

examples given by the Roman-Dutch authors, as to 'perduellio'. Those examples are given on page 989, and lower down on the page are examples of conduct which have been adjudged to be high treason by the South African Courts. My Lord,

5 I am dealing only now with the Roman-Dutch authors. My Lord, I want to read out these examples and invite Your Lordships to bear the suggested categories in mind :

"Killing or devising the death of the Sovereign, all is done in the interests of the State and not merely out of

10 personal hatred, killing any of the Sovereign's Deputies or Counsellors, bearing arms against the State, communicating with the enemy, revealing to him any pass-word, or doing any act, or giving any advice, with a view to assist him, bringing or endeavouring to bring the State into subjection

15 to a foreign power by traitorously surrendering fortresses, towns or other possessions, disclosing State secrets with hostile intention, stirring up the enemy to hostile enterprise, waging war, holding a levy of troops, raising an army without the authority of the Sovereign, or procuring

20 such army, administering ^{an} ~~under~~ oath, finding any persons to act against the State, causing the betrayal of the Army, or enabling the enemy to escape capture. Now, My Lord, if one reads the numerous authorities who deal with perduellio, Your Lordships will, in my submission find, that

25 the acts fall into those three categories. Now, My Lord, in this case, there is no allegation of the existence of a foreign enemy, nor is the Court concerned with any plotting of the death of the Sovereign, or, My Lord, if one takes an extension of Sovereign, Deputies or Counsellors,

30 or an example also included in Ulpian in the Digest - no My Lord, it is in the Code, plotting the death of ^{Senators} Fenatis, so that, My Lord, if there is treason at all in this case,

it must be treason which falls within the third category,
the use of force against the State. Now, My Lord, I
don't want to detain Your Lordships by referring to all
the authorities - by reading from all the authorities
5 which have been collected, unless Your Lordships wish me
to do so. But My Lord the - I'll give ^{you} Lordship the refer-
ences, My Lord. First of all, My Lord, starting from the
Digest, book 48, title 4(1) and following, Um Estados,
giving examples of the crime of laesis Majestatis, and My
10 Lord, the translation appears in Scott's Translation,
Volumes 9 to 11, at page 25. Then, My Lord, Voet, in
his commentary on the ^{Pandects} Pandects, 48(4)(3), the translation
is in ^{Gane} Ganis, Volume 7, at page 347. The side note
gives 24 or more varieties of the first form of treason,
15 perduellio, and then Voet sets out, numerous examples
which amount, if one breaks them up, to many more than
25. Those, My Lord, also fall into the categories. Then,
My Lord, Damhorder ^u deals with the crime, and Damhorder is
quoted in Erasmus 1923 Appellate Division, at page 84.
20 Then, My Lord, I have a note of a reference to Gujaccius,
and ^{what} ~~these~~ I have is 2(74). My Lord, I saw this book in
Johannesburg, we have not been able to find it in Pretoria,
it may well be a wrong reference, but I will endeavour to
correct that. Perøzius deals with it in his comment at
25 Code 986, Matthaeus at 48(2)(2). Now, My Lord, Matthaeus,
on page 281 of the Library copy, of the passage to which
I refer, ~~ne~~ says that those who fall foes to perduellis qui
hostilia adversus principem moliuntur; hostilia,
My Lord, being hostile act, the act of an enemy, and I
30 refer to this early, My Lord, because Your Lordship will
find that in the specimen Indictment, given in Gardiner

& Landsdowne, the acts are alleged as hostile acts. The acts in this Indictment are alleged as hostile acts. Your Lordship will find that in most of the cases the allegation is one of hostile acts. Then, My Lord, the next authority
5 is Pothier 48(4)(1). He is dealing with the crimen laesis Majestatis and he refers to the first species of this crime which is called perduellio, and it is said that it is committed by any one who with hostile intention is animated against the people of Rome, or against the Sovereign, into
10 whom the people of Rome have transferred their power. And then he gives us the example; "Just for example, those who aid the enemy, or those who overthrow the State, in whole or in part, or disturb the public security by sedition, which are again, My Lord, hostile acts. Then, My Lord,
15 there is Huber - I refer Your Lordship to Gan's translation, in Volume 2, page 437 - 439, and Moorman 1(3). Now, My Lord, we submit, that in all of these authorities, there is no suggestion that anything but force, either applied or plotted, amount to high treason.

20 BY MR. JUSTICE RUMPF :

What about any other illegal act?

BY MR. NICHOLAS :

The submission is, My Lord, that any other illegal act, would not amount to high treason, that there
25 is no treasonable act, unless it is either a forcible act or it involves the use of force. I won't run away from that, My Lord, we'll deal with that - with other illegal acts. Now, My Lords, none of the old authorities is there a suggestion of any treasonable act, other than sedition,
30 rebellion, riots, revolution. In all the South African history, My Lord, turbulent as it's been, there has been no charge as far as we have been able to find out, let alone

a conviction on a charge of treason, which was not connected with an external enemy or with revolution or riot or rebellion. My Lord, Your Lordship will see a comprehensive list, it seems fairly comprehensive, My Lord, a long
5 list in Gardiner & Landsdowne, at the bottom of page 989, of examples of conduct which has been adjudged by South African Courts, ^{to} which constitute high treason. And we submit, My Lord, that the argument of silence, is a massive argument. The facts, My Lord, that throughout our history,
10 and I exclude, My Lord, the Roman times, because there were some crimes referred to as perduellio in Roman times, which one would assume are now obsolete, for example, keeping of private prisons, and coining money. Apart from those, My Lord, throughout the whole history of our Law, perduellio
15 has been a crime involving, violence, force, against the state. And we submit, My Lord, that Your Lordships will decline in this day, ^{with} the contemporary ideas of political ^{rights} ~~rights~~ and liberties, to act on any invitation by the Crown, to hold that conduct is treasonable today, which was not
20 regarded as such in the autocracies of Rome and Holland. We submit, My Lords, that Your Lordships, will hold that in peace times, where there is no external enemy, it is only acts of war, civil war, preparation for war, revolution, sedition, whatever it be called, which can constitute treason.
25 Now, of course, My Lord, it is not necessary that a treasonable purpose should have been achieved. It is not necessary that the actual shooting war, should have started. Treason can be committed long before the first shot is fired, or the first gathering of troops assembled. It is sufficient,
30 My Lord, certainly, if there is a conspiracy to overthrow the State by force, without doing anything in pursuance thereof. And it is sufficient, My Lord, to attempt to

to commit a treasonable act to start a revolution. If the treasonable intent can be shown, and if it can be shown that the treasonable object, that there has been a step taken, an unlawful step taken in the treason, then
 5 the crime is committed. My Lord, I could just give Your Lordships the authorities.

BY MR. JUSTICE RUMPF :

But is that not
 Whether that is common cause? The Authority again that it must be an act which eventually will
 10 lead to the use of force?

BY MR. NICHOLAS :

Yes, My Lord.

BY MR. JUSTICE RUMPF :

But that is common cause.

15 BY MR. NICHOLAS :

No My Lord. If Your Lordship will bear with me, My Lord, something does turn on the words used by the old authorities, *and* but I *sh* could give them to Your Lordship. My Lord, the first is Voet 48.4.10, and he says, My Lord,
 20 that it is necessary that the voluntas, that the intention should in some way, have been deducta, led, transferred into *an* act, into action. Then, My Lord, van Leeuwen - Censura Forensis 5.2.6. He says that it is necessary that the intention should have been followed 'ipsius sceleris inchoatio'
 25 aliqua' by some beginning of the crime itself. Now, he says there must be some beginning of the crime, or, he says, there must be *acertain* and clearly provable plot, conspiracy. Then he follows with examples of an inchoatio of the crime itself, examples of preparing the poisonous potion
 30 which is to be administered to the Emperor, administering oaths to a faction and what may be of some importance, My Lord, in this case, ~~or~~ if any one has attempted by a

scelesta oratio, a criminal speech, to persuade others to
 commit hostile acts, even if he has not succeeded. So that
 an attempt to persuade others to commit hostile acts, the
 acts of an enemy, enticements to people to commit acts a-
 5 gainst the State, those would constitute crime of treason
 if done with hostile intent. Then Matthaeus, My Lord, is
 in very similar lines, 48.2.3.4. He says also that there
 must be some inchoatio, that there must be some beginning
 of the crime, and he gives the same examples, My Lord, and
 10 also expresses the view that if any one has attempted by
 criminal speech to persuade others to commit hostile acts,
 that is treason. ^{Damhonder} Damhond, My Lord, in chapter 62, he
 says that the crime is committed when the intention is
 clearly made apparent by any act. So that it would appear
 15 from Damhonder that it is essential that the act be one
 which makes the crime apparent.

BY MR. JUSTICE RUMPF :

Only that act?

BY MR. NICHOLAS :

20 Only that act, My Lord.

BY MR. JUSTICE RUMPF :

It may be a ^{portion} process of a particular act.

BY MR. NICHOLAS :

It may be divisible into parts? Yes, My
 25 Lord. And if it is divisible into parts, then one act
 would be alleged. And Van Hasselt, My Lord, 'Lyfstrafte like
 Misdaad' - he said that the intention is punished when the
 thought is shown on the outside - shown externally: "En de
 gedachte word gestraft, dat de willen en gedachten sig na
 30 buiten moet vertoonen." And, Perezuis, My Lord, at Code
 9.8.12. He says that the intention must to some extent
 have gone into external action. And he again gives the

example of the poisonous potion that is prepared, a letter that is written or the messenger who is sent to procure the death of the Sovereign. And the submission is, My Lord, that these authorities show that before there is any treason committed, there must be some beginning of the crime itself. That the crime must have been brought into an action, from which the intention may be inferred or may be proved.

BY MR. JUSTICE KENNEDY :

10 Do you quarrel in any way, Mr. Nicholas, with what Mr. Trengove said, when he set out the Crown's attitude towards the crime of high treason?

BY MR. NICHOLAS :

Oh yes.

15 BY MR. JUSTICE KENNEDY :

Because he dealt very fully with this..

BY MR. NICHOLAS :

Yes, that is why I must deal very fully with it now.

20 BY MR. JUSTICE KENNEDY :

I am wondering why it was not dealt with in reply.

BY MR. NICHOLAS :

25 Because we made no point of it, My Lord. My learned friend delivered a lecture in response to nothing that we said, My Lord.

BY MR. JUSTICE KENNEDY :

30 Well, I thought he was delivering it in response to what the Crown said was a failure by the Defence to appreciate the nature of the charge itself.

BY MR. NICHOLAS :

My Lord, we launched no.....

BY MR. JUSTICE KENNEDY :

No, I know you didn't.

BY MR. NICHOLAS :

No, so there was nothing to reply to. It
 5 was no point of ours that my learned friend was discussing.
 And it would not have helped us in the slightest, My Lord,
 to have replied to him on the nature of high treason. We
 made no point of it, on that exception.

BY MR. JUSTICE KENNEDY :

10 A great deal of what you have now said, was
 in fact said by him, was it not?

BY MR. NICHOLAS :

Yes, My Lord. He covered the same autho-
 rities but there's a difference in emphasis. A difference
 15 in emphasis and a difference in approach. So that, My
 Lord, in our submission, in the Roman-Dutch Law, treason
 involves the use of force. A treasonable act is one from
 which may be inferred the intention to commit treason, that
 is the intention to commit a treasonable act. And we sub-
 20 mit, My Lord, that unless the act reveals the intention, it
 cannot be regarded as a treasonable act. We join *issue*
 My Lord, with my learned friend, Mr. Trengove, when he says,
 any act of whatsoever nature and however innocent. Now,
 My Lord, I turn from the Roman-Dutch Law, to the English
 25 cases, to which, My Lord, my learned friend referred. But
 before I deal with particular cases, I would refer to an
 observation in Holdsworth History of the English Law, I refer,
 My Lord, to Volume 8 and the passage is on page 311. The
 learned author is dealing with the treason of *complicity*
 30 the death of the Sovereign: "And the requirements, that in
 terms of the Statute, read with the third, that *complicity*
 must be proved by an overt act." The author says: "It

is obvious that an intention to kill the King must be proved from overt acts, which show that the person doing them, had such an intention. This ^{conspiring} ~~complicating~~ in turn for imagination says Hook, though the secret is to be discovered by circumstances, precedence, concomitance and proxy." The author

5 continues: "Now it is clear that it is only from overt acts which obviously point to a design to kill the King, that an intention to kill him, can properly be inferred. But the Judges, in considering overt acts, alleged to prove this

10 intention, did not limit themselves to an overt act of this kind, they considered the overt act the Accused, - 'with all the endeavour for the safety of the King', therefore they were led to rule that acts which showed the intention not to kill him, but to put any kind of restraint or force

15 upon him, ^{to be} ~~by the~~ good evidence of an intention to kill him." Then, My Lords, he deals on page 315, he says: "Shortly after ~~Pine's~~ case, in which as we have seen, has been laid down that merely scandalous words spoken of the King, does not amount to treason. It had been laid down in Crohagan,

20 in cases decided in 1634, that if words purporting an intention to kill the King, were accompanied by overt acts, which seem to imply the intention to put the intention into execution, this would amount to treason. In that case the Accused, being at Lisbon, had said, 'I will kill the King

25 if I may come to him.' He had then come to England, and when arrested had spoken scornfully of the King, it was held that he was rightly convicted for ^{conspiring} ~~complicating~~ the King's death." The Crohagan, My Lord, was a case where there was an innocent act of coming to England and that

30 was held to be an overt act of ^{conspiring} ~~complicating~~ the death of the King. Then, My Lord, Holdsworth deals with Preston's case

on page 317. " Foster's summary of that case, is as follows, a case decided in 1691, just after the Revolution. "Lord Preston and two other gentlemen procured a smack to transport them to France, but was ^{were} stopped before they
5 got out of the river and their papers seized. Among the papers was found a scheme intended to be laid before the French King or his Ministers for invading the Kingdom in favour of the late King James II, with many letters, notes, memoranda, all tending to the same purpose. Lord Preston,
10 upon his trial, insisted among other matters, that no overt act was proved upon him in Middlesex where all the overt acts were laid, for he was taken with the papers in the County of Kent. But the Court told the Jury, that if upon the whole evidence, they did believe that His Lord-
15 ship had an intention of going into France and to carry those papers further for the purpose he is charged in the Indictment, he was taken to..... which are in Middlesex, in order to go on board the smack, was a sufficient overt act in Middlesex. Every step taken for those pur-
20 poses, was an overt act." Then Holdsworth goes on: "The last sentence contained the gist of the matter. It comes to this, every act, however remotely connected with an overt act of ^{compassing} ~~complicing~~ the King's death, is itself an overt act." Now, My Lord, those were two cases on which
25 my learned friend strongly relied. But our submission is, My Lord, that they are cases of no authority and that there are numerous dicta in the text books and in the Law Reports after the decision of those cases, which show that they do not constitute the Law of England. Now, My Lord, I deal
30 first of all, My Lord, with the text books. The first reference is to Warton's Law Lexicon, under the term 'overt': "The expression, overt act, means an act which shows the

intention of the party doing it. A treasonable intention is not punishable unless it is manifested by an overt act." And the submission is, My Lord, that that is the Law of England. In order to be a sufficient overt act of treason, 5 it must be an act which manifest, reveal, show, the intention of the person doing it. In other words, shows his hostile intention. Then, My Lord, in Granville Williams, there is a quotation from a book which is not available in this Library, My Lords. It is Clarke's Analysis of Criminal Liability. I'll give Your Lordships the reference in 10 Granville Williams in a moment, but Clarke says: "In certain cases of gross injustice and tyranny, such as the monstrous judgment related by Hale as delivered under Edward IV, and the later trials of Becham and Sydney, 15 the overt acts required by statute, has usually been not merely matter evidencing intention, but a step, however slight, towards reform". The quotation, My Lord, is on page 2 of Granville Williams. Then, My Lord, then Halsbury - I'm afraid again My Lord, I'll have to give Your 20 Lordships the reference in a moment, but Halsbury refers to overt acts and says: "and generally, any such acts as sufficiently indicate an intention to commit any particular species of high treason, and conducing to its execution, may properly be alleged as acts of high treason, even 25 though the whole plan proved abortive." Again, My Lord, the overt act, must indicate the intention to commit the particular species of high treason. And My Lord, in Foster, which was referred to at the previous hearing, page 203, the overt acts required by the Statute, are not 30 to be considered merely as evidence, tending to discover the man's intention, discover meaning disclose, but that the means made use of to effect the purposes of the heart.

Now, My Lords, so far as the ^{cases are} ~~statements~~ ^{cases} are concerned,
Your Lordship will find a quotation.....

BY MR. JUSTICE BEKKER :

Mr. Nicholas, the overt act must indicate
5 the intention?

BY MR. NICHOLAS :

Yes, My Lord.

BY MR. JUSTICE BEKKER :

Does that mean that the intention is to be
10 gathered from the overt act, without regard to any other

BY MR. NICHOLAS :

Oh no, My Lord, no, one can always have other
evidence to prove hostile intent, but prima facie, the acts
must indicate a hostile intent. Then, My Lord, in Wenzel,
15 page 272, Ramsbottom J. said that an overt act is an act
which shows the existence of the hostile intention. In
Thistlewood....

BY MR. JUSTICE BEKKER :

But isn't this accepted by the Crown?

20 BY MR. NICHOLAS :

With respect, no, My Lord, it said, any act,
however innocent, and referred to Crohagan and Preston,
to show that an innocent act to catch a boat, innocent
act of returning from Lisbon to England, was a sufficient
25 overt act.

BY MR. JUSTICE RUMPF :

But only in the light of the other evidence?

BY MR. NICHOLAS :

Yes, My Lord, but in our submission the
30 authorities are clear that the act must evidence the in-
tention. Not any trivial routine act can, in our submission
be an overt act of high treason. My Lord, in Thistlewood,

which was quoted by Watermeyer C.J. in Leibbrandt, 1944 A.D. 253, at page 284, any act manifesting the criminal intention and tending towards the accomplishment of the criminal objects.

5 BY MR. JUSTICE KENNEDY :

I didn't understand the Crown to argue that any act, completely independent from the intention, and which has nothing to do with the high treason at all, constitutes an act....

10 BY MR. NICHOLAS :

They did argue that any act, however innocent in itself, constitutes an overt act of treason.

BY MR. JUSTICE KENNEDY :

15 Yes, provided, of course, it manifests the hostile act.

BY MR. NICHOLAS :

So, My Lord, that the act must in itself manifest the hostile intention. If it manifests the hostile intent, it can't be an innocent act.

20 BY MR. JUSTICE KENNEDY :

I don't know what you mean - I don't know, did Ramsbottom say that, Ramsbottom J., say that in Wenzel's case?

BY MR. NICHOLAS :

25 Page 272, My Lord.

BY MR. JUSTICE RUMPF :

30 What is the difficulty - I don't see what your difficulty is. Surely the Crown didn't argue that any act, whatsoever, committed with a hostile intent - you say even if it is not manifested, is an act?

BY MR. NICHOLAS :

They said it this morning. Any act at all,

however innocent it looks.

BY MR. JUSTICE BEKKER :

But it must constitute the manifestation of the hostile intent. That qualification the Crown accepts.

5 BY MR. NICHOLAS :

I haven't heard it yet, My Lord.

BY MR. JUSTICE RUMPFER :

Wasn't it said, before the adjournment, when we had all that argument?

10 BY MR. JUSTICE KENNEDY :

In most matters, I think he quoted the cases it should manifest the intention?

BY MR. NICHOLAS :

15 But, My Lord, with respect, if one takes an act liketying a shoe lace, without regard to any circumstances, that can't manifest hostile intentions.

BY MR. JUSTICE KENNEDY :

No, without regard to other circumstances...

BY MR. NICHOLAS :

20 The Crown says, the catching of a boat, manifests hostile intent.

BY MR. JUSTICE RUMPFER :

25 Are you still on the argument that the Crown should allege the other circumstances, that he cannot rely on the innocent act itself, without any further circumstances.

BY MR. NICHOLAS :

30 I say, My Lord, that the Crown cannot allege acts which do not involve the use of force, and say those are treasonable acts. Unless those acts themselves, manifest the use of force. That is the submission.

BY MR. JUSTICE KENNEDY :

I thought Mr. Trengove said that any

manifestation of an act which had the necessary hostile intent, was sufficient. Isn't that what you say?

BY MR. NICHOLAS :

No, My Lord, I say an act is committed which
 5 manifests, indicates, reveals, from its commission, that
 the author of that act ^{has} have a hostile intent. That is
 necessary. One can't allege ^{has} an act of treason, an
 overt of treason, an act which does not manifest the hostile
 intent, which does not show that its author has a hostile
 10 intention.

BY MR. JUSTICE RUMPF :

And you say that if it is an innocent act,
 it cannot express a hostile intent or reveal a hostile in-
 tent, unless the other circumstances are set out so as to
 15 show that it does?

BY MR. NICHOLAS :

As Your Lordship pleases.. That is the sub-
 mission. Now, My Lord, it's in ^{Deppard} ~~Deppard~~, My Lord, 1803,
 28 State Trials at 487, in ~~Hardy's~~ Hardy's State Trials, Volume I
 20 of the new series, at 617, the passage quoted at pages
 274 - 275: "The intention can only be satisfactorily proved
 by some overt act clearly indicated ^{ive?} of that intention."
 And, My Lord, the only really modern case....

BY MR. JUSTICE KENNEDY :

25 Mr. Nicholas, I am sorry to interrupt you -
 I'm still puzzled, if you are so in conflict with what
 Mr. Trengove said on the 18th August, I think, why the
 issue wasn't raised then. Wouldn't it have been more
 convenient?

30 BY MR. NICHOLAS :

My Lord, there was no issue.

BY MR. JUSTICE KENNEDY :

Oh, I thought you are now at issue with...

BY MR. NICHOLAS :

Yes, My Lord, but when my learned friend
5 made this argument, there was no issue. The Defence had
not taken this point at that stage.

BY MR. JUSTICE RUMPF :

My Brother means, why didn't you take it.

BY MR. JUSTICE KENNEDY :

10 Why didn't you take it if you were then - if
you then were in issue with him, after it had been taken?

BY MR. NICHOLAS :

My Lord, there was nothing, so far as the
issues before the Court were concerned, there were nothing
15 to reply to, nothing turned on the argument at that stage.

BY MR. JUSTICE RUMPF :

I know, but I think my Brother wants to know
why didn't you take the point at that time?

BY MR. NICHOLAS :

20 Your Lordship will remember that my learned
leader, Mr. Maisels, said that we wanted to take the point
with regard to overacts, but that we couldn't do so, be-
cause the Counts hadn't been numbered, and we foreshadowed,
My Lord, that we would want to make such an attack, and
25 Your Lordships dealt with that in the judgment, pages
1165 and 1166. My Lord, our previous attack on the in-
dictment was a formal attack, in the sense, My Lord, that
it didn't raise any substantial issues of Law. We indi-
cated that we would want to make a substantial attack,
30 that is, on the substance of the indictment.

BY MR. JUSTICE KENNEDY :

Yes, procedur^{al}ly, it - I'm speaking for

myself, it would have been more convenient, I think, to have replied to Mr. Trengove at the time, instead of which we are having to go over the same ground twice. The Defence will obviously have to reply to this - or the Crown will obviously have to put up a reply to this.

5 BY MR. NICHOLAS :

Well, My Lord, with the greatest respect, My Lord, I must submit that the Defence are not responsible for this. It resulted only because my learned friend, Mr. Trengove thought it necessary to give an exposition on the Law of Treason, which did not arise from the exception taken by the Defence at that time.

10 BY MR. JUSTICE KENNEDY :

No, no exception as such was raised by the Defence on this point, that is true.

BY MR. NICHOLAS :

We would not have asked for any relief at that stage, My Lord. The Defence, My Lord, in taking its first exception, wished to clarify the procedural difficulties of the Indictment, formally. Now, My Lord, it is making this attack as a matter of substance. Your Lordship will remember, that in dealing with my learned leader's submission that we were prejudiced because of the way in which the overt acts have been alleged in this case, the submission that we were prejudiced because we could not contend that these did not constitute the crime of High Treason, Your Lordship said: "It is in our opinion undesirable at this stage to deal with this submission for the main reason that the Crown has been ordered to supply further particulars which, if given, will bear directly on the issue of its speeches. The Crown's reply may or may not remove the hurdle of prejudice which Mr. Maisels'

contend has been placed in the Accused's path and the Defence is free to act accordingly. Now, My Lord, the only modern case that we have been able to find, in which there has been any reference to the question of what is an overt act, is the trial of Sir Roger Casewell^{ment}. The charge to the Jury, My Lord, in the trial Court, is not reported. The appeal is reported, but it does not bear on this point. The only source, My Lord, which we have been able to find of the summing up, is in the Famous British Trials series, in the edition of Knott, and, My Lord, this is a book to which Mr. Justice Schreiner referred in his judgment in Leibbrandt's case: 'The author says { it was quoted by the Crown in that case, } the author says in his introduction that the whole record was read by the learned Judge, and I submit, My Lord, this can be regarded as an authentic report. My Lord the passage is taken, ~~I'm going to read, it is on~~ page 183 of this book, it is from the judgment of the Lord Chief Justice, Lord Reading, and there were, My Lord, two other Judges sitting with him on that trial, Mr. Justice Avery and Mr. Justice ^{Horich} Horich, and it seems, My Lord, that it was a prepared summing up which was read. Now My Lord, His Lordship said, page 183 of the book, talking to the Jury: "You may say, and probably have asked yourselves during the course of the case, what are overt acts. Overt acts are such acts as manifest a criminal intention, intended to be fulfilled." Now, My Lord, that has been the consistent ^{tenor} herald of British authority.

BY MR. JUSTICE BEKKER:

Did you say 'and the means'?

30 BY MR. NICHOLAS :

Yes My Lord.

BY MR. JUSTICE RUMPF :

Doesn't that go further....

BY MR. NICHOLAS :

No, My Lord, all the passages to which I
5 have been reading, Your Lordship, refer to manifestations
and the step. Now, My Lord, our submission is that the
whole current in the English Law, at any rate since 1800,
has been to require that an overt act, is an act which
manifests the intention, and there have been a departure
10 from cases such as Cohagan and Preston, where an act such
as catching a boat, which does not manifest any intention
at all, has been regarded as an overt act.

BY MR. JUSTICE RUMPF :

But, of course, catching the boat, together
15 with other circumstances, may...

BY MR. NICHOLAS :

May, My Lord, if alleged. And My Lord, we
submit further that this submission that an overt act in
the crime of treason, is not any ordinary, routine, every
20 day act, is supported by the Statutory Provisions, Section
256 and Section 268 of the Code. Section 256 lays down
the Two Witness Requirement, and Section 268 provides that
no evidence may be given of any overt act which has not
been alleged, unless it conduces to the proof of an overt
25 act which has been alleged. Now, My Lord, the purpose of
the Two Witness Rule is the protection of the Accused. It
is to safeguard Accused persons who are charged with crimes
such as treason. My Lord, Wigmore discusses the Policy of
the Rule in Volume VII, Section 2037 at page 269 of that
30 Volume. "The object of the rule requiring two witnesses in
treason is plain enough. It is as Sir William Blackstone

said, to secure the subject from being sacrificed to fictitious conspiracy, which..... in all ages." Then Mr. Best on Evidence, wigmore quotes from : "The reason for..... in less aggravated cases." Now, My
5 Lord, if, as seems clear, the Two Witness Rule, was designed as a protection for the Accused and consequently as a handicap to the Prosecution in treason cases, if any insignificant fact not manifesting a hostile intention, is to be regarded as a sufficient act of treason, the safeguard, My
10 Lord, becomes inapplicable at the point where it is most needed. The Two Witness Rule requires the treasonable act...

BY MR. JUSTICE BEKKER :

Do you know when that Rule came into operation for the first time in the Union. Would it have been in 1917
15 code already.....

BY MR. NICHOLAS :

No, earlier, My Lord, it was in some of the Colonial Statutes, I think, My Lord.

BY MR. JUSTICE BEKKER :

20 Well, I had in mind the one Natal case quoted during the last hearing - "He joined the enemy forces, took a rifle, fired a shot

BY MR. NICHOLAS :

My Lord, I have a recollection that it was
25 dealt with in Strauss - the history of that Provision. Strauss' case in the Appellate Division. I'm under the impression that it was in the Cape Statute and in the original Union Statute, My Lord. Natal, I don't remember. My Lord, the submission is that there can be no safeguard
30 if any trivial act, routine act, is to be - which doesn't in the alleged circumstances reveal a hostile intention...

BY MR. JUSTICE BEKKER :

Well, the last example in the previous argument, was the man going to Cape Town to blow up Parliament. He gets into a bus, goes to the aerodrome, gets into the
 5 aircraft and goes off to Cape Town. If an innuendo is set out, or the facts showing that all these movements were sinister, not merely innocent, but movements towards the achievement of a purpose, couldn't this Rule be circumvented as easily in that way?

10 BY MR. NICHOLAS :

My Lord, it has been devised for protection. My Lord, if a man is to be hanged because two people saw him catch a train to Cape Town, then there is no protection in the Rule at all. ^{The} Legislature could never have intended, My Lord, in a provision designed to protect an
 15 Accused person, that an act of catching a train, should be an overt act of treason. Our submission, My Lords, the existence of the act...

BY MR. JUSTICE BEKKER :

20 You mean that might give rise to an argument on the splitting - splitting of charges.

BY MR. NICHOLAS :

No My Lord, I make this submission, My Lord, that unless the acts ^{alleged in their own} ~~allege~~ in itself inner circumstances,
 25 (from which I would exclude the alleged declarations of the Accused,) that if the act alleged is not a treasonable act, doesn't show a treasonable intention, it is not an overt act.

BY MR. JUSTICE BEKKER :

30 Yes, well, couldn't - I thought he went further and I thought the argument was this: either the act itself must show that it is treasonable, or if it is

an innocent act. innocent in the sense debated during the course of this argument, then the Crown must allege other circumstances which show that that act, although ostensibly innocent, is in fact a treasonable act. That is the
5 argument.

BY MR. NICHOLAS :

My Lord, if he caught the train and had his pockets loaded with bombs, now catching a train is an innocent act, ^{but} catching a train with your pockets loaded with
10 bombs, manifests a hostile intent.

BY MR. JUSTICE BEKKER :

Yes, now, well what about the - assuming that the gentleman is getting the bombs down at Cape Town, and he has got to get to Cape Town, now he is catching the train
15 with the object of collecting the bombs at Cape Town.

BY MR. NICHOLAS :

In my submission, My Lord, that cannot be a treasonable act.

BY MR. JUSTICE RUMPFER :

20 But if it is - now, I'm coming back, I thought you conceded that the apparent innocent act, coupled with other circumstances, may disclose the necessary intent.

BY MR. NICHOLAS :

25 Yes, that is why, My Lord, I suggest the example of a man....

BY MR. JUSTICE RUMPFER :

Well, if it is proved that, apart now from the allegation, if it is proved that the train is boarded because of an agreement to go to Cape Town for a certain
30 purpose, then that - the boarding of the train is

BY MR. NICHOLAS :

My Lord, if circumstances can be proved that show that it is for that purpose, then that will be a case..

BY MR. JUSTICE RUMPF :

5 Your argument here is this, that the fact that the Legislature provides for two witnesses in an overt act, shows what importance there is to be attached to an overt act.

BY MR. NICHOLAS :

10 That is so, My Lord.

BY MR. JUSTICE RUMPF :

and that it is not necessarily any act, but an act which reveals the intention.

BY MR. NICHOLAS :

15 As Your Lordship pleases.

BY MR. JUSTICE RUMPF :

If it doesn't do so by itself, then, as you have said, by other circumstances which must be alleged.

BY MR. NICHOLAS :

20 As Your Lordship pleases. And, My Lord,.....

BY MR. JUSTICE BEKKER :

Well, now I come back to my difficulties. If that is so, how easily is this object not avoided, because one could split it up. This overt act of journeying
25 down to Cape Town, and to journey from Pretoria to the aerodrome as the first overt act, taking of an aircraft at the aerodrome and arriving at Cape Town as the second overt act. That would ^{exclude} excuse the operation of the ^{rule} shrew. ?

BY MR. NICHOLAS :

30 My Lord, it is difficult to visualise cases, apart from the case where a man board the train with a suitcase full of machine-guns, showing that he board^d the

train with a hostile intention. But, My Lord, might I go
back to the sections again. Section 256 provides that
there can't be a conviction where one overt act is alleged
unless there are two witnesses to that overt act. Where
5 more than one overt act is alleged, unless there is a wit-
ness to each such overt act. Now that shows, first of all,
My Lord, that an overt act must be identifiable as such in
the charge, and that is shown more clearly in the case of
Section 268. That no evidence should be given of any
10 overt act which has not been laid in the charge. There
must, My Lord, be some way of identifying the overt act,
so that the Court can recognise it when it appears. In
my submission, the only way in which an overt act can be
recognised is by looking at it in the circumstances
15 alleged and saying, does that manifest a hostile intention.

BY MR. JUSTICE BEKKER :

But this part of the argument - I've got
this clear, Mr. Nicholas, if the overt act itself disclo-
ses the intention, that is one thing, if it doesn't, if it
20 is an innocent act, then the indictment must set out the
circumstances from which it is clear that the innocent act
is really an overt act.

BY MR. NICHOLAS :

As Your Lordship pleases. Now, My Lord,
25 the next stage of the argument, My Lord, relates to the
question of words as treason. In what circumstances words
spoken or written, can constitute a treasonable act. Now
the examples which are given by Roman-Dutch writers are
examples of conspiracy to overthrow the State, conspiracy
30 to rebel, start a revolution, and so on, and incitement to
violence against the State. Those, My Lord, are the only
categories which they give in this context, in this group

of treasonable acts, My Lord, namely the group which embraces those acts which direct violence against the State. So those two examples of words give in the case of conspiracy and the case of incitement to violence against the State. My Lord, when I referred Your Lordships to van Leeuwen and Matthaeus, I laid some stress, My Lord, on the example which they gave of an oratio scelestā - a criminal speech by which an attempt was made to persuade others to commit hostilia - hostile acts against the State. That is an incitement to commit hostile acts against the State. Van Hasselt discusses this question of incitement, Van Hasselt 1.3, and he says that it was perduellio to incite a meeting or concourse of people to 'oproer', and if 'oproer' is ^{has} caused the prejudice and subversion of the State, or of the Supreme Government itself, there is no doubt that it must be regarded as high treason and punished as such. My Lord, another writer.....

BY MR. JUSTICE RUMPF :

But all high treason starts with words.

20 BY MR. NICHOLAS :

Yes, My Lord, but words in our submission, only become punishable when they are words of a particular kind. Our submission will be, My Lord, that unless words are words of agreement, or unless they are words of incite-
 25 ment, or violence, against the State, they are incapable of constituting a crime of High Treason. My Lords, another writer who deals with this question of words, is Boehmer in his Meditations, a work which was quoted with approval in Erasmus' case. My Lord, he discusses this
 30 question of speeches on pages 498. He says, first of all, My Lord, on page 497, that publica perdittio, falls under the term perduellium, and it is committed by the words and

by the deeds of subjects joined with the hostile intention and effeccacibus, effective, capable of overthrowing the State. And he says, My Lord, that for certainly words, speeches which are seditious and disorderly have this power, 5 that they are able to unite the highest with the lowest and to excite civil war, to stir up the feelings of other citizens and consequently be most dangerous to the Republic. He goes on that ^{as Layton} labour correctly observed is sufficient for the strike, he says there is so much less 10 doubt that the speeches originated from those who are of some authority and trust in the State, because nothing is easier than that the ^{blebs} pledge should be inflamed by these to sedition and other poisonous crimes. Then, My Lord, ~~Carfsovius, who was quoted in 38.27,~~ ^a Carfsovius Misdewden 15 38.27 quoted in the case of Roux in the Appellate Division 1936 A.D. at page 279. He says that evil speaking of the Sovereign does not fall within the term laesae Majestatus unless the word, perse are seditious. He says, My Lords, that it is common opinion and in his view a correct 20 opinion that evil speaking, not in themselves ^s seditious, by which he says he means the people are incited to bear arms against the Emperor, or not amounting to turbulent acclamations, by which the safety of the Emperor and the State is imperilled, do not amount to laesae Majestatus. 25 So the submission is, My Lord, that on the Roman-Dutch authorities, this is the view of Gardiner and Landsdowne, expressed at page 997 of this edition, where the conduct complained of has consisted of mere words spoken or written not constituting a conspiracy or an incitement of 30 others to treason or an act of counsel or assistance to the enemy, the accused cannot at common Law be convicted of high treason in respect of it. And he quotes Parde

in England and ^{Carpzoni} Corfsovius 38.27, a reference which I was not able to find. And, My Lord, the submission is that the English Courts have reached the same decision - that words are not treason unless they are words of conspiracy
 5 or words of incitement, advice or encouragement to others to commit treason. My Lord the cases are summed up at 11.30 Aids in Archbold's Criminal Pleadings, words spoken or published may constitute overt acts relating to treason-
 10 able acts or design. My submission will be, My Lord, from the cases, that relating to a treasonable act or design, means inciting to or forming the treasonable acts of design. So words of advice or persuasion are sufficient overt acts of this species of treason, if they advise or persuade to an act, which would of itself, if committed, be a sufficient
 15 overt act. We submit, My Lord, that that is the test, that it is only such words of advice or persuasion which can be sufficient overt acts if they advise or persuade to an act which would of itself be a sufficient overt act. So, My Lord, if there is an incitement to rebellion against the
 20 State, that is a sufficient overt act. But if, My Lord, it does not incite such a rebellion, if it does not incite the use of force against the State, the statement or the document cannot be a sufficient over t act of treason. And, My Lord, the cases....

25 BY MR. JUSTICE RUMPF :

What page is that in Archbold?

BY MR. NICHOLAS :

That, My Lord, is at page 1138. Now, My Lord,
^{Coke}
 30 ~~Cook~~ said in his Third Institute, page 117, that it is commonly said that bare words may make a heretic but not a traitor without an overt act. And, My Lord, the cases, there are many of them, My Lord, I don't want to read to

Your Lordships from them, but they all show, on analysis, My Lord, that words may be an overt act, if they consist in ~~an~~ consulting, an advising, an encouraging, an inciting to the death of the King. My Lord, cases of Thistlewood 9 1820, 33 State Trials, 681, Charnock 1696, 12 State Trials, 1377, at 14.52, Frost, 22 State Trials, page 480, a note on that page. ~~Death~~^{Depp} 1803, 28 State Trials at page 487. Now, My Lord, the English cases say that consulting together about procuring the death of the King, is a sufficient 10 overt act of treason. Now, My Lord, with submission, mere consulting together does not in South African Law, constitute an overt act of treason. That is the ^{vah}impression, My Lord, in the decision in Labuschagne's case, which is reported in 1941, T.P.D. at page 271. The head 15 note reads: "The Crown evidence against the accused on the charge of high treason disclosed that a discussion had taken place between the accused and other persons on a project of attacking a military camp." This, My Lord, was in time of war and the attack was going to be - was to be 20 on a military camp. The discussion had not culminated in any decision or agreement actually to make an attack, held that such conduct did not constitute high treason. So it would seem, My Lord, that in our Law merely consulting together, discussing a treasonable project, does not amount 25 to high treason, it only becomes such when there is a conspiracy or when there is an incitement.....

BY MR. JUSTICE BEKKER :

What was the reason for attacking the camp?

BY MR. NICHOLAS :

30 That was hostile intent, My Lord.

BY MR. JUSTICE RUMPF :

Couldn't a consultation with a view to

establishing agreement, isn't that an attempt?

BY MR. NICHOLAS :

It was held not to be, My Lord.

BY MR. JUSTICE RUMPF :

5 A conspiracy, an agreement, is an act of
high treason. An act, an attempt to agree, isn't that
high treason?

BY MR. NICHOLAS :

10 Well, My Lord, I make this submission that
on the authorities and on the cases, so far as words are
concerned, the only words to which the Law gives legal
consequences in a case of high treason, is conspiracy and
incitement. A consultation My Lord does not regard as
treason. My Lord, in England, where the offence is ^{combant} ~~combant~~,
15 if one comes together and carry on a conversation as to the
best means of procuring the death of the Sovereign, pro-
bably guilty under the Statute, would be guilty under the
Statute.

BY MR. JUSTICE RUMPF :

20 Why isn't a consultation - to establish an
agreement, why isn't it an attempt?

BY MR. NICHOLAS :

It is not regarded as such, My Lord.

BY MR. JUSTICE RUMPF :

25 Why not?

BY MR. NICHOLAS :

Because, My Lord, the conspiracy itself is
^{encouraged} ~~encouraged~~, conspiracy itself is only the beginning of the
crime.

30 BY MR. JUSTICE RUMPF :

It is only part of the attempt, really?

BY MR. NICHOLAS :

Yes, My Lord.

BY MR. JUSTICE RUMPF :

^{Concoursing}Concoursing is not yet a part of the attempt?

5 BY MR. NICHOLAS :

Or not even - My Lord, it is a preparation for a preparation to commit high treason. And, My Lord, as Holdsworth says, we can't go too far back. We can't regard acts, however, remote, as being acts of high treason.

10 And, My Lord, the submission is that on the authorities, only conspiracy and incitement - conspiracy and incitement are the only examples where words can amount to high treason. Now, My Lord, that that submission must be correct, with respect, follows from the fact.....

15 BY MR. JUSTICE BEKKER :

This Labuschagne case, is that rising out of the Potchefstroom riots?

BY MR. NICHOLAS :

Yes, My Lord.

20 BY MR. JUSTICE BEKKER :

Between the University Students and the soldiers?

BY MR. NICHOLAS :

25 They don't disclose in the case who they were, My Lord.

BY MR. JUSTICE BEKKER :

Well, what is the idea, what is the consultation.....

BY MR. NICHOLAS :

30 My Lord this was an application at the end of the Crown case. There was an application that the case

should be withdrawn on the ground that there was no evidence from which a reasonable person might or could come to the conclusion that they are guilty of the crime with which charged. The charge against them was one of
5 high treason and the only point ^{of} consideration at present is, it is not whether it has been proved that they are guilty, but whether there is evidence. The Crown has based its case on what happened at three meetings, two at Potchefstroom and the third on a farm belonging to a cer-
10 tain Prinsloo on the road between Potchefstroom and Parys. It is not ideally clear when these meetings took place.

The Crown in the indictment spoke of 'between the 1st February and 25th March of this year.' It is, however, not necessary for the purposes of this application to be
15 any more precise about the dates of those meetings. The first of these meetings took place at the house of a man called Kennedy, who appears to have been the prime mover in the activities which have given rise to these charges, but who has escaped arrest. At that meeting there were
20 present Kennedy, the third Accused, the Crown witness Basson, and others whom it is not necessary to mention. At that meeting the candidature of certain persons in connection with an organisation known as the Ossewa Brandwag was discussed. Basson was not yet an elected
25 member of this organisation, but apparently he regarded himself having been accepted and other persons who were soldiers in uniform wished to become members. Kennedy apparently, held himself out, having authority or weight with the powers of this organisation, was prepared to
30 exert his influence in order to assist them in becoming members, but he stipulated some consideration in turn. He mentioned that he wanted assistance from these soldiers

to be given in the form of instruction and drilling and in military strategy. At this meeting there was reference to a project to attack the military camp at Potchefstroom and at other camps too. And then His Lordship considers.....

5£ They consulted together, My Lord, and didn't reach agree-
ments and it was held not to be enough. So, My Lord, the
submission is, that speeches and writings cannot be treason-
able acts, unless they amount to conspiracy or incitement
to violence against the State. And we submit, My Lord,
10 that that must be ^{so} first, as it follows from the fact that
a treasonable act is one which by definition is done against
the independence or safety of the State. Merely to talk
about the State, to criticise the State, ^{to} the criticise the
policies of the Executive Government of the State, does not,
15 in our submission, amount to anything being done ^{against} about the
State. The State is unaffected by the criticisms, and as
appears from the Spoorbond case, to which I will be refer-
ring in a moment, the Courts have held that to extend the
right of the State to sue for defamation would be an undue
20 interference with the right of free speech, which is an
illustration, My Lord, of this submission that a speech
about the State is not anything done against the State,
that it is only when speech becomes an incitement to vio-
lence against the State, or an agreement to use violence
25 against the State, that it is capable of amounting to high
treason.

THE COURT ADJOURNS UNTIL THE 30TH SEPTEMBER, 1958.

COURT RESUMES ON THE 30TH SEPTEMBER, 1958.APPEARANCES AS BEFORE.

Accused absent : Accused No. 63, B. Turok. Leave of absence granted until the 6th October, 1958.

Accused No. 73, T. Mqotha, is present today.

BY MR. NICHOLAS :

My Lord, yesterday I was unable to give Your Lordships the reference to Halsbury on the nature of an overt act. My Lord, the reference is in Halsbury, Second Edition, Volume VI, page 424, section 475. He there sets 5 out, My Lord, a description of an overt act similar to the other description to which I referred the Court, and he also discusses what sort of words constitute an overt act of treason, words of consulting, counselling, inciting, instigating and so on, My Lord. My Lord, I also gave Your 10 Lordship when giving Your Lordship the Roman Dutch authorities to Ajaebius ^(waccus) and I was uncertain of that reference, My Lord. In his Volume 1, My Lord, of his ^{ae} Opera et Digest 48(4), the passage is at the bottom of page 757 of the ^{volume in the} Bethal's collection in the Supreme Court Library, and he 15 says, My Lord, like the others that perduellio is that which is committed by a rebellio ^m sumtis arnis adversus rem publicam. My Lord, at the adjournment yesterday, I was making a submission that speeches and writings are not treasonable acts unless they amount to a conspiracy or incite to violence 20 against the state. I submitted, My Lord, that apart altogether from any question of authority, that must be so in fact, because until violence was stirred up against the state, then the independence and the safety of the state

are undisturbed. I was about to make the submission, My Lord,....

BY MR. JUSTICE BEKKER :

Well, is that necessary that the safety should
5 in fact be disturbed?

BY MR. NICHOLAS :

No, My Lord, that there should be a tendency
to disturb, such as would arise from an incitement. My
Lord, I concede that an incitement is a sufficient begin-
10 ning to the disturbance of the state. But if an act falls
short of incitement, then in my submission the safety of
the state - there is no tendency towards the disturbance
of the safety of the state. I mentioned the case, My Lord,
of Spoorbond against The South African Railways, which is
15 reported in 1946, A.D. p. 999. It is a decision of the
Appellate Division, and the question there was whether
the South African Railways and Harbours, which was in
effect the Crown, can sue for damages in respect of defama-
tory statements. The Court came to the conclusion that it
20 could not. My Lord, in the concurring Judgment of
Schreiner, J.A. His Lordship said at page 1013 : "At present
certain kinds of criticism of those who manage the state's
affairs may lead to criminal prosecutions.." - we presume
that His Lordship had in mind prosecutions for criminal
25 libel - "... while if the criticism consists of defamatory
utterances against individual servants of the state, actions
for defamation will lie at their suit. But subject to the
risk of these sanctions, and the possible further risk to
which reference will presently be made of being sued by the
30 Crown for injurious falsehood, that is where the Crown
suffers damage in its business as a result of falsehood, any
subject is free to express his opinion upon the management

and dishonouring words against our Sovereign lord the king. The words complained of, which had been published in a newspaper, included the following : "Who is King George anyway? Why should we celebrate his jubilee? King George is the figurehead of the English and Boer Imperialist whose local representatives are Hertzog and Smuts, these oppressors are robbing, exploiting the poor people and workers of South Africa, in particular the Bantu people. It was the police of King George's lick-spittle South African Government who shot down the people of Durban. Workers and oppressed people of Durban, do not be bluffed by this King George nonsense. Do not kiss the boot that kicks you. Refuse to worship King George. He is not our King, but the King of our oppressors. Unite in protest against pass laws, liquor laws and all other forms of oppression. Demand freedom in our land of your fathers. Refuse to go to Cartwright's Flats, the place where our masters were murdered in 1929 and 1930." The headnote continues, My Lord : "That an appeal to a Provincial Division having been dismissed, ^{it} was held allowing an appeal that assuming the crime of laesae venerationis existed in the Union, the words complained of did not constitute such crime." My Lord, in the judgment of Curlewis J.A., there was ^a the reference, or ^{rather} a full quotation of the passage in Carpzovius "Misdaden" to which I referred yesterday, in which Carpzovius expressed the view that words could not amount to laesae majestatis, unless the words were in themselves seditious or "oproerig". Then His Lordship continued on page 280 - see also Laleque. The view is expressed : "waren kannen nie n lastering gee..... .. skoon seer strafbaar."

His Lordship said "now assuming that the crimen laesae
venerationis did and does exist in South Africa, the
words of the article complained of in the summons would
certainly not fall within the definition of the crimes
5 given by Carpzovius. They cannot be construed as seditious,
or as an incitement for taking up arms against the king,
or as inducing a mutiny or insurrection, whereby the wel-
fare of the King and the state, res publica, is placed in
jeopardy." And His Lordship says in the next paragraph :

10 "In considering the language of the article in question,
we must bear in mind that we are living in a different
age to that when mere evil speaking of the sovereign
was made an offence." Then His Lordship refers to the
history of this offence of evil speaking, and says that
15 it was first made a crime by the Emperor Augustus. Then
My Lord, at page 281, after his review of the authorities,
Curlewis J.A. says : "And even the Roman Dutch jurists
express amazement, at some of the acts which were regarded
in the time of the Romans as constituting crimen laesae
20 majestatis, so too we under the conditions of our modern
civilisation and development, and of our political liberty
and freedom of thought and speech, cannot be expected to
accept the narrow and restricted views of the 16th-18th
Centuries as regards criticism of the monarch as applicable
25 in the present day of our political advancement. We have
travelled a long way on the road of freedom of speech and
of political criticism since the days when it was a crimen
laesae majestatis to enter a house of ill fame or a latrine
with money in one's possession or a ring on one's finger
30 bearing the image of the princeps, or even since the days
when it was laesae majestatis to throw stones at or to melt
down the statue or bust of the princeps, or to urinate in

close proximity thereof. We must interpret the language complained of by the light of modern thoughts and freedom of speech and not by the light of the restricted ideas of the Middle Ages." Then My Lord, His Lordship continued to
5 an analysis of the article as a whole. He said, at the bottom of page 283 : "The phrase 'He is not our king, but the king of our oppressors' might be said to have some sinister meaning of the repudiation of the kingship. But even so, and whether the Native workers of Durban have
10 republican sentiments or not and as such disapprove of a titular kingship, the phrase is not used to incite them to do anything unconstitutional, but merely to protest against the pass laws, liquor laws and other forms of oppression, And if the language is unnecessarily strong, we must remem-
15 ber that the Natives of Durban have no voice or vote in the passing of those laws or in the Government of the country, and that they can only protest against what may be regarded by them as grievances. It may be said that the very fact that this appeal is addressed to Natives should
20 cause us to take a more serious view of the language used, but on the other hand, if the appeal is intended to be effective, one can well imagine strong and extravagant language being used in order to influence Natives." Then His Lordship says : "It is true, that reading this article
25 as a whole one cannot ^{be} realise the disrespectful tone pervading it, and it may convey to one a certain degree of contumelia. But even so it hardly seems sufficiently serious, even for a criminal charge of defamation, still less for the crimen laesae majestatis with which the
30 appellants were charged. One expects the grave and aggravated calumny or contumelia aggravated by the word themselves or by the circumstances under which they were published when

a charge of laesae majestatis is laid. No such grave or aggravated calumny is implied or expressed in the language contained in this article." Then My Lord, there was a concurring Judgment by Beyers J.A. in which His Lordship
5 came to the conclusion that the crimen laesae venerationis formed no part of the South African law. But My Lord, His Lordship also expressed views as regard freedom of speech at page 293. He said : "Die Unie is n demokratiese staat So iets sou ongetwyfeld die ent van volksregering
10 wees". The My Lord, finally there are other cases that - but I would refer My Lord only to one more. It is the case of du Plessis against the Minister of Justice, a Judgment of His Lordship Mr. Justice de Villiers sitting in the Witwatersrand Local Division. It is reported, My
15 Lord, in 1950, Volume III of the S.A.L.R. p. 579, W.L.D. My Lord, in that case, a Government Notice issued under one of the Acts made during the war, prohibited the publication and distribution of a certain pamphlet, and the applicants brought an application to Court in terms
20 of the measure, for the removal of the prohibition. My Lord, His Lordship, after considering the facts, said at page 581 : "Die wet maak n ernstige inbreuk op die regte van die landsburgers..... en die gevolge van die handeling gekeer word." Now My Lord, our submission is that since
25 our constitution regognises freedom of speech to the extent that any speech may freely be made, provided that it does not constitute a breach of the law. But certainly, My Lord, any speech which is not hit by some provision in the law, can never be a treasonable act. My Lord, in Leibrandt's
30 case, Schreiner J. pointed out that the antithesis is between constitutional action on the one hand....

BY MR. JUSTICE BEKKER :

In itself it can't constitute an overt act, is that what you say?

BY MR. NICHOLAS :

5 As Your Lordship pleases.

BY MR. JUSTICE BEKKER :

If it is in pursuance of a conspiracy it may be part of the overt act of conspiracy, but in itself it is not an overt act.

10 BY MR. NICHOLAS :

As Your Lordship pleases. It cannot be a separate overt act, My Lord. It cannot be a criminal act. My Lord, in Leibbrandt's case, Schreiner J. pointed out that the antithesis is between constitutional action on
15 the one hand and the illegal use of force on the other. The submission is, My Lord, that if conduct falls within the limits of constitutional action, it cannot be regarded as treasonable action. It is submitted, My Lord, that the motives of a speaker in making a speech not prohibited by
20 law, are completely irrelevant. He may have feelings of the greatest ill-will and malevolence to the state, but in our submission, My Lord, his feelings cannot affect the legal quality of the speech. My Lord, if it were otherwise, one would have the remarkable position that what may
25 lawfully be said by a member of the United Party or the Liberal Party, becomes a crime when the identical speech is uttered by an alleged conspirator. In our submission, My Lord, that is quite an impossible result. Or again, My Lord, the position would be that while it may be lawful
30 for a member of the National Party to make speeches in favour of the republic or some other form of state, it is not lawful for other persons to make speeches an favour of

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