TREASON TRIALS DEFENCE FUND No. 8

PRESS SUMMARY

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

Period covered: February 6,
February 9 - 12. [1959]

COURT GIVES REASON FOR REFUSAL OF JOHANNESBURG VENUE

On February 6 the three judges of the Special Court gave in writing their reasons for their previously announced refusal to move the Treason Trial from Pretoria to Johannesburg. They had come to the conclusion, they now explained, that even if this Court were entitled to order the removal of the trial to Johannesburg it should not do so.

They were not concerned with the accommodation of the Court but felt that if the case were to be heard in Johannesburg there would be large crowds not only at the commencement of the trial, but also when important Crown witnesses were put under cross examination and when the accused gave evidence. Such a congregation of large numbers of people, their lordships felt, would be not only a possibility but a likelihood, in Johannesburg.

A concourse of people, even if there were no active demonstrations, would place under strain everybody concerned with the trial and might also call for the intervention of the police. Such intervention might cause disturbance and unrest.

"We realise", their Lordships added, "that although the State has supplied transport free of charge, the accused will suffer considerable inconvenience." It seemed to them, however, that in the circumstances the transfer of the trial to Johannesburg would not be conducive to the proper administration of justice. As far as consultations were concerned the Court would always afford the accused reasonable opportunity to confer with their Counsel or with the alleged co-conspirators.

DEFENCE REPLIES TO COURT'S QUESTIONS

The Ambit of Treason.

Replying on February 9 to a question by the Judge President at the Court's last adjournment, Mr.H.C. Nicholas submitted that the soliciting of assistance at a meeting by a party to a treasonable conspiracy would not be treason, even if the announcement had been made that there would be an attempt to overthrow the State by violence. It would, however, be an incitement to conspire, a separate act, and Mr.Nicholas argued that incitement to conspire was beyond the ambit of what is laid down as High Treason. Certain acts have been laid down by law as punishable, but a separate act must be considered as an act of violence before it could be established as treason.

Lack of Authorities

Mr.Nicholas stated, in reply to further questions from Mr. Justice Rumpff, that no authorities could be found for establishing a request for assistance as a treasonable act and argued that the very fact that no authority could be found was the most powerful argument against its being a treasonable act. The Crown must draw the line somewhere and this must be where no authority could be found.

The Proving of Violence

Mr.Justice Rumpff then put to the Defence that the Crown allegation was that the accused entered into an agreement to overthrow the State by violence; other agreements following concerning the means that were to be used. The Crown claimed that it need not show more than the main agreement to use violence, and need not prove any form of violence. Mr.Maisels had submitted that the documents, speeches and events were innocent in the primary sense and that therefore the Crown must go further and say why it relied on them. "Does this argument mean that on the facts in the indictment and the further particulars, the facts do not disclose an agreement to violence?", asked Mr.Justice Rumpff.

Replying, Mr.Maisels submitted that the Crown sought to give a blanket answer to the facts from which it inferred both the main and the ancillary agreements: "It is vital for the defence to know from where or what the Crown infers violence. The task cannot be evaded even if it can be postponed, and in fairness to the accused, it should not be postponed." If apparently irrelevant facts were to be held relevant, then the special circumstances should be pleaded to establish the relevance.

FURTHER AMENDMENT GRANTED

Mr.O. Pirow, Q.C., applied for an amendment to the further particulars to the indictment relating to the date on which the accused were alleged to have joined the conspiracy. Although the indictment itself specified the period October 1952 to December 1956, in the further particulars the Crown had indicated that the alleged conspiracy might have been established before October 1952. The amendment to the particulars would restrict the period to that alleged in the indictment.

Mr.Maisels objected to the proposed amendment on the grounds that this appeared to indicate a change of facts and suggested that it might be intended as a safeguard against the exception taken by the Defence to the indictment. If the facts were different, the Crown should explain that difference, for the effect of the amendment appeared to be that the Crown did not in fact know when the accused had joined the conspiracy.

Mr.Pirow protested that it was most unusual for the Defence to query the motives of the Crown. The Crown's object was to ensure that even if people had joined the conspiracy before October 1952, they would be covered.

In granting the amendment Mr.Justice Rumpff assured the Defence that if it became apparent at a later stage that the accused were prejudiced by this amendment, a further submission could be made.

Crown's View of Court's Indictment Duties

Mr.Pirow then addressed the Court on the duty of the Court in relation to the indictment. He submitted that if in S.A. law the indictment were held to be defective and could be cured by amendment, the Court was bound to make an order that the indictment should be amended.

"The Court has the power to quash, to order an amendment or to refuse to make an order," and the Crown submitted that in this case the Court ought to refuse to make any order to amend.

The Court would, of course, order any amendment as it thought fit. In reply to a question by Mr.Justice Kennedy, Mr.Pirow denied that the Court could order any part of the indictment to be struck out, but asserted that the Court could order the Crown to do so, and suggested that there was a clear duty on the Court to assist in formulating the indictment, provided that both sides were given the opportunity to express their views.

Soliciting of Assistance for Conspiracy

Mr.Pirow then addressed the Court on the attitude of the Crown to the soliciting of assistance for a conspiracy by a speaker at a meeting. The Crown held that such a meeting would be held, not for discussion but for the furtherance of a conspiracy already completed, and that the purpose of addressing the crowd would be to enlist their support for the conspiracy. The state of mind of the crowd was of no importance, all that mattered was the state of mind of the speaker, and if the speech was i in furtherance of treason, then it must be an overt act and therefore a treasonable act.

CROWN REPLY TO QUASHING APPLICATION

Passing to the Defence submission for the quashing of the indictment, Mr.Pirow argued that in their application for the quashing of the first indictment the Defence had neither requested the Crown to supply facts relating to the conspiracy or the adherence to the conspiracy, nor had they done so for the second indictment, but that the Defence were now pressing for the particulars relating to violence. It was then apparently perfectly clear that the facts supported the conspiracy to overthrow the government. But how could the government be overthrown without violence? The Crown submitted that the facts could not be split up; that the facts had been given for the establishing of the conspiracy and thus also for the establishing of violence.

Role of Apparently Irrelevant Documents

In reply to questions relating to apparently irrelevant documents (including a street map of Bucharest), Mr.Pirow explained that the Crown had supplied a list of documents found in the possession of the accused on which it relied for associations, not exclusively on contents. The accused were not entitled to know how the facts would be used; if the documents were innocent the accused could supply the explanation.

Mr.Pirow disagreed with the suggestion that the number of documents and speeches were excessive; of the 5,000 documents relied on, at least 2,000 were duplications. It was unavoidable that the Defence must read and study all the documents - including the parts no longer relied on by the Crown. The use of the documents and facts might well vary at the trial and the Crown could not bind itself to any particular use of any particular document or speech.

Background of Inherently Violent Creed.

The Crown had given all the facts but the Defence now wanted an explanation of the facts; a construction of the evidence. Mr.Pirow illustrated for the Court how the documents and speeches could not be taken in isolation but must be related to the background of the conspiracy. The demands of the Freedom Charter interpreted as a multi-racial Socialist state could be obtained by peaceful means, but in the speeches and documents there was no suggestion of constitutional methods, in fact just the opposite. The Crown alleged that shortly after the outlawing of the Communist Party, former leading Communists were to be found in high places in some of the organisations listed in the indictment; inherent in the Communist doctrine was the resort to violence. The Crown alleged also that the so-called Liberation Movement in South Africa was linked to a world-wide movement of violence. The campaigns against passes and Bantu Education, the bus boycott - all these were not isolated from the campaign to overthrow the government. "The accused say so!", said Mr.Pirow, "The references in speeches to 'fighting ... blood ... death' - are these mere rhetoric? No, not as far as the non-European accused are concerned. All this is part and parcel of the background to the conspiracy and the Crown cannot give details .... Mr.Maisels asks what the indictment means. The Crown will not interpret it. The Court may. The Defence can't sit and wait for the Crown to put the interpretation and then say 'This is not so!'."

Invalid Defence 'Concertina' Tactic

Continuing the Crown argument Mr.C. Hoexter submitted that the Defence had tried to concertina the three related but distinct elements of treason:

The hostile intent,
The overt act,
The ultimate violence against the State,

and had called upon the Crown to produce acts "which ooze blood and reek of gunfire in peacetime!" But the real test of the indictment was whether it alleged a determinable treasonable purpose and disclosed overt acts in pursuance of the treasonable design; and whether those overt acts were reasonably referrable.

New Class of Treason Urged

Mr.Hoexter then argued that a fourth species of treason should be added to the three classes distinguished by Mr.Nicholas, the stirring up of hostility within the State by attempts to oppose and to resist the authority of the government. Any attempt to change the Government by extra-Parliamentary methods must lead ultimately to violence, but it was not essential that each overt act of treason must in itself be forceful.

Mr.Nicholas had claimed that the speeches were still in the realm of discussion and could only become treasonable when they constituted incitement to action and had quoted the case of Labuschagne in support of his contention, but Mr.Hoexter claimed that careful analysis of this case did not support the Defence, because in that case the three accused had not been the prime movers of the conspiracy.

Intention of Words rather than Effect

Mr.Hoexter disagreed with Mr.Nicholas' argument on the importance of the effect of words on the audience and argued that if "the speech were in furtherance of the conspiracy the contents would not matter in principle; the Court must look at the intent of the perpetrator of the speech and disregard the effect. Mr.Justice Bekker commented that if Mr.Hoexter were wrong, the Crown would be in difficulty, but if he were right, the speech itself need not be directly or indirectly related to the overthrow of the State. The Crown would not need to plead how and why the speeches were in furtherance of the conspiracy; the Crown averrment would suffice.

To Mr.Justice Rumpff's suggestion that the Crown would have to indicate some innuendo for the accused to know what they must prepare for, Mr.Hoexter replied with a vehement "No!" and continued that it was an essential part of the Crown case that if words meant nothing to the person incited, there could be no incitement, but the Crown disagreed with this contention and submitted that the only test would be that the speeches must be referrable to treasonable conspiracy and claimed that this had been established by the Crown. Mr.Justice Bekker objected that this approach appeared to be in conflict with the submission that the contents of the speeches did not matter.

Referability Established as Criterion

Mr.Hoexter replied that the test should be whether the speech was referrable, i.e. "intended by the accused thereby to further or carry into effect the means of the conspiracy", and illustrated his point with several speeches from Schedule C of the indictment, pointing to one speech in particular as being "emotional, demogagic, impulsive." Mr.Nicholas had claimed that this speech did not come within the principles necessary for an overt act of treason, but the Crown would give it high marks! It was certainly not the language of constitutionalism, but of revolution.

After Mr.Hoexter had given several illustrations, Mr.Justice Rumpff

assured the Crown that their broad submission of the referability of the speeches had been accepted and suggested that there was no necessity to continue with these examples.

How "In Our Lifetime" is Equated with Five Years

Mr. Jacob de Vos, Q.C., then addressed the Court for the first time in the trial, dealing with the submission by the Defence that the failure by the Crown to furnish the resolution adopting the Freedom Charter constituted a formal defect in the indictment. Mr.de Vos argued that this had not been a material defect but had now been complied with. Passing to the phrase "in our lifetime" appearing in Part E of the indictment, Mr.de Vos claimed that it was an objective statement by the Crown of an inference of a "tacit term of Agreement" as to the fulfillment of the demands of the Freedom Charter.

Mr.Justice Bekker interjected "The preamble of the Freedom Charter doesn't say 'In our lifetime'. Where does it come from? Mr.Justice Rumpff commented "It must be either an express or a tacit term indicating the time fixed by the parties to the agreement. If it is a tacit term, it requires details." Mr.de Vos replied that it referred to the intention of the accused voting in favour of the resolution to work together to achieve the demands of the Freedom Charter "in their lifetime" and submitted that further particulars were not necessary. The accused had used the phrase "in their lifetime" to indicate that their objective would be achieved "within a certain period", i.e. five years.

Mr.Justice Bekker: "The Freedom Charter does not use 'in their lifetime' are the accused not entitled to know how this phrase arrived?"

Mr.de Vos repeated "In our lifetime is an expression used by the accused and accepted by the Crown to mean 5 years".

Mr.Justice Kennedy: "The Defence asks: Where does the Crown get it from?"

Mr.de Vos: "The accused said so on a number of occasions!"

Mr.Justice Bekker: "When?" "Why give years?"

Mr.de Vos remained silent for a few moments and then said, after being prompted by his leader, Mr.Pirow: "These particulars will be available to the Defence tomorrow".

Mr.de Vos then proceeded with the submission that Part E of the indictment (dealing with the Freedom Charter and the achievement of the demands quoted) should be judged according to the criterion put forward by Mr.Hoexter. "Is treason reasonably referable?" and argued that in relation to the conspiracy and the main treasonable intent, and more particularly to the alleged active preparation for the violent overthrow of the State, there could be no doubt that this portion of the indictment was clearly referable. In reply to a suggestion by Mr.Justice Kennedy that although the demands of the Freedom Charter were radical, they might not be treasonable, Mr.de Vos replied that these demands could not be achieved in the lifetime of the accused unless by force.

The "National Liberation Movement" and Alleged International Conspiracy.

Dealing with the complaint by the Defence that the Crown's reply to the request for specific information concerning an alleged international liberatory movement and the "National Liberation Movement" existing in South Africa was inadequate, Mr.de Vos referred to the evidence of Prof.Murray in the record of the preparatory examination and in reply to the complaint that the references to Marxist Leninism were vague and embarrassing, he referred the Defence both to Professor Murray's evidence and to the statement by Professor Bochensky, already given to the Defence.

"In our Lifetime" Schedule Supplied by Crown.

At the commencement of the proceedings on the following day, Mr.Pirow informed the Court that particulars relating to the phrase "in our lifetime" and to the alleged period of five years had been furnished in the form of a schedule of documents and speeches from where the inference had been drawn.

Mr.de Vos continued his submission of the previous day by proposing to quote from speeches and documents to illustrate the type of material before the Court. Mr.Maisels queried this procedure on the ground that if these particulars had not been supplied or requested, the Crown could not at this stage bring particulars to the Court. Mr.Justice Rumpff said he had understood that these illustrations would relate to Schedule C only, but Mr.de Vos said this would not be so, as Schedule C consisted only of overt acts, and not of facts indicating relevance. Mr.de Vos did not proceed further.

Mr.J.J. Trengove continued the argument for the Crown, first drawing the attention of the Court to its powers to strike out portions of the indictment which may be objectionable and then submitting that to strike out any material portion would not be an amendment if what remained would no longer be an indictment.

Turning to the Defence argument that the accused were prejudiced by the allegation of joining the conspiracy and participating, Mr. Trengove submitted that this embarrassment had been resolved by the latest Crown amendment limiting the period of joining from 1952 to 1956. He then referred to the complaint that the Crown had failed adequately to furnish particulars for certain parts of the indictment. Mr.Trengove proposed to argue that the Crown's reply was adequate and supplied the Defence with all the particulars required for pleading and to prepare for trial. The Defence had argued no violence was disclosed in the indictment, to which the Crown's reply was that the violence was intended against the State, and the answers required by the Defence could be found by analysis of the information supplied by the Crown. It seemed that the Defence wanted to know how the mind of the Crown works.

Means and Ends

During a discussion arising from questions by their Lordships on the differentiation between the means and the end, Mr.Trengove disagreed that it was essential that the means used should be violent, submitting that treason was in itself the overthrowing of the State by violence, and thehallmark of treason was the hostile intent.

Referring to Mr.Maisels' objection to the Crown reply that it was "not required to furnish the particulars in the form in which the request was made", Mr.Trengove submitted that having regard to the summary of facts furnished to the Defence the accused had been adequately informed of what the Crown relied on. There was no obligation on the Crown to show that any single fact taken in isolation was the fact relied on. Every portion of the summary of facts was relevant. Mr.Trengove then illustrated his argument by reference to the "Liberation Movement" and the World Peace Council, claiming that "the accused are not lost when they peruse the documents and read them in relation to the Liberation Movement and the World Peace Council." Referring to the large number of documents alleged to be possessed by the accused, Mr.Trengove explained that the Crown relied on these facts to show the association with international organisations such as the World Peace Council, e.g. the documents entitled "The Peace Movement and the Congress of the People".

Mr.Trengove then referred to the Crown's submission that the organisations have been infiltrated by former members of the Communist Party, arguing that it was not impossible that such people had retained their communist tendencies since they had been forced to abandon the Communist Party through legislation, and had not done so through conviction. "Once a Communist always a Communist", he said.

In reply to Mr.Maisels' allegation that the Crown had slipped in reference to the Defiance Campaign on a "side wind", Mr.Trengove argued the relevance of this fact on the ground that the Defiance Campaign was part and parcel of the liberation movement, quoting the close relationship of the African National Congress and the S.A. Indian Congress right up to and after the date when the conspiracy was formed, and the National Planning Council which had been set up to direct the National Liberation movement supported mass action.

It was no part of the Crown procedure to analyse all the evidence to show how the Crown's mind works but if Mr.Maisels felt it was improper to introduce the Defiance Campaign on a "side wind" then the Crown would show the relevance and invited their lordships to study the reference to this campaign in the summary of facts. Mr.Justice Rumpff objected to this, saying that the judges had enough documents already to study!

Objects and Policies

Dealing with the request for the objects and policiesof the organisations, Mr.Trengove argued that these were clearly available to the accused in the summary of facts, where the objects of the organisations were set out as far as they were relevant. The Crown inferred the policy from statements made by responsible A.N.C. speakers at A.N.C. meetings.

When Mr.Trengove proposed to submit to the Court examples from speeches other than that of Dr.Conco quoted by the Defence, Mr.Justice Rumpff ruled that this was unnecessary, but assured Mr.Trengove that the Court would give him the right to argue on additional speeches should any be introduced by Mr.Maisels.

Mr.Trengove then passed on to the complaints by the Defence that certain documents relied upon by the Crown appeared irrelevent, and also certain portions of documents which had been left in, while others had been scored out; and submitted that the Crown relied upon these documents for eveidence of the activities of the organisation, but was not required to say what use it would make of them.

At the opening of the trial on the following morning, Mr.O. Pirow informed the Court that the Crown would lead no further argument, and was satisfied that the Court had noted the Crown case. Mr.Justice Rumpff then assured the Crown that when he had stopped Mr.Trengove on the previous day, it was because he had felt that all the speeches would be the same as that of Dr.Conco and had suggested that the Crown would make a general submission. His sole desire had been to shorten the argument, not in any way to curtail the Crown case. If the Defence were however to argue any further speeches, opportunity would be given to the Crown to reply.

Significance of Street Map, "Conditioning", and Five Years

Mr.Trengove rose to make three further points.

1. (a) The significence of the Bucharest street map was that it was in fact a brochure for the Fourth World Festival of Youth held in Bucharest under the auspices of the World Federation of Democratic Youth (allegedly a world-wide Communist organisation)

   (b) That where one speech contained references to the liberation movement, the Western Areas Removal, Bantu Education, Freedom Volunteers etc., the Crown could not be expected to disintegrate the speeches by taking out portions to relate to special means as requested by the Defence.

2. The attack upon the use of the word "conditioning" was unjustified. The latest edition of the Oxford dictionary showed that the verb meant "bringing into the desired state, to make fit". If the meaning was not clear, the Defence ought to have asked the Crown for an explanation.

3. The period of five years is a proper inference from the speeches and

and documents handed to the Defence the previous day.

Mr.Trengove closed his remarks by quoting from the judgement in Heine's case that "a solid and assiduous application of the particulars" would elicit all the information required by the Defence.

DEFENCE REQUESTS ADJOURNMENT

Mr.A. Fischer, Q.C., then requested the Court to grant a postponement until February 16, so that the Defence could study the new schedules supplied by the Crown, of 145 speeches and documents scattered through the record, submitting that the Defence argument could not proceed before this had been done without upsetting the logic of the prepared argument. The Defence could moreover, only have access to the documents during Court hours. After discussion, the Defence finally conceded that Mr.Nicholas could present his argument first and the Court would then adjourn until February 16.

OPENING OF DEFENCE REPLY

Mr.H. Nicholas openedthe Defence reply by submitting that Mr. Hoexter's postulation of a fourth class of treason was based on a misconception. Arguing that the judgement he had quoted was not dealing with the nature or category of a treasonable act, but with the nature of the hostile intent. The present indictment was dealing with one category of treason only, insurrection and rebellion, and Mr.Nicholas submitted that insurrection and rebellion against the Government are merely non-legal words for sedition. If treason during a period of peace consists in acts of sedition with a hostile intent then the field covered must be co-existent with the field of sedition. The only difference was the hostile intent, the hall mark of treason alone.

Existence of a Enemy

Mr.Hoexter had submitted that the act of assisting conspirators in peacetime was equivalent to assisting the enemy in war time and in reply to a suggestion from Mr.Justice Bekker that the act of conspiracy set up an enemy in peace time,that war had been declared, although there was no formal declaration of war, Mr.Nicholas argued that there could be no enemy without a formal declaration of war or an act of violence. Mr.Justice Rumpff interjected that if there were hostile intent, then an enemy had been created.

Treason Only though Sedition

Arguing from the principle that an overt act of treason must first be an act of sedition, Mr.Nicholas submitted that the indictment contained no allegation of seditious acts, no breach of the public peace, no disturbance of the tranquility of the State. The meetings had not been unlawful, unless it could be proved that they were held in pursuance of the conspiracy. His submission was not that words were on a different plane from deeds; this could only be when the nature of the words differed from the nature of the deeds. Words could only be seditious when their utterance constituted violent action against the State by consequence, that is when they affected the mind of the hearer.

Mr.Hoexter had argued that the effect of words was of no importance; it was only the intention that mattered. Mr.Nicholas suggested that this submission was a "flight from reality".

Mr.Justice Rumpff commented that this was the main point of difference between the Crown and the Defence.

Mr.Nicholas submitted for the Defence that the only referrable means to conspiracy must be violent means, the Crown could not bring in any means and then refer them to the furtherance of conspiracy.

The Ballot Box and Force

Referring to Mr.Hoexter's submission that meetings and demonstrations could be treasonable if the intention was to overthrow the government, because they were not the methods of the ballot box, Mr.Nicholas contended that Mr.Hoexter had misunderstood the judgement of Mr.Justice Schreiner, who had made the point that there were only two effective methods of changing the government, the ballot box and force. Mr.Justice Rumpff suggested however that the vote could be inflated by demonstrations etc.

Mr.Nicholas then submitted that none of the means alleged in Part b(4) of the indictment, except those relating to violence, could be capable of being overt acts of treason. They would not even be acts of sedition.

Test of Crown's Proposition

The Crown's proposition could best be tested by the consequence which would flow from it.

A commits an innocent act with hostile intent, but as the act is unrelated to conspiracy he is innocent.

B commits an innocent act with hostile intent, but related to the conspiracy; he is guilty of treason. The only difference is that he has entered into the conspiracy.

"This just can't be!" said Mr.Nicholas.

Mr.Nicholas submitted further that the difference between treason and sedition is that treason is committed when the step is taken, but sedition is committed only when the act has been committed and completed. The nature of the act is, however, identical. An act falling short of the attempt could be treason, but this would not be the case with sedition.

Mr.Justice Rumpff contended that the law differentiates ... "You can talk sedition, but you can't talk treason!"

In reply to a question from Mr.Justice Bekker, as to whether incitement to join a conspiracy would not be treason, Mr.Nicholas replied that this would be too far away.

Possibly Criminal but not Treasonable

Finally Mr.Nicholas submitted that he had referred to the speeches in Schedule C as being innocent and not treasonable. He was not defending the speeches concerned, some might indeed be criminal, but they were not treasonable. The State, however, protected its people against abhorrent or objectionable ideas through the Suppression of Communism Act and the Native Administration Act. He submitted that this situation did not call for any extensions to the protection afforded by these Acts.

The Court then adjourned until February 16.

- -