it punished as severely except in the case of crimes where it is specially provided by law, such as treason and others. And then he proceeds to say that it is rightly said under the Lex Cornelia, the intention and attempt to commit those crimes are punishable, and Matthaeus says the same.

My Lord, what His Lordship said here was that in the case of some atrocious crimes, the intention was puhished in the same way as the completed crime, but it was necessary that the intention should be manifested, should be demonstrated, should be proved by some overt act. There must be an act, he says, as may be expected therefore, the act mentioned

in the civil law, as sufficient to establish any one of these atrocious crimes, are acts which prove the intention, and need not necessarily be attempts to commit the crimes as we understand the term. Among the acts which are in the Roman Law regarded as sufficient to sustain a conviction of murder - when a murder has not actually been convicted, Voet 48:8:4 that of going about with a weapon with the intention of killing a man, or that of making, felling (?), preparing or having in possession poison with the intention of killing a man, because it is enough in such a case to prove an intention, and an overt act manifesting such intention.

My Lord, this Judgment was referred to , again in the AppellateDivision, by Chief Justice Watermeyer in the case of the King against Schoombie, which is reported in 1945 A.D. at page 541. His Lordship said at page 545 : "Now in discussion was the subject of attempt, the difficulty in deciding when preparation ends and perpretation begins is almost invariably pointed out, and our Courts have deliberately declined to lay down a test whereby the dividing line can be determ ned in all kinds of crime. It may be that it is impossible to find such a test which will prove satisfactory for all crimes, see Kenny, Criminal Law. The matter was discussed in the Judgment in Ndhlovu, and it was there pointed out in particular by Maasdorp J.A. how much wider was the view held by the Roman Dutch authorities as to what constituted an attempt, and the view held by modern authorities.

Thenat page 546 His Lordship refers to a definition
Stephen ?
given by Friedman (?) in his Digest of the Criminal Law, and said : "This defintion was criticised by Salmond Jurisprudence, paragraph 137, as affording no sufficient guidance and as laying down no principle by means of which preparation can be distinguished from attempt. Salmond suggests that when such acts have reached the stage that they are evidence of the criminal intent..." - here, My Lord, in a work on Jurisprudence, there is a recurrence of the idea expressed by the Roman and Roman Dutch writers - "..Salmond suggests that when such acts have reached the stage that they are evidence of the criminal intent with which they are done, then they constitute an attempt." His Lordship says : "I take the word 'evidence of' to mean 'proof of', and it follows that if no evidence alliande (?) is required to prove the criminal intent, if in fact the act charged as an attempt bears the criminal intent upon its face, then an attempt has been established." And it is our submission My Lords, that if the requirements - that the requirement that an overt act should manifest the hostile intent means that the act should bear the hostile intent upon its face. That one should be able merely by looking at the act to say, from this act there is to be inferred that the perpetrator of it had a hostile intent.

MR. JUSTICE RUMPFF :

Irrespective of any other evidence?

MR. NICHOLAS :

Oh no, My Lord. It is always open to an

Accused person to come forward and say - I say always open, in many cases it is open to an Accused to say I didn't have the intent that appears from this act, you are drawing the wrong inference. It is alwaysopen to the Crown to introduce other evidence also to prove the hostile intention to reinforce the intent that is apparent from the act. But unless the act, in our submission has the intent upon its face, at any rate - unless the act is reasonably capable of supporting an inference that it was done with hostile intent, then it is not an overt act.

My Lord, I have submitted that apart from the question that a particular intent is required in treason, there is no real difference between treason and other crimes. There must be an actus reus, there must be a specific intent. And in the Roman and Roman Dutch Law where they set aside certain atrocious crimes as being punishable, even though the act has not been completed, the identity between treason and the other atrocious crimes is complete. And the Romans, by special enactment, made poisoning, assassination and rape as the special crimes which were punishable merely because there was an act evidencing the wrongful intent.

My Lords, Voet, in 48:8:4 states - pages 429 of Gains' Translation, - his heading is "Under Cornelian Law, preparation or attempt punished like act" . He says, "In the first place, there is no need under the civil law for killing to have ensued in actual fact. . . . . is enough for a person

merely to have walked about with a weapon for the purpose of killing a human being or of . . . . . or to have made, sold, prepared or possessed poison with a view to slaying a human being, or to have performed evil sacrifices so that human beings might be killed, or to have exposed . . . . . a child, who exposes a child for . . . . . full with every brutality and cruelty and to be . . . . . homicide . . . . . inflicting upon it more unfortunate creatures. Or lastly to have wounded a human being with the intention of killing him - they were all the same, death has not ensued. In this and in certain other somewhat serious misdeeds, the - regard is paid for the wish and not for the result. And in this Cornelian Law, evil intent is expressly taken for act. That is to say the intention to kill stands in the same position as if a person had really killed. This however is to be understood in the sense that intention has been displayed by some act, which comes near to homicide.

MR. JUSTICE BEKKER :

Mr. Nicholas, I am very curious about something. I would just like to know - you can do it later on - how are you going to apply it to what the Crown has produced, what are you going to say on the alleged overt acts? Speeches, meetings, that type of thing?

MR. NICHOLAS :

I am going to submit, My Lord, that none

of them constitute overt acts on this case.

Then My Lord, Boehmer said the same thing in regard to the crime of treason. He said it My Lord in the liberary copy of his Meditations at page 498. He said, My Lord, that simplex dolus, ordinary dolus, or the intention of doing harm to the Emperor, no more than hatred which has been conceived against him, are sufficient for the crime of treason, unless it appears ex qualitate facti, unless it appears from the quality of the act, which must of necessity be of a threatening nature, hostility appears. Unless hostility appears from the nature of the act itself.

Then My Lord, Damhouder said the same thing in Chapter 62. He is dealing specifically with treason, and he there says that it is necessary that the act should indicate the intent. And Moorman, in the library copy of his Verhandelinge Over de Misdaden,...

MR. JUSTICE BEKKER :

Don't you think you have given us enough authority now for this proposition.

MR. NICHOLAS :

As Your Lordship pleases. This is at page 6 of the library copy My Lord.

My Lord, we submit that the examples which are given in the old authorities in the case of crimes other than treason, those examples are examples of cases which are capable of supporting an inference that they have a hostile intent, and we submit that similarly, My Lord, for there to be a

hostile act of treason, an overt act of treason, it must be an act which is capable of supporting the inference that the doer of the act had a hostile intent.

MR. JUSTICE BEKKER :

Simply put, which manifests the hostile intent.

MR. NICHOLAS :

Which manifests,it, My Lord, which shows it on its face.

MR. JUSTICE BEKKER :

We will accept that and go on to the next step.

MR. NICHOLAS :

So that we submit, My Lord, that an act which manifests a hostile intent is an act which shows that the doer of it has the intention of overthrowing or coercing the state. We submit My Lord, that the only acts which manifest hostile intent, are acts of hostility or whatis referred to in the authorities as hostilia. We submit that the test is an objective test. The enquiry is not, at this stage what subjectively is the state of mind of the doer of the act, but what does the act in itself reveal.

MR. JUSTICE BEKKER :

Do you mean that even if the doer of the act has the hostile intent, but this act which he performs in pursuance of that particular intent does not reveal his real intent, it is not an overt act?

MR. NICHOLAS :

That is the submission My Lord. We submit, My Lord, thatit is of importance that there is no reported South African treason case in which an overt act was charged which did not bear the hostile intent upon its face, and which an act was charged from which one could not say merely by examining it, the doer of this had a hostile intent. And to find cases of overt acts of treason being charged, which did not manifest the treasonable intent on their face, one must go to the English law. It is submitted, My Lord, that English cases are not even of persuasive authority, except insofar as our Courts have accepted particular dicta in English cases as being in accord with the principles of the Roman and the Roman Dutch laws.

MR. JUSTICE RUMPFF :

I am afraid I don't follow you here. You say because of the absence of a decided case in South Africa, the nature of the overt act must be looked at in a certain light.

MR. NICHOLAS :

No, My Lord, I reinforce the argument based on the authorities that the nature of an overt act must be looked at in a certain light ...

MR. JUSTICE RUMPFF :

I take it your argument is always subject to the fact that that particular overt act must always be looked in the light of itself, plus whatever evidence there is to throw light on that act.

MR. NICHOLAS :

It must be looked at in the setting.

MR. JUSTICE RUMPFF :

In its setting, the evidence, yes.

MR. NICHOLAS :

I was submitting, My Lord, that the Court should not have regard to English decisions on particular facts as being indicative or as being in any way persuasive as regards the nature of an overt Act; that it is only to the extent that statements of Judges in the English cases have been adopted by the Courts in South Africa as being a correct statement of the principles of our law, that they should be looked at. Although My Lord we have largely adopted the English rules of evidence applicable to treason trials, we have not adopted the English law of treason. There is a suggestion by Chief Justice Wilde in the case of the Queen against Botha, reported in . . . . . 149, that we had taken over the English law of treason, but that suggestion has never been approved. The South African sugestion - the South African law of treason is Roman Dutch in origin and arises from Digest 48:4 dealing with the lex . . . . . majestatis. And it is to the Roman and Roman Dutch sources that we must look for our law.

On that, My Lord, I would refer to the case of Erasmus, 1923 A.D. 73 at p. 84. My Lord, Chief Justice Watermeyer, in the case of Strauss, 1948 (I) S.A.L.R. 934, pointed at page 939 to the fact that there is a difference between the two systems of

law. He was dealing with Section 284 of the old Code, which is now Section 256, which deals with the two witness rule. His Lordship said : "Section 284(2) is in fact a section which creates difficulty because it is an importation with a slight alteration into our law of the provision dealing with proof in England of certain forms of treason. Section 2 of . . . .c. . . . . William III Chapter 3, provides that no person should be indicted, tried or . . . . . of treason on the . . . . . of treason, except upon the oath and testimony of two lawful witnesses, either both of them to the same overt act of treason, or one of them to one and the other of them to another overt act of the same treason." His Lordship italicised the word "same" and "treason" (?). "That provision dealing with overt acts of the same treason fitted into the English statutory definition of treason, which seems to have consisted of certain classes or catagories of disloyal conduct which could be manifested by overt acts. The subject is an involved one, governed by many statutory provisions, fully dealt with in Stephen's History of the Criminal Law of England. The provision with regard to overt acts seems however to be out of place in our law of treason, because we have no recognised statutory classes of treason which are in legal theory manifested by the commission of overt acts." Notwithstanding those observations, My Lord, the Crown has continued to rely on English cases, and the only authority for such reliance is the statement by His Lordship Mr.

Justice Ramsbottom in Wentzel, reported in 1940, W.L.D. 273, in dealing with an argument that acts of preparation could not be an overt act of treason. And His Lordship said : "I think the English cases may be used since what would be an open deed such as would be required by the statute of treason, would be covered by the words 'iets doen of ondernemen' in Moorman's definition." And then his Lordship said at page 272 "I think that an act corresponding to what in English law is called an overt act, must be proved when necessity of such proof is recognised in Sections 284(2) and 302 of the Criminal Procedure Code."

Sofar as the statutory provisions are concerned, My Lord, Section 256 of the Criminal Code does not in our submission have the effect of introducing into our law the decisions of the English law in regard to overt acts. English decisions on the interpretation of the equivalent English statutory provision are not binding in our Courts. That appears from the case of du Preez, which is reported in 1943 A.D. 562, at page 576. That was the case where the Court was concerned with the old Section 295, which is the section prohibiting the asking of an accused of certain questions, which was a section which had been derived from an English statute. And the Court held that English decisions on the almost identical section might be interesting, might be of value, but Tindall J.A. said at page 576 "Though the language of section 295 is taken from an English statute, the section appears as a substantive provision in a statute of the

Union, and must be interpreted in South Africa as a substantive section of our own statute." So that even in the case of the evidential and procedural provisions in regard to treason which we have taken over from the English law, those must be interpreted as if they were sections in the South African statutes. But, a fortiori, those sections must not be regarded as introducing into South African law the English law of treason. They are procedural only, they relate to evidence only, and the English . . . . . (substance ?) . . . of law was not important into the country with them." That appears from the case Tregea against Godart reported in 1939 A.D. page 16 at page 31.

So we submit, My Lord, that there is no justification for arguing that because we have taken over certain evidentiary and procedural provisions of the English law in regard to treason that we have therefore taken over the English law.

As regards the second reason suggested by His Lordship Mr. Justice Ramsbottom, that what in English law is referred to as an overt act seems to be similar to what Moorman calls "iets doen of ondernemen" it is submitted that the mere fact that there may be a verbal similarity between the terms used in South African law and English law does not mean that the substantive rules are the same. That appears very clearly from the use of the word in the two systems of sedition. The word is the same, but sedition in English law is a completely different thing from sedition as it is used in the South African law.

That appears from Viljoen's case, 1923, A.D. at pages 92 to 93.

We submit, My Lord, that the way in which the English law of treason has developed, the oppressive (?) purposes which the English law of treason has been made to serve, renders it a dangerous model to follow. Your Lordship will remember that previously when we argued the exception, we referred to an article in the Harvard Law Review, by Willard Hurst, reported in 1944/1945, Volume 58 of the Harvard Law Review and we quoted from page 429, in which the learned author said : "The charge of compassing the King's death had been the principal instrument by which treason could be used to suppress a wide range of political opposition, from acts obviously dangerous to order and likely in fact to lead to the King's death, to the mere speaking or writing of views restrictive of the Royal authority. Resort to treason trials is the weapon of political combat . . . . . , the judicial technique was that, to quote from Hallsworth (?) of inferring an intention to kill from overt acts which were only remotely connected, if they were connected at all, with the formed intention to kill the King, in short (?) constructive treason (?). As Hallsworth's description implies, this involved more than devitalising the mental element of the crime by raising a treasonable intent upon tenuous innuendoes. The protest had also involved the emasculation of the overt act requirement in the statute of Edward III, for if

treason were to be used effectively to suppress political opposition, it could not be limited to the relatively rare cases of resort to violence or the imminent threat thereof. It must be extended to cover the expression and advocacy of belief and ideas and at the high point of thisprocess it was in fact extended to punish the possession of unpublished writings. And then Herbst (?) says in his article that in America where the law of treason has been directly derived from the Statute of Edward III, limitations have been suggested on the use of English authority, namely in regard to English cases dealing with charges of compassing the death of the King and cases decided in time of political turmoil when there was being asserted an arbitrary power. That appears from page 812 of the article.

My Lord, the English law is statutory. It is derived from a fourteenth century statute in England. Our law is the common law, and we submit that we have no concern with the . . . . . of English Judges on an English statute, particularly where they concern a form of treason compassing the King's death which has no counterpart in our law. It is true, My Lord, that in Erasmus, page 89, Coetzee J.A. says that in its main features our law is in accordance with the English law. But is is clear from the examples which he gave that the learned Judge of Appeal was dealing with a particular form of treason, namely revolution, which is a form of treason with which this Court was concerned in that

case. He wasn't intending to suggest that particular decisions, particularly relating to a form of treason which we do not have, should be applied in South Africa.

My Lord, the submission that we are making involves, My Lord, a submission that Your Lordship concluded in the Judgment on Exception that the overt act need not per se manifest a hostile intent, was incorrect. We respectfully submit, My Lord, that Your Lordship fell into error by giving to the word "manifest" a meaning other than its true meaning. We submit My Lord, that it is open to Your Lordship at this stage to correct what is in our submission an error.

MR. JUSTICE BEKKER :

If it is a manifest error?

MR. NICHOLAS :

No, My Lord. Your Lordships are completely free, with respect, ...

MR. JUSTICE BEKKER :

are we?

MR. NICHOLAS :

With submission, yes. Maybe it is difficult My Lord to persuade that Your Lordships were incorrect, but that we shall attempt to do. And we submit, My Lord, that this is a purely interlocutory order, which is in no way binding on Your Lordships,= and if Your Lordships can be satisfied that Your Lordship expressed a wrong view, then Your Lordships can correct it at this stage.

My Lord, this question was discussed in

a civil case, Blaauwbosch Diamonds against the Union Government. It is reported in 1915, A.D. at page 599. Innes C.J. was considering the question of whether an order dismissing an exception was appealable. His Lordship says : "The question is whether this was purely an interlocutory order. The characteristics of purely interlocutory orders were fully considered in the case of the state versus Fitzgerald, Steytler and most of the South African decisions were discussed. It was then laid down that a convenient test was to enquire whether the final word in the suit had been spoken on the point, or put in another way, whether the order made was reparable at the final stage. And regarding this matter from that standpoint, one would say that an order dismissing an exception, if not the final word in the suit on is ? that point, that it may always be repared at the final stage. All that the Court does is to refuse to set aside the declaration, the case proceeds. There is nothing to prevent the same law point being re-argued at the trial, and though the Court is hardly likely to change its mind, there is no legal argument to its doing so upon a consideration of fresh argument and further authority."

MR. JUSTICE BLKKER :

In what terms did this Court decide that the overt act need not per se manifest - on what basis did the Judgment proceed?

MR. NICHOLAS :

His Lordship Mr. Justice Rumpff said at page 13, the last paragraph on that page : "The act

itself need not per se manifest a treasonable intent. The act may be an apparently innocent act and the treasonable intent may be proved by circumstantial evidence". We submit, My Lord, with great respect that that is erroneous. Compare Rex against Wentzel, and Kramer against the United States. Where Mr. Justice Jackson ? . . . . . observed "actions of the accused are set in time and place in many relationships, environment illiminates the meaning of acts, as context does that of words. What a man is up to may be clear from considering his bare acts by themselves. Often it is made clear when we know the reciprocity and sequence of his acts with those of others, the interchange between him and another, the give and take of the situation".

My Lord, the principle in the Blaauwbosch Diamonds case has been applied in two criminal cases in the Appellate Division, in the case of Melozani, which is reported in 1952(3) S.A.L.R. at page 639. That was a case in which it was contended that a confession was inadmissible, and the Court held that the confession held that - that the confession was admissible. But it was also held that if it appears at a later stage of the case that it was inadmissible, then the Judge should reverse his previous decision and exclude the evidence. And the principle was also applied in the case of Solomons, who is reported in 1959 (2) S.A.L.R. at pages 362 to 263. "It was also urged upon us by Mr. Sachs," said his Lordship Mr. Justice Ogilvie-Thompson, "that the cross-examination of the Accused was irregular, because the Presiding Judge's earlier

ruling excluding the evidence of . . . . . .
which the Crown had . . . . . .
I am unable to agree. That ruling did not in my opinion preclude the learned Judge from at this later stage, authorising the Crown to cross-examine the Accused in relation to the . . . . Subject to considerations of prejudice, the ruling on the admissibility of evidence may be of an interlocutory nature, thus susceptible of alteration during the trial". And His Lordship refers to Melozani's case.

My Lord, Your Lordship the Presiding Judge said that the act may be an apparently innocent act and the treasonable intent may be proved by circumstantial evidence. We submit, My Lord, that if the act does not . . . . . manifest a hostile intent, then it does not matter what treasonable intent is proved by circumstantial evidence, that act is not an overt act of treason.

MR. JUSTICE RUMPFF :

Are you relying for that on the Roman Dutch authorities you have quoted?

MR. NICHOLAS :

As Your Lordship pleases. We rely for that ...

MR. JUSTICE RUMPFF :

Where do they say that that is so?

MR. NICHOLAS :

They say that they must manifest is, My Lord - His Lordship Mr. Justice Maasdorp said so. The nature of the act is referred to by the Roman Dutch

authorities.

MR. JUSTICE RUMPFF :

The effect then is that unlike the English and American law, the Roman Dutch law has a peculiar view of the overt act in this way, that if by itself only - there may be cases where you have other evidence, but you must look at the overt act only, and that by itself must disclose a hostile intent to overthrow the state. Is that ....?

MR. NICHOLAS :

My Lord, we have taken over, we have accepted as being a correct statement of the law of England, statements in some English cases that the overt act must manifest the criminal intention. We submit, My Lord, that that word manifest means that the act must reveal a criminal intention.

MR. JUSTICE RUMPFF :

But you say that in English law the word manifest in that sense does not mean that . . . (?) - it may be an innocent act, but illuminated by other facts?

MR. NICHOLAS :

My Lord, there are cases in English law where for example the man set out from Spain or from Portugal to go to England, when he was convicted of treason because it was proved that he said he was going to England to kill the King. In our submiss on My Lord, the act of leaving Portugal for England does not manifest a hostile intent. It does not reveal or prove or carry upon its face the hostile intent.

MR. JUSTICE BEKKER :

On that basis, nor would the ringing of a bell being the signal....

MR. NICHOLAS :

No, My Lord, the ringing of a bell is on a different basis.

MR. JUSTICE BEKKER :

What makes - what is it in the ringing of a bell that reveals the hostile intent?

MR. NICHOLAS :

My Lord, I will be coming to those examples which are referred to in the Judgment of Mr. Ramsbottom in Wentzel's case. It may be My Lord, that that act, regarded in its setting, is a warlike act.

MR. JUSTICE BEKKER :

In its setting, right.

MR. JUSTICE RUMPFF :

But it may be a church bell that he rings.

MR. NICHOLAS :

Any sort of bell, My Lord.

MR. JUSTICE RUMPFF :

That is at ten o'clock on a Sunday morning when the service is due to start.

MR. NICHOLAS :

And there may be evidence ...

MR. JUSTICE RUMPFF :

And there may be two groups of people waiting for the bell, the congregation inside and the army outside.

MR. NICHOLAS :

It doesn't with respect affect it, My Lord.

MR. JUSTICE RUMPFF :

But you say then if the bell is rung...

MR. NICHOLAS :

If it is shown that the bell is the signal for war, for revolution, then that act shows on its face a hostile intent. In its setting it is a warlike (?) act.

MR. JUSTICE RUMPFF :

If the departure of a word be murderer of the King, the departure in pursuance of the plan to murder the King, that departure is not an act which shows the intention?

MR. NICHOLAS :

It doesn't reveal the intention in any way at all. It is a completely innocuous act.

MR. JUSTICE RUMPFF :

No doubt you will deal with those examples.

MR. NICHOLAS :

My Lord, it is true that any act may be apparently innocent if considered apart from its surrounding circumstances. If it is taken in isolation from the res gesta. It is true, that to ring a bell or fire a rocket or any of the other examples given, may be innocent regarded in isolation, sterilised, by themselves. And it is permissible, My Lord, and proper to look at the act in its setting in order to

see whether it reveals a hostile intent. There is the example given in Hardie's case, which was quoted at page 275 in Wentzel's case. "Now, gentlemen, an overt act indeed manifesting an intention to commit any of these species of treason, need not necessarily be an act of treason in itself., For example, suppose there is an undoubted scheme proved . . . . . to raise an insurrection, or to levy war against the King for a general purpose, there can be nothing more innocent in itself in the world than the ringing of a bell or the firing of a skyrocket, the beating of a drum or anything of that sort. But if it be proved at the same time that any of these acts were to be the signal for the insurrection, then these acts, perfectly innocent in themselves, if done by a person who was aware of the object of them, is an overt act of treason. That is to say it is an overt act intimating the treasonable purpose a man has in view".

MR. JUSTICE BEKKER :

Isn't that all the Presiding Judge meant at page 13, when he said the act itself need not per se manifest a treasonable intent? The act may be an apparently innocent act and the treasonable intent may be proved by circumstantial evidence?

R. NICHOLAS :

My Lord, my submission is that it isn't the treasonable intent that is proved by circumstantial evidence - a treasonable intent appears from the fact that that act was committed in this particular situation. To ring a church bell in the situation of an

ordinary Sunday morning is an innocent act. To ring the church bell in the situation of a planned - of a plan for an armed uprising to follow on the ringing of the bell is a signal for war, and to give a signal in such a situation manifests a hostile intent.

MR. JUSTICE BEKKER :

Well, isn't that all the learned Judge meant here?

MR. NICHOLAS :

My Lord, His Lordship went on to apply that to the present conspiracy such as this, and in our submission it is not applicable.

MR. JUSTICE BEKKER :

Well, what you call the setting, as far as the ringing of the bell is concerned, isn't the conspiracy the setting here, which makes ...

MR. NICHOLAS :

In such a case, My Lord, the conspiracy is part of the res gesta. The conspiracy shows that this act, prima facie innocent, is in fact a warlike act. That is the bell case, My Lord. The conspiracy shows that this is a warlike act. But our submission is that in the facts of this case a conspiracy can't turn the act of making a speech, a political act, into a warlike act.

MR. JUSTICE BEKKER :

Doesn't that depend on the nature and the scope of the conspiracy?

MR. NICHOLAS :

With respect not at all, My Lord. Unless

the speech is a signal for an armed uprising, for war, revolution. But if the speech is a political speech, then it doesn't matter what the intention is with which it is done.

MR. JUSTICE BEKKER :

The Crown suggests that that is preparation for war.

MR. NICHOLAS :

My Lord, I come to deal with the question of preparation. Our submission relates at this stage to the question of what is an overt act. We say it is an act which manifests, reveals, or shows an intent. And we submit that unless the act in its setting is deemed to be an act of war, it is incapable of being an overt act of treason.

MR. JUSTICE BEKKER :

But surely that must depend, Mr. Nicholas, it must depend on the scope or the nature of this conspiracy.

MR. NICHOLAS :

My Lord, we are concerned with respect, My Lord, with the nature of an overt act. We submit it is perhaps a slightly more accurate (?) description, an act which, viewed in its circumstances, manifests a hostile intent. But, we say, that a distinction must be drawn between an act which manifests an intent and an act which is done in pursuance of an intent, or done with an intent, or done in execution of an intent.

MR. JUSTICE BEKKER :

What is the difference between an act manifesting an intent and one done in pursuance of that conspiracy. Doesn't - if you do an overt act in pursuance of the conspiracy to overthrow the state by violence - doesn't that manifest the intention as much as any other ...

MR. NICHOLAS :

No, My Lord, with respect. The proof the conspiracy - it amounts to proof that the conspiracy has a hostile intent. The act manifests nothing in itself. The intent is manifested by the conspiracy, not by the act. For example, My Lord, I could have written a letter last night saying it is my intention to go tomorrow to the Court. That would be proof of mymy purpose. This morning, My Lord, when I got up, I got up with the purpose and design of coming to Pretoria. It was with that intent that I put on my clothes and that I packed my robe. Those acts, My Lords, were done in pursuance of my intention..

MR. JUSTICE RUMPFF :

And show your intention to the outward eye.

MR. NICHOLAS :

They didn't manifest, My Lord - those acts in no way showed my intention to come to Pretoria.

MR. JUSTICE RUMPFF :

Well, what did they show then?

MR. NICHOLAS :

They were neutral, My Lords, they showed

nothing. They are equally consistent with my going to Chambers in town.

MR. JUSTICE RUMPFF :

Yes, by themselves, certainly.

MR. NICHOLAS :

My submission is, My Lord, that it is not enough to prove that an act is done with an intent or in pursuance of an intent. The act must reveal the intent, manifest it. If I go to the station and buy a railway ticket to Pretoria, that would have manifested an intent to go to Pretoria. But neutral acts don't in any way manifest intention. If My Lord, to use the example referred to in Wentzel's case, it is shown only that the Accused fired a rocket, nothing more, that would be an innocent act. But if it were shown that there was a plan that an insurrection should begin on the firing of a rocket by the Accused, then the act of the Accused in firing the rocket becomes in that setting a hostile act, an act which manifested his intention.

MR. JUSTICE RUMPFF :

Your argument is quite clear if you say that neutral acts cannot possibly show an intent, they may or may not, let us put it that way, by themselves - to the person outside it doesn't by itself disclose an intent, unless it is connected in some way with the conspiracy in a particular case, where there is a conspiracy.

MR. NICHOLAS :

My Lord, the basic submission is that

there is a distinction to be drawn between the intention with which an act is to be done, and the intention which the act reveals or manifests. Proof of the conspiracy, My Lord, just as the proof of my writing of a letter last night reveals the intention with which I did these acts, - but the question is not with what intent was this act done. The question is, what intention does this manifest - what intention does this act manifest. The acts which manifest hostile intent are acts which reveal and intention to do a hostile act, to use the words used in Strauss' case. The making of a speech, My Lord, does not manifest an intention to do a hostile act to make war on the state. Unless, the making of the speech is a signal for an insurrection. Again My Lord, if there were an incitement to sedition, that would manifest a hostile intent. We submit, My Lord, that the existence of a prior conspiracy does not provide a context, a setting in which the speeches and documents referred to in the indictment, have a different significance from their apparent or prima facie significance. The proof of the conspiracy in the case of firing a rocket gives that act a different significance, it enables the observer to say that is an act of revolution. But an observer of one of these speeches, who knows of the conspiracy, cannot say that is an act of revolution. It is only a speech, My Lord. It is still only a political speech, which is not an act of war.

MR. JUSTICE BEKKER :

Well, doesn't the matter then really turn

on the correctness or otherwise of the Crown's submission that violence is not part of - need not be part of the crime of high treason?

MR. NICHOLAS :

My Lord, we made the submission ...

MR. JUSTICE BEKKER :

Because the overt act must always reveal force. If the overt act must always manifest some kind of force, then you may be right. But if high treason can be . . . . . constituted (?) . . . where no force is ever used, the overt act needn't ...

MR. NICHOLAS :

We have made the submission, My Lord, that high treason always involves the use of force, and we shall repeat the submission and repeat the argument if necessary.

MR. JUSTICE BEKKER :

Well then, Why should that be, on the Crown argument and on the definition of high treason, anything done with the necessary hostile intent is - to subvert the state is high treason.

MR. NICHOLAS :

And the only way the state can be subverted is by force. There is no other way.

MR. JUSTICE BEKKER :

What about the decision in Leibbrant?

MR. NICHOLAS :

Yes, My Lord, I will deal with the Leibbrandt case. I submit it is clear throughout that judgment that force and violence are necessary elements