Op Rugkant

Argument: 8 & 9 March 1961

Op Voorblad

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MR KENTRIDGE

equally, one just cannot put it on the scale on the Crown side. It is an expression which is just as reconcilable with innocence as with guilt.

BEKKER J: What is the phrase used in DeVilliers' case? "Each circumstance must point to the guilt"?

MR. KENTRIDGE: My lord, in the quotation from Best,"i t is of the utmost importance to bear in mind that where a number of independent circumstances point to the same conclusion, the probability of the correctness of that conclusion is, the compound result". In other words, it must point to a particular conclusion. In the first place not beyond a reasonable doubt, but merely as a probability, but if you get something which is as consistent with innocence as with guilt, which doesn't point in a particular direction at all, then you can't even put it in the scale and, of course, my lord, one can understand that. Let us assume that one has the word 'clash' in context where the Court cannot say that it points towards a violent means. Then, my lord, it doesn't matter whether it is used once in that way, or fifty or a hundred times; there is nothing to add together. You simply have the use of the word which is as consistent with innocence as with guilt. Let's assume that you hawe a man who has used the word 'clash' in a speech and the Court cannot say that it points towards an idea of violence. It doesn't matter whether that man has used it once, or fifty times; it cannot be added - there is nothing to add together, because there is nothing which points to guilt.

Now, my lord, we submit . . .

RUMPFF J: That obviously must be so, if it's once used in an innocent way it's kept on being used in an

innocent way . . . .

MR. KENTRIDGE: May I just put it a little more widely, my lord. When your lordship says in an innocent way, shall we say a way which the Court cannot find is probably guilty.

RUMPFF J: Yes, well, it leaves it entirely open.

MR. KENTRIDGE: Which leaves it open, my lord. As your lordship pleases.

RUMPFF J: Well, if he uses it fifty times in that way it's still open.

MR. KENTRIDGE: Yes, it's a make weight.

RUMPFF J: What would be the case if a person like that - - I'm entirely on your argument - - uses the word thirty times - - assume there are thirty speeches which he makes and in every one of them he uses the word 'clash' - in twenty of them it is open, whether he intended a physical clash or not; but in ten, having regard to the context, the inference may be held against him that it's a physical clash. In that case the twenty speeches should be ignored? Or may they be used at all?

MR. KENTRIDGE: My lord, I would say that the twenty cannot be used at all because obviously . . .

RUMPFF J: They have a different audience.

MR. KENTRIDGE: They have a different audience - it's not proved they have the same audience, and one bears in mind that we use words in different - with different meanings at different times.

RUMPFF J: Yes; I pre-suppose that the same topic would be dealt with.

MR. KENTRIDGE: But even if it is a political topic, my lord, if we talk about politics we might say

there was a clash between police and strikers in Belgium and we mean violence, but we might use the word clash in talking of some other incident in a very similar sort of way, yet we don't mean violence.

RUMPFF J: Yes.

MR. KENTRIDGE: Now, my lord, this point was in fact mentioned in the American case which his lordship Mr. Justice Bekker to my learned friend Mr. van Niekerk in the course of his argument, at page 23081 of the record. It was the passage in the case of Sneiderman vs. The United States in the Federal Court, in which the Court stated that the Defendant had the right to criticise the system of government and the government itself . . .

RUMPFF J: Would you just give the reference to the case again?

MR. KENTRIDGE: Yes, my lord, it's the case of the United States vs. Sneiderman, 106 Federal Supplement, page 906, at page 935. His lordship Mr. Justice Bekker quoted that passage in which the Judge there had said that there was freedom of expression, and that the Defendants were entitled to criticise the foreign policy of the United States and to praise the foreign policy of other governments and the role being played by those governments in international affairs, and my learned friend for the Crown accepted that, but one will recall that in Sneiderman's case, having said that, the Court said that from that sort of expression, however crudely or intemperately put, no inference could be drawn that the people who used it were intending or were advocating the overthrow of the government by force."

BEKKER J: Unless there was something else.

MR. KENTRIDGE: Unless there was something else. As it's put in another place, no inference that any of the Defendants conspired as charged in the Indictment may be drawn from the advocacy or teaching of Socialism or other economic or political doctrines, no matter how distasteful the Jury finds them to be.

In other words, my lords, it's something - - it's not a case of adding those things to other factors; if the other factors don't prove the guilt of the accused this sort of factor which the Crown has repeated time and again in its argument - criticisms of the form of State, praise another form of State or another economic form - - those just don't count at all.

My lord, we all know . . .

BEKKER J: It depends, I suppose, for what purpose the Crown uses it. Is there any objection to the Crown saying "Well, calling this country Fascist" or whatever it is, "shows that you don't like this country", and linking that up with hostile intent.

MR. KENTRIDGE: Well, my lord, subject to the argument by my learned friend Mr. Nicholas that that isn't hostile intent. . .. but I would go further, my lord, I would say that when we say in this country that there is free speech in the sense that one may criticise the government and even criticise it in intemperate and hostile terms, as was said in Sneiderman's case, what that means, if one is free to do it, is that one is free to do it without having any inferences of treasonable intent drawn against one; otherwise it's no sort of freedom at all.

And so, my lord, I do go so far as to say that

it's not even a matter of taking it into account with other circumstances; if the other circumstances are not good enough these mere make weights can't push the Crown over the hump.

My lord, we all know the proper application of this rule about adding circumstances together; one finds numerous examples in Wills on 'Circumstantial Evidence' in the library edition, page 48 and the following pages; one knows, my lord, that in the case of a murder there is no eye witness, but the accused is seen running from the house at about the time of the murder; he is shown to have bought a dagger the previous day for which he normally has no use; there are blood stains on his clothing which he cannot explain; he is found to have some of the deceased's property on him which he can't explain. In such a case each of those circumstances may in themselves point in a certain direction, but it's when you add them up that they count, but it's very different my lord, from trying to add up expressions of political opinion and trying to create from those expressions of political opinion something which goes beyond political opinion.

And, my lord, in that sort of case, where you have the circumstantial evidence about a murder you've got a Corpse. Here you've no acts of violence, there is corpus delicti in this case.

And, my lord, we submit that the Crown's argument in trying to construct a chain of circumstantial evidence has been, with respect, a spurious argument, my lord. They have tried to link up circumstances where there is no natural link. They've tried to make links out of phrases, sentences or political opinions which at

best for the Crown might be merely suspicious but which are entirely reconcilable with the absence of the A.N.C. conspiracy to use violence, and my lord, I refer again here to the point which my learned friend, Mr. Nicholas, made. One must be careful not to link up two circumstances without being certain that there is a natural link. One can often find the semblances, my lord; one may find for instance that in this case a man in the Eastern Cape in 1954 made a particular speech on a topic, and one might show that there is some Transvaal journal in 1956 in which there is a very similar kind of expression. The Crown has tried in any case has tried to put that sort of thing together, but a mere resemblance isn't enough; the Court, before regarding those as links, must be certain that there was a real link, that there was some real connection and not a mere resemblance or coincidence.

One must bear in mind, as my learned friend pointed out, inquoting I think the case of Henry Hunt that one must always bear in mind that for instance a similar action, or a similar expression may result, because the two people who used that expression have the same experience, perhaps the same motive, without there being a real connection between them. I mean, applied to this case, my lord, one can conceive of an African let us say in Port Elizabeth and an African in Durban might make the same sort of statement about the Pass Laws - and perhaps even use similar words, because they have the same experiences, the same view - - without there being any real link between them at all.

Now, my lords, it's therefore - its for that

reason,because of this sort of difficulty in drawing inferences from circumstances, that the writers have constantly stressed the dangers inherent in relying on circumstantial evidence. My lord, one knows that circumstantial evidence is not only admissible, in some cases it is conclusive, there is no question of a Best Evidence Rule in the ordinary sense because a Court may convict on circumstantial evidence alone, but Best on Evidence in his 10th Edition, at page 259, has this to say about it: contrasting it with direct evidence:

"When truth is direct, for instance where it consists of the positive testimony of one or two witnesses, the matters proved are more proximate to the issue - they lave but two chances of error, those which arise from mistakes, or mendacity on the part of the witnesses, while in all cases of merely presumptive evidence - which he uses that synonym for circumstantial evidence - however long and apparently complete the chain, there is a fair chance of error, namely that the inference from the facts proved may be fallacious." He says: "Besides there is an anxiety felt for the detection of crime, particularly such as are very heinous or peculiar in their circumstances which often leads witnesses to mistake or exaggerate facts and tribunals to draw rash inferences, and there is also natural to the human mind the tendency to depose greater order and conformity in things than really exists."

Now, that is the point, my lord; one's mind does have a tendency in seeing resemblances,to suppose there is a greater order and conformity than there really exists, and similarly, my lord, Roscoe in his Criminal Evidence, 16th

Edition, page 21, quotes .....(?) on this. He says: "It may be observed circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crime. This anxiety often leads witnesses to mistake or exaggeration of facts and Juries to draw rash inferences; not unfrequently a presumption is formed on circumstances which would not have been noticed as a ground of crimination but for the accusation itself, for example the conduct, demeanour and expressions of respective persons when scrutinised by those who suspect . ..."

Now we submit, my lord, that this applies very directly to this case, to the Crown approach, because there is a tendency on the part of the Crown to attach to expressions used by the accused an importance which we submit no one would ever have given them but for the very fact that they are accused of High Treason.

We submit to your lordships, my lord, that many of the expressions on which the Crown has spent a great deal of time in evidence, cross examination and in argument, would never have given any one a moment's pause in their original context; that it was only when they were scrutinised to see whether they afforded evidence on Treason that anyone would ever have thought of even the possibility of a sinister meaning.

My lord, there have been many cases where people have spoken, and used words like for example, often used in this case, "Some thing or other will happen over my dead body"; we submit that in cases like that, my lord, if there was no charge of Treason, no one would have dreamt of drawing

any inference from such an expression. It's only when one says "This man is charged with Treason" and one starts a close analysis, that the Crown starts to draw inferences, and we submit, my lord, that one must be extremely careful on this point; one must bear in mind that one musn't draw inferences which would not naturally be drawn merely because there is a serious charge against the accused.

(COURT ADJOURNED FOR 15 MINUTES)

ON THE COURT RESUMING:

MR. KENTRIDGE: My lord, there is another passage in Wills on circumstantial evidence at page 331. It is extremely pertinent to the present case, my lord. The learned author there quotes Sir Matthew Hale as saying on the dangers of circumstantial evidence, "That persons who are really innocent may be intangled under such circumstances that appear to carry great probabilities of guilt," and that is the chapter where the learned author gives a number of cases about extremely damaging circumstances surrounding an accused who was unjustly suspected as a result. The learned author points out, and this is the point here, my lord - one of the dangers, and that is that all the probabilities of a case, all the circumstances, may not be before the Court. The learned author points out that you might have a circumstance which is inconsistent with the Crown case, or which points away from it, which isn't before the Court, and that is extremely important, my lord, in the present case where the Court is proceeding on documents

and speeches largely and it is clear that they are not all before the Court, and my lord, Wills at page 45 quotes Baron Alderson (?) in a case called Rex vs. Hodjes reported at 168 English Reports, page 10136, in which he pointed out that a Jury mustn't forget that a single circumstance which is inconsistent with the conclusion of guilt is of more importance than all the other circumstances which might point towards guilt.

Now, my lord, applying Blom's case here the Crown must naturally satisfy the Court that there is no circumstance which is inconsistent with the conclusion of the guilt of the accused.

BEKKER J: Does that observation apply to the speeches too that are before the Court, other than the shorthand speeches?

MR. KENTRIDGE: I would submit yes, my lord. The point is that applying Blom's case, and really it's a matter of commonsense and logic, if the Crown relies on circumstantial evidence, the Crown has got to satisfy your lordships that there is no circumstance which is inconsistent with the guilt of the accused.

Now, my lord, if all the relevant evidence - all the relevant circumstances have not been placed before the Court, the Crown is obviously in no position to satisfy the Court. For example, my lord, can the Court be sure that no speeches were made at meetings which are inconsistent with the Crown's hypothesis?

We submit that obviously this Court - to put it no higher - cannot be so satisfied, because the Crown has not chosen to place evidence of all the speeches before the Court.

MR. KENTRIDGE

And, my lord, this brings me to another question, and that is the manner in which the Crown has chosen to prove its case. Now, my lord, we know that as a matter of law the Court may convict on circumstantial evidence alone, but we submit, my lord, that in the present case, in the nature of things, if the Crown's hypothesis is correct, there must have been a mass of direct evidence which would have been available to the Crown.

Now, my lord, one knows - it appears in some of the cases that my learned friend Mr. Nicholas has quoted - that it is sometimes said that conspiracies are usually proved by circumstantial evidence, because in the nature of things one doesn't normally have direct evidence, and that, of course, applies to the normal criminal conspiracy where a few people meet in a room and decide to embark on a system of fraud, or on a murder, or even for that matter on let us say an insurrection. But this isn't a case of that sort, my lord, this is a case charging a nationwide conspiracy involving a dozen organisations with tens of thousands of members - not a constant membership, my lord, as the evidence has shown - - a changing membership; people coming to the A.N.C. but who leave it for various reasons.

RUMPFF J: This argument refers really back to your Policy argument.

MR. KENTRIDGE: Yes, if your lordship pleases.

RUMPFF J: I take it, if the Crown has a different view of the policy - rightly or wrongly - then it's approach would be different? I take it the Crown approached this matter not on the basis that policy meant the policy that you refer to, but something which is made over a period by

leaders and organs and so on . . ,

MR. KENTRIDGE: My lord, I wouldn't like to speculate on that, with respect; as far as I can recall the Crown in its argument adverted to this point only once when my learned friend Mr. Hoexter said that he wanted to tell the Court that when he referred to policy he did not necessarily confine himself to what was in the constitution, but although the Crown has told the Court what it doesn't confine itself to it has never to the best of my knowledge suggested any other basis, or any other meaning to be attached to the word policy. It has never suggested any alternative method, or means or facts out of which a policy can arise. But leaving that aside, my lord, even on the Crown case, even on the Crown case, let's assume that the Crown has some other view of policy, other than the normal meaning of the word - - it is nonetheless part of the Crown case that this conspiracy was part of the policy of these organisations; that is to say, that it was a policy which took in thousands of people presumably - a dozen organisations - - a policy which was put forward presumably to thousands of people who were subjected privately or publicly to A.N.C. propaganda, It's a matter we deal with further in connection with other parts of the argument, for instance in connection with the Western Areas. Whatever one's view of policy the Crown case is that the A.N.C. was telling the householders in the Western Areas to do certain things. We point out to your lordships that there must have been thousands of people from the Western Areas to tell the Court what the A.N.C. told them to do.

There is evidence that there were police informers in the A.N.C; there is evidence that people were expelled from the A.N.C. Now, my lord, it's not an unusual thing for the Crown to call as a witness in a case a person who was a member of a conspiracy alleged to be criminal. We know for instance in the Leibbrandt case a number of the Crown witnesses were people who had been in Leibbrandt's organisation, Either they had broken with it, or the Crown gives them a free pardon and they turn King's or Queen's evidence, but we submit, my lord, that it is inconceivable that if it was a matter of A.N.C. policy, that the State was to be overthrown by violence, that nobody could be found by the Crown to give direct evidence of that allegation. We say that the inference that the Court must draw is that the Crown allegation is unfounded.

BEKKER J: Was there any request in the Particulars, or did the Crown indicate what it meansby policy?

MR. KENTRIDGE: My lord, the Crown . . .

BEKKER J: In the Further Particulars?

MR. KENTRIDGE: My lord, we did not ask what was meant by it. I think, my lord, if I may say so with respect, that we all understood policy as policy; it's a word. If I may make the suggestion with respect, my lord, I would submit that all of us in this Court, and without presumption, perhaps I could include your lordships, understood policy in the ordinary sense in which my learned friend has explained it.

My lord, my attention has been drawn to a passage in the record at page 14781, Vol. 69, where my learned friend Mr. Liebenberg was cross examining Mrs. Joseph, and

he asked a question about Congress alliance policy, and particularly the Congress of Democrats, and your lordship, the presiding Judge, said this to the cross examiner: "Mr. Liebenberg, are you now asking her questions of policy? Then you assume that there may have been decisions or formal statements by the organisations having regard to this particular question", and my lord, we submit with great respect that that is how anyone would understand a policy of an organisation - a formal decision of the organisation, and, my lord, in the Indictment . . I should say in the Particulars, in the Summary of Facts, at page 57, all that is said is that it is part of the policy of each of the organisations, and I think that your lordships' judgment, particularly the judgment of his lordship Mr. Justice Bekker, holding that it was an organisational conspiracy alleged - - I think in the very finding that it was an organisational conspiracy accepted that the policy of the organisation is the policy of the organisation.

As my learned friend Mr. Nicholas pointed out it's not a question of secrecy. Obviously one can have a decision of the National Conference which isn't publicised; it could be secret, but nonetheless in our submission when the Crown talks about the policy of an oragnisation, and in the course of this case one puts before the Court - as the Crown has - the resolutions of the National Conference, the Crown puts it's annual reports, its constitutions, its official documents before the Court as proof of its policy, it's rather difficult, my lord, to believe that anything else was intended.

BEKKER J: Why I'm asking you is this: it

may have been in the first Indictment, as argued -- I think Mr. Maisels raised the question -- it may have been during the course of his argument -- that what is this policy the Crown is relying on. Is it a secret policy? and I think it may be in that context that this question was raised.

MR. KENTRIDGE: My lord, I rather think that in the case of the first Indictment it wasn't yet clear whether it was an organisational conspiracy. My learned senior said "If it is, then tell us, then we can produce the constitution, etc." I think in the course of this case once or twice in cross examination the question arose as to whether what was alleged was a secret policy, and I think it waspointed out that all that was alleged was that it was a policy, and, my lord, when one looks at the Indictment I would submit with respect that there is a reference to a well known organisation - the A.N.C. -- the Crown chose to refer to the policy -- -- it would be conspiracy on that basis, without any gloves on or modification, or qualification, as the ordinary language -- and I would say again, my lord, that the Crown has never made any suggestion of any other way in which a policy could be adopted by the A.N.C.

BEKKER J: What is the dictionary meaning of policy. We have the authority on it; what is the ordinary meaning of policy, as used in the dictionary?

MR. KENTRIDGE: My lord, I haven't got it at my finger tips; I suggest it is something of the nature of the objects of an organisation, or a party, or a person. But we shall look up the definition.

RUMPFF J: Mr. Kentridge, was the matter not raised at all by the Crown representatives during the argument for the Crown? The question of policy; what constituted policy?

MR. KENTRIDGE: My lord, my learned friend Mr. Hoexter - now that I think of it, my learned friend Mr. Trengove also said that by policy they don't necessarily mean what's in the constitution. Now, as I say, my lord, that may be correct in the sense that you could have a conference, a duly constituted conference which passes a resolution which it doesn't publicise. I don't think that one could deny that that would be policy, even though it were secret - a company can pass a secret resolution. My lord, again when one looks at part B of the Summary of Facts at page 81, it's alleged that each of the accused had full knowledge of and supported the policy and the activities of the organisation. And, my lord, one recalls in cross examination, which was sometimes put to a witness, "This was the policy of the A.N.C. and you knew it", and there was no particular suggestion made - well, this was the policy in some peculiar sense. Certainly, my lord, we might as well say this - certainly there has never been any suggestion in the proving facts that this conspiracy was anything other than a conspiracy arrived at by the policy of the Organisation. It was never suggested that for instance the hundred co-conspirators had their own policy which wasn't the policy of the organisation, because one would never call that the policy of the A.N.C. One wouldn't bring the policy of the A.N.C. into the Pleadings.

MR. KENTRIDGE

And that is why particularly, my lord, we submit that it is astonishing -- if the Crown is right- that there was no direct evidence brought.

My lord, in the .....edition of Pothier, that is the book quoted by the Appellate Division in De Villiers' case, in 1944, on page 340, this is what was said. It's said: "A person who rests his case on the argument that certain circumstances which he adduces afford the presumption of the existence ofa disputed fact, is not entitled to any attention whatever if he cannot but be in a condition to give direct and positive evidence of the fact itself supposing it to be true." That's at page 340 of the second volume of Pothier.

Now, my lord, that is stated very strongly; when he says he is not entitled to any attention whatever, if that means, of course, that the evidence is inadmissible -- that, of course, is not in accordance with the modern approach - the evidence is obviously admissible, my lord, but when he says as a matter of reasoning, as a matter of inference, that if a person must be in a condition to give direct and positive evidence of the fact, if it were true, but if he limits himself to circumstantial evidence he really can't expect anyone to pay attention to it.

Now, my lord, the other authorities are to a similar effect: I can quote Best's 10th Edition, page 258, Wills at page 318. Wills said "The suppression or non-production of pertinent and cogent evidence necessarily raises a strong presumption against the party to withhold such evidence, when he has it in his power to produce the evidence. If you apply a fortiore to circumstantial

evidence which for reasons which have already been urged is inherently in .....as direct testimony."

Now, my lord, I'm not suggesting certainly any improper motive on the part of the Crown. The inference which I suggest should be drawn is simply, and as stated by Pothier, if there were, if there had been such a conspiracy, then it is simply incredible that no direct evidence would be available.

And as I say, my lord, this isn't the ordinary type of conspiratorial conspiracy. There has been positive evidence in this Court, to which detailed reference will be made later when the argument on the policy of the A.N.C. is presented, of people who have left the A.N.C., for various reasons and joined other organisations; of police informers in the A.N.C at the relevant period, and we submit, my lord, that the absence of direct evidence is in itself destructive of the Crown's hypothesis.

My lord, we are dealing here with circumstantial evidence of a conspiracy, and naturally the Crown cannot succeed without showing that the only inference to be drawn is that the alleged conspiracy exists; not any other sort of conspiracy, my lord.

My lord, my learned friend listed cases - there is the case of Sweeney vs. Koet, 1907 Appeal cases at page 221, where the House of Lords said, at page 202 - that was a case of a conspiracy to injure - "A conclusion of that kind is not to be arrived at by a light conjecture. It may, like other conclusions be established as a matter of inference from proved facts, but the point is not whether you can draw that particular inference but whether the facts are such that they cannot admit of any

other inference being drawn from them", and my lord, my learned friend Mr. Nicholas quoted to your lordships the case of the Queen vs. S - that's the test case reported in 1959, Vol. 1 of the reports at page 680. That case shows that if the facts are explicable on the basis of some conspiracy other than the one actually charged, the Crown must fail. Now, my lord, this may seem an obvious point. No doubt it is , but I stressit because I submit it's important if the activities of the accused are of the type which the Court may consider to be improper in a broad sense, or even illegal. That is to say, it's not enough if the circumstances point to a conspiracy to do an illegal act; they must point to the particular illegal act, illegal conspiracy charged.

And, my lord, the need for this especial care in considering circumstantial evidence in cases where the facts may suggest other inferences which in themselves may be abhorrent, is illustrated very well in the judgment of the Court in the Queen vs. S. My lord, I propose to recapitulate the facts to indicate the way in which the Court applied this principle in Blom's case to the proof of conspiracy.

Now, my lord, that was a case where the accused were charged with a conspiracy to have unlawful carnal intercourse with a coloured female in contravention of Act No.23 of 1957, and the evidence was that the accused - to wit a European male and two other European males had been found at night in a locked and darkened room with three coloured females; all six persons were in various stages of undress and the accused has given no explanation

Now the Magistrate had found there that the accused were guilty of the conspiracy charged, and the Court reversed this judgment by an application of Blom's case because the Court held that the first difficulty in the way of the Crown was that on the facts there were other reasonably probable inferences; for instance that the Appellant and one or other of the three women intended to commit some indecent act. In other words, my lord, although the circumstances might have pointed strongly to the fact that there was some criminal offence on foot, the Court had to be satisfied it was that one charged.

And, my lord, in a passage at page 683 to 4 which I needn't read out, the Court considered in detail the evidence and the possible inferences which could be drawn; all of them admittedly, my lord, inferences of indecent behaviour, but nonetheless, my lord, the Court could not draw the inference which the Crown wanted it to draw, and the Court considered the various inferences.

Now we submit, my lord, that in this case the Crown has really adopted the same incorrect approach as the Magistrate had adopted in the case of the Queen vs.S. My lord, the Crown points to facts which in its submission show that the A.N.C. wants to change the existing order, that it was prepared to resort to extra parliamentary action to do so, that it was even prepared to break the law in certain ways to do so; that it realised that its struggle would entail sacrifice and hardship; that it might lead even to grave economic hardships. The Crown also proves that the accused expressed views which may well be abhorrent to many people in this country, including

people in this room in their private capacities; in the words of my learned friend Mr. Trengove, the views they propagated, he said, may be against all that South Africa stands for.

Now, the way the Crown argues is this, my lord, they say 'We have shewn that the accused have done or contemplated things which may involve illegality and which the Court may regard as improper and immoral', and then from there it leaps the gap, asking the Court to reach the conclusion that the accused had not merely relied on a particular immoral or illegal plan - on any one - but on a particular plan for a violent overthrow of the State; just as the Magistrate, my lord, in the Queen against S. leapt to the conclusion that because the accused had been shewn to have been contemplating some illegal activity, therefore it was the particular conspiracy charged.

And that's how the Crown argued the accused had agreed to extra-parliamentary action, strikes, defiance, - they agreed to conduct which might lead to the State having to use force, and the Crown says "Well, then what is more likely than that they also agreed to use violence themselves or to have violence used by the masses."

But the Crown fails completely, my lord, to exclude the possibility that it was before that point that the accused stopped, quite apart from the direct Defence evidence. We submit, my lord, that the Crown completely overlooked that their reiterated submissions that one finds throughout their argument - their constant submission, my lord, 'This speech shows that unconstitutional and illegal action was planned' - takes them nowhere at all.

My lord, one finds what I may with respect call the undiscriminating approach of the Crown, also in its manner of dealing with the question of violence.

Now, my lord, as your lordships know the Defence has attempted to show by direct evidence, as well as by documentary evidence, that the A.N.C. had a positive policy of non-violence. Now, my lord, I need hardly say that although we have in our case attempted to establish that there is no onus on the accused to establish that, if your lordships were for any reason to find that it was not proved, either beyond a reasonable doubt or even on a balance of probabilities, that the A.N.C. had a positive policy of non-violence, needless to say that would not imply that the Crown had succeeded.

My lord, the Crown in its argument has completely ignored the numerous possibilities nuances of policy between the policy alleged by the Crown and the policy deposed to by the Defence witnesses.

Let's assume for example, my lord, that for some reason the Court didn't make a positive finding that the A.N.C. had a positive, firm policy of non-violence, an immovable policy of non-violence, such as the Defence witnesses have deposed to, trying to bear in mind the approach in Regina vs. S one can consider possibilities. One can consider the possible policy of a political organisation on the question of violence. One possibility as we say is that it had a positive, unchanging policy of non-violence. Then there is another possibility; it may never have been discussed at all in the Conference; individuals may have their own views or no views, and then

there is another possibility. The question may have been discussed without reaching a positive conclusion as in Labuschagne's case, 1941 Tvl. case, where it was found that a number of people had discussed an attack on a military camp in wartime and serious discussion about it had taken place but no decision had been made. Then, my lord, there is another possibility, that one has in theory and that is that an organisation may have a policy of non-violence with an open mind on future policy. Or it may even contemplate the possibility of changing its policy in the future. It may have a policy of non-violence about which some or many of its members are doubtful. . .

RUMPFF J: What's that?

MR. KENTRIDGE: A policy of non-violence, my lord, about which some or even many of its members are doubtful. It may have a policy of non-violence to which many of its members are disloyal, either spasmodically or in some cases it may be consistently. You may have in an organisation, which has no policy of violence, a number of members who may be desirous of changing the policy from one of non-violence to one of violence. They may even be making propaganda to that end within or without the organisation.

The Crown simply talks of violence, my lord, or non-violence. The Crown, in order to succeed, would have to show that the evidence does not only exclude the policy of non-violence deposed to by the Defence, but excludes all those various possibilities which I've mentioned.

My lord, we submit that the Crown's evidence produces nothing which is inconsistent with the policy of

the A.N.C. as deposed to by the Defence. Certainly we submit that the Crown has not excluded, as it must in order to succeed, all inferences other than that the policy of the A.N.C. was the one pleaded - and I go further, my lord, - - the same applies even to the policy which, although not pleaded, was argued by the Crown. They have certainly not shown that either of those two conspiracies is the only conclusion to be drawn from the evidence before the Court.

My lord, with regard to the drawing of inferences there's one further point which I wish to mention. My lord, we shall in due course address your lordships on the dangers of drawing the inferences which the Crown wishes to draw from political speeches which may be inaccurately reported or which may be metaphorical, or from political documents which may also contain loose expressions. There is a further point, my lord. The Court here is concerned with inferences about an agreement reached by the accused; largely it is asked to draw the inferences from the use of words, either in speeches or in documents. Now, my lord, although in normal cases of contract the Court interprets the contract objectively, we submit that in a case like this the Court can only draw inferences against accused persons from the words as understood by the people who used them. Now, my lord, obviously in deciding what a person meant when he used a particular expression, the Court will have regard in the absence of anything else, to the ordinary meaning of the word - that's naturally a factor in determining what the writer meant when he used it, but here, where the Crown is asked to prove a specific intention, the Court is concerned in drawing

an inference from the words as understood by the accused.

Now, my lord, in the case of the United States vs. Sneiderman to which I have already referred, part of the instruction to the Jury which deals with this point -- my lord, before I read this quotation I ought to say something in reference to the case of Sneiderman. My lord, the conviction of the accused in Sneiderman's case was apparently reversed by the Supreme Court of the United States in a case called Yates vs. the United States, reported in 354 United States Reports at page 298. But, my lord, it was reversed because it was held that the summing up of . . .

KENNEDY J: A misdirection in summing up.

MR. KENTRIDGE: A misdirection in that there wasn't a sufficient distinction drawn by the Judge between advocacy of an opinion and incitement to action, but insofar as the other parts of the summing up are concerned such as the one quoted by his lordship to my learned friend Mr. van Niekerk, which I referred to this morning, there is no criticism of that by the Supreme Court, and, my lord, one submits that although this, of course, is purely persuasive insofar as it may commend itself to your lordships, I submit, my lord, with respect that what the Judge had to say on this point is sound common-sense which would commend itself to your lordships. This is what was said:

"You should bear in mind that it is not your own understanding of the meaning of the language of an exhibit, but the defendant's understanding of the meaning of such language that is to be considered in arriving

at your verdict."

KENNEDY J: What page are you reading from?

MR. KENTRIDGE: Page 938, my lord. "You are to determine the Defendant's understanding of the meaning of the language of an exhibit, from any acts done or statements or declarations made by the Defendant which may tend to indicate his or her understanding of the meaning of such language, and from all facts in the evidence which may aid to determine that issue."

I suppose one would take into account the person's understanding of English; the possible use of idioms, explanations given in the witness box, but the point is, my lord, that the Court is concerned in drawing an inference in all cases with what the writer understood, and not what may be a more correct interpretation of the word objectively.

My lord, there is another case to which I can refer your lordships, to which there was a similar approach; the case of Akerhielm vs. Demare and Others, 1959, Appeal Cases 789. That was an Appeal to the Privy Council in a fraud case, my lord, and I can simply quote the headnote, what the Privy Council held was this:

"The question was not whether the Defendant in any given case honestly believed the representations to be true in the sense assigned to it by the Court, but whether he honestly believed it to be true in the sense in which he understood it, or be it erroneously."

And, my lord, these principles we submit apply in the present case.

My lord, finally, I wish to deal briefly with this question of excluding other inferences, this question of inconsistencies. My lord, in the course of cross examination in this case one has heard a lot of the word inconsistent or inconsistency; someone is shewn a document or a speech and he says 'Yes, I think this is inconsistent with the policy of the A.N.C.", meaning that it's out of line with the policy, or is not the policy. When, in dealing with inconsistency in a much more precise sense my lord, there is a well known example given, and often quoted, of inconsistency in the proper sense in circumstantial evidence. It's what I may call the German Spies example. Its the one referred to by Mr. Justice Davis in the case of Lawson and ..... the S.A.Discount Corporation, 1938, C.P.D. page 273, and I think it's the example that is often given by lecturers and others on the subject.

Mr. Justice Davis poses the case of a Parisian beggar, a cripple, and the question is whether he is a German spy, and he puts up the case he is a Parisian beggar - he speaks no German, he only speaks French, and he is a cripple, he cannot get about etc., etc, and the way Mr. Justice Davis put it is this; he said "That he habitually speaks French and limps on two sticks matters not at all; that he was once heard speaking fluent German and was seen to run may well be conclusive."

Now, my lord, that is an example of the correct application of this rule of inconsistency. It doesn't matter that he was heard to speak French a hundred times; if he claims that he can't speak German, the fact

that he once by reliable evidence proved to have spoken fluent German, is inconsistent with his case, or if he claims to be a cripple and at the relevant time it is proved conclusively that he had been running without sticks, that is inconsistent with his case that he is a cripple.

Now, my lord, one sees at once that it's completely different from the sort of inconsistency about which witnesses spoke in this case. My lord, the fact for instance that a particular accused may make say a violent speech, attacking the police, is not inconsistent with his organisation having a policy of non-violence. It's true it's something which ought not to be said by a member of that organisation, but it's not inconsistent in the true logical sense, and why? my lord. Well, an individual may deviate from his organisation's policy once or even more times. He may even be trying to alter that policy, he may have doubts about it; he may disagree with it, and yet one can still say the policy of his organisation is not one of violence, but if the Parisian cripple speaks German and runs, it can't be a mere deviation; it can't be because he is angry that day, or because the police have annoyed him; it can't be that he is doubtful about a policy. That is inconsistent - if you speak only French you cannot speak German; if you speak German you can't say that you speak only French.

Now, my lord, there is no inconsistency in that sense when a member, even a leading member of the A.N.C. makes a speech which deviates from policy. There are so many reasons which will make it consistent with the facts that the organisation has a policy of violence.

Now, my lords, similarly in that case one could say the fact that this Parisian beggar was heard to speak French a hundred times didn't really matter, but in a case like this where irrespective of any speeches relied on by the Crown one has an enormous mass of evidence on non-violent speeches made, it is an extremely significant fact. My lord, one can illustrate it in another way, also mentioned by Mr. Justice Davis in the case I mentioned. One supposes one may try to find out whether a transaction between two business men is a sale or is really a usurious loan. He points out that you may have a number of letters between them in which they speak of a sale; he says the effect of that would be destroyed probably if you found one letter between them in which they openly spoke of the usurious loan. Also a case of inconsistency, my lord.

But when you have a political organisation which is seeking mass membership, which is seeking mass support, putting forward a policy and when they speak in those circumstances of a policy of non-violence, urge people to follow their policy of non-violence, it's a very different thing from a private correspondence between two business men.

There is a vast difference, my lord, between the correspondence of two parties to a shady deal, and the political language used by hundreds of people all over the country over years who are addressing the public. I recall, my lord, my learned friend Mr. Hoexter in dealing, I think, with a speech of the accused Moretsele, in which he had put forward a non-violent policy - he said it was eyewash; he didn't say whose eyes were washed, my

lord, if that's the correct expression. It's rather different from two business men who understand each other completely, and they know when they talk about a sale they are merely referring to a loan. What about all these people at the meetings, my lord; they come there to find the policy of the A.N.C. and they hear that it's non-violent. It's not the same thing at all, and we shall submit, my lord, that the constant advocacy of non-violence by so many people in so many different circumstances, points to genuineness and not to some elaborate disguise.

When you are talking to the public, supposing you do find a speech in which someone talks in violent terms, if you are looking for the policy of the organisation you also compare that with the number of times they've spoken to their public in other terms. Well, my lord, I've quoted in this part of the argument the rules in Blom's case - the Crown must show that the evidence, for instance the speeches and documents exclude all inferences save the policy of violence with which we are concerned, and the Crown must also satisfy your lordships that the evidence of non-violent speeches and documents is somehow consistent with their own hypothesis.

Now, my lord, this is an extremely difficult task which the Crown has undertaken, and we submit that it is an impossible task. It's not surprising, my lord, Russell on Crime, the 2nd Volume, at page 1697, that is the Library Edition, the 11th, makes the point that I was trying to make earlier, that normally in a conspiracy case if what the people conspired to do is never done, it is extremely difficult to persuade the Court to draw an in-

ference that they conspired to do it, and, my lord, we say here that the Crown evidence in general on the question of violence is so thin, it's so incomplete and so ambiguous, and the absence of direct evidence is so glaring, that it's not surprising, my lord, that the Crown cannot succeed, and it's not surprising, my lord, when one bears in mind that search for a source as one will, one cannot find any analysis case where a Court was asked to draw an inference of a treasonable conspiracy from this type of evidence - political speeches and documents, without any hints of actual violence planned or committed.

My lord, I've said that this is an impossible task. However, by reason of the provisions of the Criminal Procedure Code, the Crown is compelled to perform its task not once but twice, and this takes me, my lord, to the next part of my argument which is devoted to what is called the two witness rule, and the application of it in the present case.

Now, my lord, in this case - I don't want to go over the Indictment again in detail, but in this case as we know each accused is charged with more than one overt act of treason. Each act is alleged to be committed with hostile intent, and the first Overt Act is the conspiracy including certain agreed means, and then as we know, in Part C, D and E further Overt Acts are alleged consisting of the making of speeches, or association with speeches, the writing or publishing of a document, and participation at the Congress of the People leading up to the drafting of the Freedom Charter and setting oneself to carry it out. Now, my lord, it will be observed that the Indictment doesn't

allege merely that these various acts were done with hostile intent. For example, my lord, if one looks at Schedule C one finds various speeches. It's not alleged merely that the accused made a speech, or speeches with hostile intent. It's alleged - and my lord, I read this - - it's alleged in Part C "in pursuance of and furtherance of the said conspiracy, more particularly as part of the act of preparation for the violent overthrow of the State, the accused with the hostile intent aforesaid did proceed to certain meetings which were convened in pursuance of the said conspiracy, and for the purpose of furthering and carrying into effect the means set out in Part B, paragraph 4(b) (i) to (v), with the knowledge that the said meetings had been convened for the aforesaid purpose, did there and then attend the said meetings and make speeches for the purpose of furthering and carrying into effect the means aforesaid."

And, my lord, every Overt Act in Part C, D and E is specifically linked with one of the terms of the conspiracy in paragraph 4 of Part B, and so one sees, my lord, that these overt acts are said to be done not merely with an individual hostile intent, but in pursuance of the specific conspiracy alleged in Part B of the Indictment.

And, my lord, the significance of this fact I shall develop in due course, but before dealing with those overt acts, my lord, I should like to deal with the question of how one proves any overt act in the light of the two witness rule.

Now, my lord, this rule is to be found in section 256 (b) of the Code, and it provides that no Court shall convict any accused of Treason except upon the evidence of two witnesses where one overt act is charged,

or where two or more overt acts are so charged, upon the evidence of one witness to each such overt act.

Now, my lord, before I go on to the details of this, I think I should tell your lordships at the outset what the argument is which I propose to develop.

My learned friend, Mr. Nicholas, has argued to your lordships that notwithstanding your lordships' judgment at the exception stage the overt act in Parts B, D and D cannot be overt acts of Treason, because they do not in themselves manifest the hostile intent, and that the nature of those acts is not altered by the fact that they are said to be committed in pursuance of the conspiracy. If my learned friend's argument is correct - as we submit it is - it follows that the other overt acts will fall away, and as against each accused there will be one overt act only - that is the conspiracy which will consequently have to be proved by two witnesses. My argument, my lord, will be to the following effect:

That accepting the correctness of your lordships' judgment, accepting that Parts C,D and E properly charge overt acts, nonetheless we submit that on the Indictment as interpreted by your lordships, and as relied on by the Crown, it is an integral part of each overt act that it was committed in pursuance of the conspiracy, and consequently that in proving each of those overt acts one would have to prove the conspiracy again as part of that act. In other words, my lord, as your lordship Mr.Justice Bekker put it to my learned friend Mr. Trengove very near the beginning of his argument, for practical purposes there is only one overt act with which the Court is concerned,

namely the conspiracy, and we submit that that must be proved twice over. And we shall submit, my lord, that on the authorities it is abundantly clear and beyond any question, my lord, that that is what is required in this case, and we shall submit, my lord, that the Crown, far from establishing double proof of the conspiracy, has not even adverted to that problem.

Now, my lord, I'd like to start off by dealing simply with the ordinary meaning of that clause in the Statute as applied to any overt act, leaving aside for the moment its application to the present Indictment.

My lord, my learned friend Mr. Nicholas referred your lordships to the judgment of the Appellate Division in the case of Strauss, 1948 (1) S.A. Law Reports at page 934, where mr. Justice Watermeyer said at page 939, "The provision with regard to overt acts seems however, to be out of place in our law of Treason, because we have no recognised Statutory classes of Treason which are in legal theory manifested by the commission of overt acts".

But, my lord, the concept of overt act having to be charged and proved against a person accused of Treason has, of course, been fully assimilated into our law, whether by reason of the Statutory provision or otherwise., and your lordships will recall that in previous arguments there have been many cases referred to - some of which are to be found in the judgments of his lordship the presiding Judge in the judgments on exception which show that it is always a factor, to charge overt acts (??).

And the Chief Justice in Strauss' case went on to add "With reference to our Statutory provision it was, I think, intended to maintain the requirements of at least two witnesses in every case of Treason". Now that's important, my lords, I submit, "intended to maintain the requirement of at least two witnesses in every case of Treason so that if there were two overt acts charged the same witness could not, if he were the only witness, prove both of them." The same witness can't prove both overt acts, my lord. That, my lord, is the key to the whole argument.

Now, my lord, this rule has been referred to and applied. It's a living rule and my lord, in the case of Rex vs. Hennig, 1943, Appellate Division, page 172, the Appellate Division set aside a conviction for High Treason purely on the basis of this Statutory provision, that there were not two witnesses on the overt act, and similarly, my lord, in the Special Court in Leibbrandt's case, your lordships will find on looking at the Judgment - I give the exact reference later - that accused Nos. 4,5 and 6 were acquitted solely on the application of the two witness rule. It was found that there was an adequate chain of evidence against them, satisfying the Court of their guilt, but that there were not two chains or two witnesses.

Consequently, my lord, if we can deal for the time being with the case of only one overt act and let us take the case of a conspiracy such as that charged here, if that were the only charge, it's clear it will have to be proved by two witnesses.

Now, my lord, if one looks at Leibbrandt's case and the English cases one will find that frequently

the Crown is able to produce a direct witness, someone who was in the conspiracy, and in such cases of course the application of the rule is perfectly clear. Two credible witnesses are required to convict, but, my lord, the Rule applies equally to cases in which circumstantial evidence is tendered, on which the Court is invited to draw an inference of treasonable conspiracy. This is common cause apparently between the Defence and the Crown but I should like to refer your lordships to the argument on it - the judgment on it, and the particular application of the rule, in the case of circumstantial evidence.

My lord, both in Leibbrandt's case before the Special Court and in the case of Strauss before the Appellate Division Counsel did argue that an overt act as referred to in the section means an act directly provable by an eye witness or an ear witness, and it was argued that the statutory provision impliedly excludes proof of an overt act by circumstantial evidence only. But in both cases, my lord, this contention was rejected.

The Courts held that overt acts could be proved by circumstantial evidence. Your lordships will find that dealt with in the part of the Special Court's judgment which is reported in Leibbrandt's case. 1944 Appellate Division, at page 255, and it's dealt with in Strauss' case, 1948 (1) South African Law Reports, at pages 938 to 939.

Now, my lord, in Strauss' case, when Counsel for the Appellant argued this point it relied on a passage in the Appellate Division Judgment in Leibbrandt's case, 1944 Appellate Division page 285, my lord.

Now, my lord, in Leibbrandt's case in the Appellate Division the Court rejected the submission that hostile intent must also be proved by two witnesses. In the Court below the Special Court held the view that hostile intent should also be proved by two witnesses, but the Appellate Division said hostile intent needn't be proved by two witnesses, and the learned Judge, Mr. Justice Watermeyer at page 285 referred to Hennig's case and said the following:-

"Hennig's case did not decide that the intention which accompanied the overt act must be also be proved by two witnesses. In my opinion the law only requires an act insofar as it is overt - that is, so much of the act as can be perceived by the senses and consequently is capable of proof by witnesses, to be proved by two witnesses. The state of mind which accompanied the act which is imperceptible to the senses and incapable of direct proof, is left to be inferred from surrounding circumstances, otherwise it may be impossible to prove the crime of High Treason except in those cases in which the accused admits his hostile intent."

Now the Court found that it didn't have to prove hostile intent twice, but, of course, the Court there didn't intend to say that "What you have to prove by circumstantial evidence isn't and can't be an overt act". On the contrary, in Strauss' case, my lord, the learned Chief Justice dealt with Counsel's attempt to invoke that passage and he said at pages 939 to 940: "There is nothing in the provisions of the Statute from which it can be inferred that the Legislature intended to impose upon the Prosecutor the duty in cases where more than one overt act is charged with pro-

ducing at least one witness who could prove the overt act by direct evidence, and he says that if the language in Leibbrandt's case suggested that only direct evidence could be used in proof of an overt act, then he took the opportunity of correcting that. In other words, my lord, on Strauss' case and Leibbrandt's case the position is clear, that an overt act can be proved by circumstantial evidence but you don't have to prove the hostile intent twice, but of course, my lord, it doesn't mean, as the Chief Justice made clear, that if there is a part of the act which can be proved only by circumstantial evidence, that it falls outside the rule. The rule does cover circumstantial evidence.

Now, your lordships will see then that the rule is applied to circumstantial evidence and the precise manner in which it is applied was dealt with in detail by the Special Court in Leibbrandt's case in a passage which is found in the Appellate Division Reports at pages 254 to 255.

This is what the Special Court laid down, my lord: It laid down that "a chain of circumstantial evidence was equivalent to one witness; that one chain with a number of links, each proved by a different witness, or that some links proved by one witness - that chain was equivalent to one witness; that is to say, if you had ten circumstances shewing guilt which were proved by ten witnesses, each of which is proved by one witness, that amounts to a single witness, and it was held that if there was no direct witness to the overt act, one would have to have two independent chains of circumstantial evidence. That is

to say, my lord, two chains with no overlapping witnesses; a witness is used in one chain and cannot be used in another chain.

This appears, my lord, from the judgment of Mr. Justice Shreiner. He said "Mr.Ludorf submitted that the proviso excluded proof by circumstantial evidence". He said it may be remarked in the first place that the proviso - that is the Statute - does not in terms refer to direct or circumstantial evidence, and it would be remarkable if circumstantial evidence which is so often far more cogent than direct evidence, were without express language to that effect, to be excluded from consideration in Treason cases." And then he goes on to say that a lot of what is referred to as direct evidence is really circumstantial evidence.

He says: "Circumstantial evidence must be proved by the evidence of witnesses, and it differs from direct evidence only in the extent to which inference is applied to the facts observed. "In the same way oral admissions or documents have to be proved by witnesses. It seems to us that the proviso permits proof to be established by circumstantial evidence, oral admissions and documents as well as by direct evidence." And then, my lord, is very important sentence. His lordship said: "What is really required is double proof", and that is really the long and short of it, with submission, my lord. The section requires double proof.

And then the application of it is given, my lord. "If there is one credible eye witness and also a chain of circumstances proved by one or more witness which

would lead to the inevitable inference of guilt, the proviso is satisfied. Again, if there is no direct evidence the circumstantial evidence may be so abundant that it may be possible to establish two chains, each sufficient in itself to leave no doubt of the accused's guilt. This, too, would in our view fulfil the requirements of the proviso. Where, however, the circumstantial evidence does not suffice to provide two adequate chains the circumstances from which guilt is to be inferred must in all essential parts be proved by a link through witnesses." He then says statements by the accused may be used alone or in conjunction with proved circumstances to set up a chain; he deals with extra judicial cohfessions.

So, my lord, in the case where there is no direct evidence, the way it works is this: one might have say 50 witnesses, each testifying to a fact, and one might be able to take the evidence of twenty-five on the one side and twenty-five on the other and say - even taking them separately, each chain leads to the inference of guilt beyond a reasonable doubt, but where you cannot do that - where you haven't got two chains, each circumstance which is necessary for the inference of guilt must be proved by two witnesses. For example, in a case like this, if you didn't have enough evidence for two chains and the inference of guilt could be proved say by the evidence of ten speeches or ten documents, each of those speeches or documents would have to be proved by two witnesses. That's the one way of doing it.

RUMPFF J: When is a chain a chain?

MR. KENTRIDGE: Well, my lord, that's one of the difficulties the Crown has. I take it when it is so com-

plete that the Court is satisfied that it gives rise to the inescapable inference of guilt.

RUMPFF J: It depends on the strength of each link?

MR. KENTRIDGE: Yes, my lord.

RUMPFF J: A chain may come into being as a result of two links; but then they must be very strong?

MR. KENTRIDGE: Yes, my lord. I take it that this chain could be made in an infinite variety of ways. A Court examining the evidence, the circumstantial evidence, may say "Well, these links - although there are only two or three - are quite sufficient in themselves to prove guilt beyond a reasonable doubt; so we put those on one side and then we can examine all the rest of the evidence to see if it provides another chain".

RUMPFF J: But there must be at least two links to make a chain.

MR. KENTRIDGE: Yes my lord. Otherwise, I suppose it would be by direct evidence, my lord.

RUMPFF J: Yes.

MR. KENTRIDGE: The Court may find itself in a position by the time it's managed to construct a single chain, it finds it's exhausted all the evidence, or most of it. That's what happened in Leibbrandt's case, in connection with some of the accused, my lord. Your lordships find the judgment of Mr. Justice Shreiner considered the facts against an accused and said well, those satisfy us of his guilt, and then he deals with what is left of the evidence, and decides there is not enough left to form another chain.

another chain.

My lord, when I spoke of the Court being able to do this or that in constructing a chain, of course it's open to the Court, but normally one would expect the Crown to suggest how you make up the chain and not leave the Court simply to go through the evidence to see if it can somehow or other construct some chains. But that's a point I'll deal with at the end of my argument, my lord.

What it means in effect, my lord, is that when the Crown has to rely on two chains, one cannot have overlapping witnesses; that is to say, a witness whose evidence forms part of one chain cannot be relied on for any purpose in making up the second chain. If a witness proves two facts, one can't have one fact in the one chain and the other fact in the next chain. The chain is constructed by witnesses, and I think, my lord, that was accepted by the Crown when they said that any . . . .

KENNEDY J: It's common cause.

MR. KENTRIDGE: Yes, any witness used for a second overt act must be disregarded for the conspiracy for all purposes. And, of course, that means whatever the evidence of that witness is, if a witness for instance is relied on for a second overt act his evidence falls out of the conspiracy against that accused, not merely his evidence on that particular speech, his evidence on all speeches, and also any evidence he has given about possession of documents.

And, my lord, this judgment of the Special Court, this application is of course the only logical application of the two witness rule. Of course, my lord,

in the case of one overt act one requires two witnesses for the overt act, and that means - as has been said by the Courts - two witnesses to each essential part of the overt act. It's not enough, my lord, if one has say a fairly complicated act, it's not enough to have one witness to one part of the act and another witness to another part of the act, if either of those witnesses, taken separately, doesnot prove the overt act in all its essentials. If the act of conspiracy can only be proved by twenty witnesses, then, of course, you can't have double proof satisfied unless there are two witnesses to each circumstance making up the act. And, my lord, that is stated by Wigmore. It's the 3rd Edition, Vol. 7, page 271, paragraph 2038(b). Wigmore says:

"Dealing with the two witness rule in Treason, each of the witnesses must testify to the whole of the overt act, or if it is separable there must be two witnesses to each part of the overt act"; and he refers to a judgment by Mr. Justice Hand in an American case where he said, "It is necessary to produce two direct witnesses for the whole overt act. It may be possible to piece bits together of the overt act, but if so, each bit must have the support of two oaths." He says: "On that I say nothing because it wasn't before him in that case."

But the point is, my lord, if you only find your overt act by piecing bits together, each bit must have the support of two oaths. Or if you've only got one oath to each bit you must have enough bits to make two chains.

Now, my lord, this passage in Wigmore was

directly approved by the Appellate Division in Hennig's case at pages 179 to 180. My lord, in connection with Wigmore I see I've given your lordships a slightly incorrect reference. It's paragraph 2038, (4) not (b), my lord.

KENNEDY J: What is the page?

MR. KENTRIDGE: The page in Wigmore, my lord, is Vol.7, page 271.

COURT ADJOURNED FOR 15 MINUTES

ON THE COURT RESUMING:

MR. KENTRIDGE: My lords, I was indicating to your lordships the authorities including Hennig's case which show clearly that it is the whole of the overt act that must be proved by two witnesses. You csn't have one witness to one part and one to another. Now, my lords, the whole rule is very well illustrated; the full force of the rule is very well illustrated in Hennig's case. My lord, in that case the overt act charged was an attempt to convey military information to the German Consul - I should say Naval information, to the German Consul at Lourenco Marques during the War. Now, my lords, there were two witnesses called by the Crown. The first witness was a man called Lotter, and his evidence was fully accepted by the Court. His evidence was that the accused had got in touch with him, asked him if he spoke German, and said that he wanted to send a message to the German Consul at Lourenco Marques, and he came to the house and according to his evidence he gave him a slip of paper

which she showed to him and it contained Naval information and she requested him to take the letter to Lourenco Marques and she gave it to him to take away.

Now there was the second witness who went to the house but he didn't see Mrs. Hennig give the first witness the slip with the Naval information; he didn't see what was on the slip, but the accused told him in the presence of the first witness that the first witness had to go to Lourenco Marques to see the German Consul for her.

Now the Special Court convicted on that evidence, but the Appellate Division disagreed; the Appellate Division said that the offence consisted, not merely of sending the first witness to the German Consul but in sending him there with Naval information. The second witness could corroborate the fact that theaccused had made an arrangement to send the first witness to the German Consul at Lourenco Marques but couldn't give evidence that what was to be sent was labelled 'Information'.

Now, my lord, the then Chief Justice, Mr. Justice DeWet gave the judgment in the Appellate Division. There are a number of parts in the judgment to which I wish to refer your lordships in some detail.

My lord, at page 179 the Chief Justice referred to some of the judgments in an Irish case which has been quoted, the case of the Queen vs. McCathady. The Special Court had purported to follow that judgment. Now the learned Chief Justice said that in McCathady's case several overt acts had been charged and that it was necessary to have a witness - one witness for each overt act. And this is what he said: "The remarks of O'Hagan J, in the Irish

case in my opinion simply means that instead of one witnessbeing required to prove all the different stages and circumstances of the overtact, it is sufficient if these different stages are established by the joint evidence of several witnesses, each one testifying to a different stage."

In other words, my lord, if you have so to speak a long overt act you didn't need to have a witness who could testify to all of it; you could have a chain of witnesses. Now that's exactly the same as the approach in Leibbrandt's case in the Special Court where you equate one chain of witnesses - the circumstances, to one single overt act.

Then Mr. Justice de Wet continued and said: "The remarks of Fitzgerald J. are not so clear, but if by these remarks he intended to lay down that when only one overt act is relied on the essential part or parts of the overt act implicating the accused need not be proved by two witnesses, he is not borne out by any other authority which I have been able to consult."

In other words, he holds every essential part must be proved by two witnesses, my lord.

Now his lordship dealt at page 178 with our Statutory provision and this is what he said about it: "It's meaning, however, seems to be clear, namely that when one overt act is charged in the Indictment each essential part of that overt act must be proved by the evidence of two witnesses", and he said, dealing with the case of Mrs. Hennig in front of him - he says "It follows that in the present case in which the Crown is relying on

the evidence of only two witnesses to prove the whole overt act, the evidence of each of them must be such that standing alone it would, if believed, be adequate to establish the fact that the accused committed the overt act of Treason with which he is charged."

Now, my lord, with submission that is plain, when one deals with one overt act each of the witnesses standing alone disregarding the other witness, must be such that if believed it is adequate to establish that the Overt Act of Treason was committed as charged.

And finally, my lords, there is a most important passage - that is where the learned Chief Justice after referring with approval to that passage in Wigmore which I quoted, quoted with approval the dissentient judgement of O'brien J, in the Irish case, and this is the quotation, as approved. He said: "It is not sufficient - - this is on page 180 -- "It is not sufficient to prove by more than one witness the occurrence of the overt act relied on unless there is also more than one witness to prove the prisoner's connection with, and guilty responsibility..."

Now, my lord, I'd like to underline the words " guilty responsibility" to which I shall refer. "If it were otherwise it would in my opinion amount almost to annulling the provisions of the Statute. This is not a question of an accomplice with corroborating circumstances."

Now, my lord, one can see how if one had any other rule it would annul the effect of this proviso; if it's enough to have one witness to one part and one witness to another part, then of course, the protection afforded

by the section falls away, and one has exactly the same thing said, my lord, in connection with the Statutory provision with regard to Perjury where, although the provision isn't the same, one needs more than one witness.

In the case of Rex vs. Rajah, 1936, Appellate Division, page 45, Mr. Justice de Wet said at page 49: "To hold that the proviso means that if there is the evidence of one witness as to one element of the offence it would be sufficient if there was other competent and credible evidence as to another element, would reduce the Statuteto an absurdity."

The application, of course, is clear, my lord. One makes a false statement knowing that it is false. If you have one witness that the statement is false and another witness that the accused knew it was false, well, you are really convicting him on the evidence of only a single witness.

Now, my lord, therefore I submit on these authorities that they establish three things beyond question, insofar as we are dealing with the question of proof of an overt act by circumstantial evidence. My lord, the first point is that all witnesses whose evidence is necessary to make up a conclusive chain of circumstantial evidence rank together as a single witness for the purposes of section 256 (b) - the first submission. All the witnesses necessary to make up a conclusive chain rank together as a single witness.

The second point that is established by these authorities is that where you have only one overt act and your proof depends entirely on circumstantial evidence, the Crown must prove its overt act either by two independent

chains, each one of which is conclusive, or by one chain in which each link is proved by two witnesses. Those are the only two ways it can be done, my lord· two independent chains with no overlapping witnesses, or a single chain where each link is proved by two witnesses.

And the third point, my lord, and the most important, is that it is established by the highest authority that this requirement of double proof, as Mr. Justice Shreiner calls it, the requirement of double proof applies to every essential part of an overt act; that is to say, to every part necessary to establish the accused's guilty responsibility. That is what, I take it, is meant by this. I think it is clear from the authorities that that is what is meant by an essential part, that is a part which is necessary to establish the accused's guilty responsibility.

Now, my lord, the Crown approach in this case I submit with all respect to the Crown, has really been to ignore this provision. The Crown has accepted that you can't have overlapping witnesses. The Crown has ignored the fact that witnesses must prove all essential parts of the overt act.

Now, my lord, my learned friend Mr.Nicholas has argued that an overt act must be such as shows the guilt of the accused on its face, irrespective of its place in a treasonable design. This Court has held up to now that it needn't. Your lordships have held, and it is the Crown's case also, that one can have an overt act which may not be an overt act considered on its own, but which in its context, or as his lordship Mr. Justice Kennedy put it yesterday, as tained by the conspiracy, is

an overt act.

Now, my lord, the Crown adopts this attitude, the Crown does not contend that these acts in Parts C, D and E are overt acts in themselves apart from the conspiracy. My lord, on Monday at the close of his argument my learned friend Mr. Trengove put it indeed as clearly as it could possibly be put; he said, and I quote, "As the Indictment is framed we accept the position that in participating in the Congress of the People and voting for the Freedom Charter that in itself would not be an overt act of High Treason". The Crown has therefore specifically stated that insofar as those accused are concerned the Freedom Charter and the Congress of the People, and all those other acts, are overt acts because done in pursuance of the conspiracy.

I therefore submit, my lord, that it is clear, that it follows therefore from the Indictment, as accepted by the Crown, and by your lordships, that in the case of each overt act in Parts C, D and E, an essential part of it is that it was done in pursuance of the conspiracy, that consequently when it comes to trying to prove those overt acts it's not enough for the Crown simply, when dealing with that overt act, to say the accused made this speech attacking the Western Areas Removal Scheme; the Crown has got to prove that that speech was made in pursuance of a particular conspiracy with a particular turn, and in accordance with the general rule which I have already stated and which the Crown accepts, in doing so one must disregard any other evidence which has gone to prove another overt act. In other words, my lord, however one proves the first overt act of conspiracy

if one can do it, one must then in proving another overt act prove the conspiracy again in order to show that the speech or whatever it is is made in pursuance of that particular conspiracy.

BEKKER J: By a different set of witnesses?

MR. KENTRIDGE: By a different set of witnesses, my lord.

KENNEDY J: Are you going to deal in due course with the practical results of what you submit follow from your argument?

MR. KENTRIDGE: Yes, my lord, I'm going to deal with the practical result on the Crown's case; does your lordship mean that, or the general result?

KENNEDY J: The individual results?

MR. KENTRIDGE: My lord, we will in due course deal with it, but I,before I end this part of my argument, will deal with the practical results in a general way.

Now, my lord, your lordships will realise that to some extent we have in that part of our argument - that we are beating the air, because the Crown hasn't addressed any argument on how you find the chain, but, my lord . . .

BEKKER J: Before you go on, assuming the Crown has proved overt act B by two witnesses, or two chains or whatever it is, assuming the Crown proves a subsequent speech made by an accused by another witness, could the Crown not argue that that speech obviously is made in pursuance of the conspiracy and if that is the only conclusion, must it still prove the conspiracy?

MR. KENTRIDGE: My lord, strictly speaking,yes. If in spite of the fact that it had proved the first act,

by two witnesses or the equivalent of two witnesses, the Crown for reasons of its own, whether it be punishment or any other reason, wanted to prove an additional overt act it would really be unnecessary. It would then have to prove that conspiracy as part of that overt act. Of course, one can divide it up; one can take the first chain as the one witness to prove the first overt act, conspiracy, and use the other chain as part of the second overt act. But, my lord, the section says clearly where two or more overt acts are so charged on the evidence of one witness to each such overt act. Consequently, my lord, in a Treason case, if the Crown for reasons of its own, wanted to prove five overt acts against the accused instead of two, it would have to have five witnesses. That's one of the consequences of choosing to prove five overt acts. Of course, the Crown can have a conviction for Treason on the one overt act properly proved, or on two overt acts proved by one witness each, which for reasons of punishment or any other reason it wants to prove ten, then on the wording of the section it will have to have ten witnesses.

BEKKER J: If the Crown proves B by one witness, and it comes along with a speech made under C, with one witness . .

MR. KENTRIDGE: Does your lordship mean just as a speech?

BEKKER J: As an overt act, in an endeavour to prove that overt act. Now your case is that the essential ingredient of the overt act in C involves proof that this was done in furtherance of this conspiracy.

MR. KENTRIDGE: As your lordship pleases.

BEKKER J: Hence there must be proof forthcoming

that it was so performed?

MR. KENTRIDGE: Yes, my lord.

BEKKER J: Right. Now what if the nature of the speech is such - as I think has been suggested by the Crown - that it could only be made in furtherance of a conspiracy?

MR. KENTRIDGE: Well, my lord, that with respect wouldn't be good enough; it must be shown to be made in pursuance of this particular treasonable conspiracy. My lord, if of course your lordship suggests the case of a speech which bears on its own face the evidence that it is part of the treasonable conspiracy, then of course, it would fall within the category of overt acts which we all agree would be proper overt acts.

BEKKER J: But if it doesn't?

MR. KENTRIDGE: If it doesn't, my lord, you've got to prove the facts of the conspiracy and the place of that speech in the conspiracy. In due course I hope to illustrate to your lordship that that is the only reasonable application of this rule, if it has tohave any effect.

But, my lord, in requiring the Court to do this, as I shall show your lordship, we are requiring them to do no more than to prove their case as .....(?).

My lord, in this case the accused are each charged with more than one overt act. We are submitting there must be double proof of the conspiracy. Now, my lord, it's clear, leaving aside the argument of my learned friend Mr. Nicholas, it is quite clear that each act is alleged to be an overt act only insofar as it is alleged to be committed in pursuance of the conspiracy and as being

designed to carry into effect one or more of the particular means - the point which your lordship Mr. Justice Bekker put to my learned friend Mr. Nicholas - each overt act in C, D, and E is tied up to a particular means in the conspiracy. Your lordship put to my learned friend "Mustn't one look to the terms of the conspiracy, the particular terms of the conspiracy, to see whether that speech is an overt act". If my learned friend Mr. Nicholas is wrong, of course it follows naturally that one must look at the particular terms. If it is to be an overt act, because it follows the terms of the conspiracy then of course one must look at the conspiracy, but, my lord, it's quite clear from the extracts from the Indictment which I have already quoted. For instance, my lord, if one takes a particular case it's perfectly clear - - let's look at page 68 of Schedule C where there is an overt act charged against the accused Dr. Conco; he is a leged to have said "We of the A.N.C. go on the unconstitutional methods for we defy - we must sweat if we want freedom". The Crown doesn't allege that this is an overt act, simply because Dr.Conco said it with hostile intent. That is to say, a personal hostile intent in his own mind as an individual accused because indeed on the judgment of this Court that couldn't be an overt act of treason. I think this Court accepted at the exception stage that but for the conspiracy, the sort of speech charged here wouldn't be an overt act unless it were an incitement to sedition. What the Crown alleges is that these words are an overt act because Dr.Conco spoke them not with a mere general hostile intent, but in pursuance of a conspiracy to overthrow the State by violence, at a meeting convened in furtherance of that conspiracy,

and that he spoke them for the purpose of advocating unconstitutional action as a means of furthering the objects of that conspiracy. His speech is connected up, my lord, with sub-paragraph 3 of paragraph 4 (b) of the conspiracy and it is said that that is an overt act because those words were uttered by him as one of those specific agreed means.

Consequently, my lord, it is clear, leaving aside the question of two witnesses, it is absolutely clear on the pleadings and the Court's judgment, that that overt act is not proved unless your lordships are satisfied that the speech is made in pursuance of this particular conspiracy of which Dr.Conco was a member, leaving aside the two witness rule - how you do so. I submit that it is common cause in this Court at least that unless in the case of each of the speeches the Court is satisfied that it was made in pursuance of that conspiracy, it's not an overt act. The Crown isn't saying that because let us say the accused Molife attended the Congress of the People on a particular day, that he was therefore guilty of an overt act, even if it proves perhaps that on that day he had a general hostile intent. The Crown is only asking for a conviction on that overt act if it can satisfy your lordships that he was there in pursuance of the conspiracy, as part of the means alleged in the Indictment.

And, my lord, this is shown even more clearly if possible in paragraph 14 of the Further Particulars. That's where we asked for particulars of the overt acts of associating with the speeches of others, and it is quite clear, my lord . . . .

at your verdict."

KENNEDY J: What page are you readng from?

MR. KENTRIDGE: Page 938, my lord. "You are to determine the Defendant's understanding of the meaning of the language of an exhibit, from any acts done or statements or declarations made by the Defendant which may tend to indicate his or her understanding of the meaning of such language, and from all facts in the evidence which may aid to determine that issue."

I suppose one would take into account the person's understanding of English; the possible use of idioms, explanations given in the witness box, but the point is, my lord, that the Court is concerned in drawing an inference in all cases with what the writer understood, and not what may be a more correct interpretation of the word objectively.

My lord, there is another case to which I can refer your lordships, to which there was a similar approach; the case of Akerhielm vs. Demare and Others, 1959, Appeal Cases 789. That was an Appeal to the Privy Council in a fraud case, my lord, and I can simply quote the headnote, what the Privy Council held was this:

"The question was not whether the Defendant in any given case honestly believed the representations to be true in the sense assigned to it by the Court, but whether he honestly believed it to be true in the sense in which he understood it, or be it erroneously."

And, my lord, these principles we submit apply in the present case.

my learned friend pointed out yesterday, that this Court accepted the definition of an overt act as one manifesting a criminal intention and tending towards the achievement of the criminal object. The Court quoted from the definition of Abbott C.J.in Thistlewaite's case, and it was quoted in Leibbrandt's case, that is to say the statement that any act manifesting the criminal intention and tending towards the acoomplishment of the criminal object, is an overt act, and then your lordships also accepted the definition in Caseman's case, and the effect of it, my lord, is that your lordships held that the act considered in isolation might not manifest a criminal intention, or tend towards the accomplishment of the object, but that if one could gather from the circumstances pleaded, namely that it was part of this conspiracy that it did manifest such an intention or tend towards the achievement of the object, then it was properly pleadable as an overt act.

My lord, there is a quotation from Wentzel's case in which Mr. Justice Ramsbottom said the act may be apparantly innocent and the treasonable intent may be proved by circumstantial evidence, but my lord, neither Mr.Justice Ramsbottom nor with respect your lordships were intending to depart from the definition in Thistlewood or Casemans, namely that an over act is one which manifested a hostile intent. The only question was whether one had to look at it in isolation, or whether one looked at it in its context, and my lord, that was also made clear in the quotation in your lordship's judgment from the judgment given in the American case of Cramer vs. the United States which was quoted in the judgment of his lordship the Presiding

Judge: that is the case where it was said that environment illuminates the meaning of acts. What a man is up to may be clear from considering bare acts by himself, often is made clear when we know the reciprocity of these acts with other acts.

Now, my lord, that's a useful quotation, with respect, the way it's put. In some cases the bare act may show what a man is up to. Now, my lord, that is with respect what your lordships are concerned with here, what were the accused up to? In other cases, where the bare act doesn't show what the accused were up to, and only the surrounding circumstances show, then in order to see what he is up to - that is whether he has committed an act of Treason - the Court must know how this act fits in. In that case the context of the act forms an essential part of the overt act.

My lord, can I put it another way? Your lordships have accepted, without cavell, if I may say so, and I think it's common cause in this Court, that an act is only an overt act of treason if it manifests the criminal intention, and only if it can be seen as a means which tends towards the accomplishment of the criminal object. Now that being the case, in order to decide whether an act in part C is an overt act, your lordships have to decide whether it manifests a criminal intention and if your lordships cannot see that by looking at the immediate act in isolation and has to extend it, then needless to say part of the proof of the overt act consists in the proof of that context - those surrounding circumstances. If that's the only way one can show that it manifests hostile intention then it must be part of the proof of the act.

My lord, before turning again to the Judgment of your lordship, I may say that the concept that an act includes certain of its surrounding circumstances is one which is well known to jurisprudence. For instance, my lord, Challinor on Jurisprudence, 10th Edition, at page 361, says this: "Every act is made up of three distinct factors. (i) Its origin in some bodily or mental activity; (ii) Its circumstances and (ii) its consequences." And then he says: "Circumstances and consequences are the two kinds - they are either relevant or irrelevant in law." He says: "Out of the infinite array of circumstances and the endless chain of consequences the law selects some few as material. They and they alone are constituent parts of the wrongful act."

Now, my lord, when one applies this to an act say in Part C one says "Of all the surrounding circumstances which are the material ones in law" and obviously amongst the material ones would be the fact that the act is in pursuance of a conspiracy. And he says, "It is for the law to select and define the relevant and material facts in each particular species of wrong. In theft, the hour of the day is irrelevant, in burglary it is material. An act has no natural boundaries any more than an event or placehas. It's limits must be defined for the purpose in hand. It's for the law to determine in each case what circumstances shall be counted within the compass of the act with which it is concerned", and as I shall show, my lords, the whole meaning of your lordship's judgment is that the relevant and material fact in Parts C, D and E of the Indictment includes the conspiracy. Your lordships - to quote Salmon's words - have determined in this particular

case what circumstances are relevant to the overt act of treason and have found that it's place in the conspiracy is one of those circumstances.

And, of course, the Crown has alleged it and the Crown has conceded it, my lord. Because, my lord, it's clear, the mere speaking of the words without the constituent conspiracy is just not the overt act relied on and the Crown has admitted as much. But, my lord, this is put beyond doubt by the judgment of your lordships in this case. My lord, if I may refer back to the Judgment of his lordship the Presiding Judge, his lordship Mr. Justice Rumpff, on pages 10 to 11, quoted a passage from Hardy's case in 1 State Trials New Series. Your lordship will find that certain passages are underlined by his lordship the Presiding Judge. That's the part where it was said that mere words, however wicked, if they do not relate to any act or design, then on foot against the life of the King, do not amount to Treason, unless it were proved that the man in contemplation some plot then actually in progress for that purpose. Writings will amount to an overt act of Treason if they are in furtherance of any treasonable measure then in actual preparation."

That is to say, words are Treason only if they are part of a plot and therefore proof of a plot is an essential part of the proof of the overt act, and his lordship Mr. Justice Rumpff continued at the foot of page 11: "The present Indictment does not allege mere words, it alleges the conspiracy and words spoken and written in pursuance of that conspiracy. To ascertain whether this Indictment discloses a case against the accused one should not look only at the words alleged to have been spoken, but one

should enquire whether the acts averred are in law overt acts of Treason, having regard to the circumstances to which these words are alleged to be related".

KENNEDY J: Is it necessary to press this point any further?

MR. KENTRIDGE: I think not, my lord. My lord, it appears in the Judgment also of his lordship Mr. Justice Bekker and in the judgment of your lordship on part E in which it is pointed out that what happened at the Congress of the People is an overt as being part of the conspiracy.

My lord, the page references are given in the judgment of his lordship the Presiding Judge; it's dealt with by his lordship Mr. Justice Bekker at pages 3 and 4 and by his lordship Mr. Justice Kennedy at page 10.

In other words, my lord, the words constitute overt acts only on proof of all the facts alleged in Parts C, D and E, not merely on proof of the words, so it follows, my lords, that the overt acts are not proved unless all those facts are proved in conjunction with those overt acts.

Proof of the conspiracy is part of the proof of those overt acts, so that if those overt acts are relied on then in terms of section 256 (b) either a witness or a chain of witnesses is required who will prove not only the words but the conspiracy, quite independently of any witnesses who prove the conspiracy as the overt act in Part B.

Now, my lord, my learned friend Mr.Nicholas pointed out that in English cases but not in our own there was some precedent - he suggested not very valuable precedents - some cases which were prosecuted in times which

are not our times, where there seem to have been charges of so to speak more or less colourless overt acts. There are not many of those cases, my lord, but there may be some. But, I submit, my lord, that even in the English authorities, in any period, where that type of overt act is charged, there is no authority, no suggestion even, for the proposition that such overt acts can be proved by two witnesses so to speak in isolation from the treasonable design. The English cases insofar as they may be relevant at all, the English cases also show clearly that where acts are said to be overt acts because they are part of some design, then on the application of the two witness rule it is the design which has to be proved by two witnesses. My lord, it's clear, apart from the authorities, from the various extracts which were quoted both in Wentzel's case and by your lordships in the present case, for instance Hardy's case, 1 State Trials, New Series, page 610 - at page 625. That's where the learned Judge said "Words would not be Treason unless it were proved that the accused had in contemplation such plot in progress." That suggests that proof of that plot is necessary to make the words an overt act, and similarly, in Thistlewoods case, one considers the examples of Chief Justice Abbott; he said "Overt acts are frequently consisted of meetings, consultations and conferences about the object proposed and the means of accomplishment." He doesn't suggest that the mere fact of a meeting or attendance at a meeting would be proof of an overt act apart from proof of the treasonable object.

My lord, if one were to go to the report of Thistlewoods case itself in 33 State Trials, 684 and were to look towards the end of it, at the Judge's summing up,

from pages - columns one might say approximately 943 onwards, one sees there, if one goes to the case, that the overt acts relied on, apart from such acts as the collection of a large quantity of arms, consisted of meetings to forward a scheme of political assasination, and certainly one finds no suggestion in the summing up that it would have been sufficient to prove as an overt act the mere meeting, without proof of the object.

Now, my lords, similarly in Charnock's case - this is referred to by Mr. Justice Ramsbottom in Wemtzel's case - - Charnock's case is 90 English Reports page 1276. Now that's the case in which Holt C.J. said that an external act manifesting a treasonable design was an overt act. One looks at the report and one sees that the proof in that case was that the meetings were held about the assassination of the King. No suggestion that a mere colourless meeting is enough in itself.

And then the famous example given by the same judge, Holt C.J. in Parkinses case also quoted in Wentzel's case, where it is said it's lawful for a man to buy a pistol, but if it can be plainly proved from his words or speeches that the design of buying it was to use it against the person of the King that would be an overt act. Now the keywords here are "if it can beplainly proved that the design of buying it was to use it against the King". In other words, the essential proof in order to make the buying of the pistol an overt act is the proof of the design with which the pistol is bought, not merely proof of the buying.

And, my lord, one can see that this is so if one takes the trouble to look at the actual report of

Parkins' case, which is referred to in State Trials, page 63. And if one looks, my lord, from approximately column 130 onwards, one comes to the summing up. My lord, in that case the overt acts were sending a messenger of the King of France, hiring assasins, collecting weapons. Now, my lord, there has been a direct witness to the plot to assassinate the King; there were other witnesses about collection of arms and sending a messenger to France, and in that part of the judgment the requirement of the two witness rule is concered, and the whole of this part of the summing up makes it clear, with submission, that what the law required was two witnesses to the accused's complicity in a design to assassinate the King, not simply two witnesses to the fact that he had collected some arms, or that he had sent a messenger to France. Two witnesses to his complicity in the design to attack the King, to assassinate the King.

My lord, Chief Justice Holt indeed put it this way: "If what Sweet and other witnesses say is true there has been a full proof by two witnesses to prove Sir Williams Parkins to be concerned in that design." And then, my lord, he considers whether a certain witness called Sweet was good enough as a second witness of the overt acts. It had been proved that the accused had got together a troop of men and arms, and Holt C.J. said that Sweet's evidence plainly shows what those arms were for. Not simply that he had arms, my lord.

My lord, if one reads Parkins' case it's quite clear that Holt C.J, who is one of the great English Judges, was concerned with the question of whether there was double proof of the accused's complicity in a treasonable

design, nothing less. It's the only thing that he considered, my lord.

My lord, one of the cases quoted often is Lord Preston's case; that's the case about taking a ship at Surrey.Stairs. But, my lord, if one looks at the report of it in State Trials it's reported under the name of Rex vs. Sir Richard Graham, 12 State Trials, 645, and one peruses the many closely printed columns, for example from column 740 onwards, one shows that what was put to the Jury was not merely whether there was sufficient evidence that the accused had taken a boat at Surrey Stairs but whether he was privy to the design of going into France with treasonable papers to the King of France, and my lord, one sees this clearly when one looks at the well known quotation which is in Wentzel's case - - it's from a case called Wilson which is a footnote for Harding's case - - that's about the ringing of the bell, where it's said "There can be nothing - - if there is an undoubted scheme proved to raise an insurrection or levy war, there can be nothing more innocent in itself in the world than the ringing of a bell, or the firing of a sky rocket, the beating of a drum or anything of that sort, but if it can be proved at the same time that any of these were to be signals of the insurrection, they may become an overt act", and I respectfully draw your lordship's attention to the words "If it can be proved at the same time that any of these were to be a signal for the insurrection". One sees here that it wasn't said that if one has other evidence on the scheme, it's sufficient to prove the ringing of a bell as an overt act, it must be proved at the same time that this was to be the signal for the insurrection.

In other words, my lord, proof of the ringing of the bell as an overt act involves proof of its connection with the conspiracy, and my lord, I'm aware of no authority that in a case like this, even where there is aconspiracy, and one must bear in mind, my lord, that in most of these treason cases, except where you have say an individual going over to the enemy in wartime, but in most of these Treason cases you've got combinations of persons - there is usually a conspiracy. Leibbrandt's case, 1914 Rebellion, 1922 strikes. My learned friend Mr. Nicholas, my lord, submitted to your lordships that one found nowhere in our cases any example of overt acts such as you have in paragraphs C, D and E and he gave a reason for it, namely that they are not overt acts. Even if that is not accepted by your lordships there is clearly another reason why they have not been proved as overt acts, or charged as overt acts, and that is, my lord, because if they are charged in this way there is obviously no benefit to the Crown. If an act like this is an overt act only because it's part of the conspiracy, and it's charged as an overt act, as part of the conspiracy, the conspiracy in any event has got to be proved twice over, and the prosecutor gets no real advantage.

My lord, if one considers Leibbrandt's case for instance, and indue course in another part of the argument I shall be referring your lordships to the full facts of that case - - your lordships will see that in that case the overt acts charged in addition to the conspiracy were acts which bore the hostile intent on the face of them - getting into touch with Germany in wartime, blowing up a troop train - stealing explosives from Government arsenals

Now, my lord, if one looks at the facts of that case one can see that in pursuance of the conspiracy charged there there were many acts of various kinds; people drove from Potchefstroom to Johannesburg to hold a meeting; private meetings were held in which the accused Leibbrandt made speeches attacking the Government and other political organisations. I venture to suggest, my lord, that it did not occur to the Attorney-General that he could make a difficult case easier by charging an overt acts the fact that a man - that Leibbrandt was driven to Johannesburg in pursuance of the conspiracy, or that he made a speech criticising the Government in pursuance of the conspiracy. Even if it had occurred to the Attorney-General to charge such a thing as an overt act, which is unheard of, and was unheard of, he must have realised that it would be no advantage because if such an act is only an overt act because it's tained by the conspiracy, then in any event he'd have to re-prove the conspiracy as part of that act in order to satisfy the Court that it was indeed an overt act - that is to say one which manifested hostile intent.

And, my lords, I submit that if one approached the matter in any other way, it's quite clear that the Statutory provision would be rendered nugatory.

Now, my lord, I want to emphasise at this stage that proof of hostile intent, which doesn't require two witnesses, is not the same as proof of the conspiracy, as proof that the word were uttered in pursuance of the conspiracy. As your lordships put it to my learned friend yesterday, if his argument is incorrect, in order to decide whether words are overt acts one doesn't simply enquire about hostile intent; one has to look at the terms

of the conspiracy and see whether they are in pursuance of the terms of the conspiracy as pleaded, because the words are overt acts - - my lord, I know I'm repeating myself here, but I must stress this - - they are overt acts not because spoken with hostile intent, which may be an individual state of mine, but because they are spoken in terms of a specific conspiracy.

My lord, in a case like this if one proves adherence to this conspiracy one no doubt proves hostile intent, but proof of hostile intent isn't the same as proof of the conspiracy and adherence to it, An individual may have his own hostile intent, apart from the conspiracy. One can prove from an individual confession that an accused has hostile intent. He may say 'Yes, I wanted to overthrow the Goverhment by force and I am going to take every possible step towards it." That's not proof that his speech was made in pursuance of this conspiracy.

My lord, if I may refer to a way of putting it - a formulation of it which really sums it up - there is a case which is referred to in Gardiner and Lansdowne, 6th Edition, Vol. 2 page 996, on the necessity for charging and proving overt acts. That case is - - I don't know whether it was Rex or Regina then - - at any rate the Crown against Vorster, heard in the Special Court at Burghersdorp on the 3rd July, 1901; the full report I understand is only in the Archives in Cape Town, but Gardiner and Lansdowne refer to the report in the Cape Times newspaper of the 3rd July, 1901. I have copied it out, my lord. The Court consisted of Sir William Solomon, later Chief Justice, Mr. Justice C.J. Maarsdorp, and Mr. Justice Lange. In that case the accused were charged with four overt acts.

Taking up arms, inciting the Burghers to rebellion, to continuing the rebellion; inciting particular people to take up arms against the State -- - this was in time of war - - and inciting a certain Commandant Grobellaar to invade Steynsberg. Now those were overt hostile acts charged.

Now, in the judgment, in the final summing up, by Justice Solomon, he had this to say: My lord, I have copies, as it's not reported; possibly I could give them to the Registrar for safekeeping, and I have copies for the Crown. Your lordship will see that what was said was this: "Some evidence has been given directed specially to the specific charges in the Indictment. There was other evidence of a general character which we always consider of some importance in these cases, evidence directed to show what the prisoner's attitude was before and at the time of the rebellion; whether the state of his mind was one of sympathy with the Republicans and hostility to his own Government or the contrary. I may make this remark, that in cases where a man is charged with High Treason it is not only necessary for the Crown to prove that the man is hostile to his own government, it has to be proved that he committed certain specific acts in order to assist the Republicans in the war they were carrying on." "No amount of evidence as to hostility of mind can dispense with the necessity of proving specific and overt acts of Treason committed by him with the view of assisting the Republicans."

Those are the words I stress, "Overt acts committed with the view of assisting the Republicans". That's not the same as general hostile intent. The specific

proof of the design to assist the Republicans is part of the proof of the overt acts.

And, my lord, the distinction between a general question of hostile intent and the putting of that intention so to speak into specific action by entering the conspiracy, was made clear in Leibbrandt's case, 1944, Appellate Division, in the passage at page 290 - the top of the page where thr Chief Justice drew the distinction between the unexpressed intention in the mind of the signatory -- that is the hostile intent - - and what is actually expressly agreed upon. He says it's a mistake to say that conspiracy rests in intention only, it cannot exist without the consent of two or more persons; the argument compounds the arrangement of the conspirators among themselves, with the secret intention which each must previously have had in his own mind, and which did not issue in acts until it displayed itself by mutual consultation and agreement." That is to say, my lord, proof that an act was done in pursuance of a conspiracy is part of an act; it's not merely a question of proving the accused's personal hostile intent.

Now, my lord, I submit that the nedd for double proof of the conspiracy is demonstrated is demonstrated if we refer back to the authorities like those quoted earlier, the need for double proof of the whole of an overt act. As was said in Strauss' case, my lord, in the passage I quoted the same witness cannot prove two overt acts. Therefore if the conspiracy is part of the other overt act then the witness relied on for the proof of the conspiracy as the Part B overt act cannot be relied upon for the other overt acts. One just has to wipe it out, wipe him out.

Now, my lord, if the overt act has as an essential element its relationship to a conspiracy, then as stated in Hennig's case, because the requirement of double proof relates to every essential part, then if the relationship to a conspiracy is an essential part there must be double proof of that also. I can refer back to the words of O'Brien A.J. in the Irish case, approved by the Appellate Division; it's not sufficient to prove by more than one witness the occurrence of the overt act, you must have more than one witness to prove the prisoner's guilty responsibility.

In this case guilty responsibility implies adherence to the Treasonable conspiracy; there is only guilty responsibility for an overt act in Part C if it is part of the treasonable conspiracy.

Now, my lord, it's quite clear why the Courts say if you have any other rule there is an absurdity. My lord, there is no difficulty in proving any number of political speeches on A.N.C. platforms, by one witness or perhaps by fifty witnesses, and if, my lord, having proved the A.N.C. conspiracy, let us say, it were enough simply to prove that a man has made a public speech attacking the Bantu Education Act, then the rule is valueless to the point of absurdity. My lord, this very point was made in the American case quoted by his lordship the Presiding Judge, Cramer's case. Now, my lord, that case apparently held that on a charge of giving aid and comfort to the enemies of the United States in wartime, there must as a minimum requirement be sufficient evidence by two witnesses of an act by the accused which actually

amounted to the giving of aid and comfort. Now, my lord, the Treason in the United States was apparently Statutory and the particular facts there are quite remote from this case, but it appears that Counsel for the Government that argued in that case said that provided it proved the man's hostile intent - that is to say the intention to aid the enemy - it would be enough to prove by two witnesses any apparently insignifcant act, and then leave its real significance to be gleaned from the general evidence on hostile intent, and this is what the Judge giving the majority judgment said:

"The Government's contention that it may prove by two witnesses an apparently commonplace and insignificant act and from other circumstances create an inference that the act was a step in Treason" - that is to say not by two witnesses - is a contention really that the function of the overt act in a Treason prosecution is almost zero. If the Act may be an insignificant one, then the constitutional safeguards are shrunken so as to be applicable only at the point where they are least needed. The words of the constitution which incorporates the two witness rule - he says "The words of the constitution were chosen not to make it hard to prove merely routine and everyday acts but to make the proof of acts that convict of Treason as sure as trial processes may". In other words, my lord, one doesn't have the two witness rule, in order to make it hard to prove merely routine and every day acts, but to make the proof of acts that convict of treason as sure as trial processes may; one doesn't have the two witness rule to make it hard to prove that the accused addressed an open air meeting; you have the two witness rule to make

it hard to prove that the accused was party to a treasonable conspiracy.

My lord, the last sentence which I quoted from the American judgment with submission gets to the heart of the matter. The Judge there spoke of acts that convict of Treason, and that I submit is what the two witness rule relates to; acts that convict of Treason. My lord, as the Special Court put it in Leibbrandt's case, what is really required is double proof, and one asks, my lord, double proof of what? Not surely double proof simply of ringing a bell, or double proof of voting for the Freedom Charter, or double proof of a speech criticising the Bantu Education Act. My lords, there is no value in double proof of those matters. My lord, one could have proof fifty times over of those matters; one could have fifty people, a hundred people, who say at church one morning 'I saw the accused ringing the bell'. That wouldn't carry any more certainty that Treason had been committed, that acts had been committed which convict of Treason. One couldn't say in that case there were a hundred witnesses of guilty responsibility. The evidence of guilty responsibility would be the evidence of the design.

My lord, one may ask why, if the act of conspiracy is proved against an accused beyond reasonable doubt, by one witness, one needs to prove the same adherence to the conspiracy again, One may ask why can't it simply be accepted as a background to the second colourless act? My lord, the answer I submit is that the rule laid down by the Statute requires double proof in each case beyond a reasonable doubt. My lord, as pointed out in Hennig's case it's not mere corroboration, it's double proof beyond

a reasonable doubt. Even if one has one witness whom the Court accepts as truthful beyond a reasonable doubt, a second is still required.

My lord, that's made clear in Hennig's case; my lord, in Hennig's case at pages 178 and 180, and my lord, it's made clear in Leibbrandt's case 1944 A.D. at page 255 in the judgment again of the Special Court. That's the passage where Mr. Justice Shreiner made it clear that there must be two chains, each sufficient in itself to leave no doubt as to the accused's guilt. Both chains, he says, must lead to the inevitable inference. It's not mere corroboration, my lord. And my lord, the reason one must remember that this is a rule which is there to make it hard for the Crown to convict of Treason. It's there to protect the accused.

My lord, Wigmore states this very well in the volume I've quoted, paragraph 2038 (i) on page 270. He said "If the rule is to be maintained at all regard should chiefly be had to the interests of those for whose protection it is established." My lord, this rule is maintained for the protection of the accused, and in applying it one must remember their interests, and my lord, if one goes back to the historical reason for this rule one sees that the object is to protect the subject against even a remote possibility of being wrongfully convicted by the requirement of a degree of certainty which is double that ordinarily required. My lord, the matter is dealt with in many of the writings. Blackstone, for instance, Blackstone's Commentaries in Book 4, page 358 gives this as the main reason: "The reason is undoubtedly to secure the subject from being sacrificed to fictitious conspiracies.

Fictitious conspiracies, my lords. And you do it, my lord, in possibly acrude way, you do it by laying down this two witness rule; it makes things very difficult for the prosecution in many cases no doubt; in some cases impossible. In a case like Hennig's case the Court was satisfied by a completely credible witness who was accepted as truthful, that an act of treason had been committed, but it wasn't enough.

And Best on Evidence, my lord, is the 10th Edition at pages 515 to 517, and he says this: "Although Treason when clearly proved is a crime of the deepest dye and deservedly visited by the severest punishment, yet it is one so difficult to define;the line between treasonable conduct and justifiable resistance to the encroachment of power, or to the abuse of constitutional liberty, is often so indistinct that the vision of the accused is so perilous - that it is the imperative duty of every free State to guard with the most scrupulous jealousy against the possibility of such prosecutions being made the means of ruining political opponents." Now needless to say, my lord, one isn't concerned with the motive of a prosecution in this particular case, or any particular case. What this shows is that the rule is there to protect the accused, to make it difficult to convict an accused, and it says that by the law as it stands people who might really be guilty of treason might escape; they accept it, but on the other hand those who are innocent, he said, those who are innocent of that terrible crime lie under no dread of being falsely convicted.

(COURT ADJOURNED).

9 MARCH 1961

COURT RESUMES ON THE 9TH MARCH, 1961.

APPEARANCES AS BEFORE.

MR. KENTRIDGE :

My Lord, I was about to give Your Lordships illustrations of the results which would follow if one took the Crown view of the application of the two witness rule. As I pointed out yesterday My Lord, it doesn't matter whether one has direct evidence or circumstantial evidence, the rule applies equally in each case. Consequently My Lord, one can test the rule in a very simple way. If one assumes that instead of circumstantial evidence of the conspiracy one had a direct witness, assume that a witness had been brought by the Crown to say that he was present at a meeting of the 29 Accused where they agreed to this conspiracy, with all the terms of it, and that was the only evidence of the first overt act, then there would be one witness, like one chain ofcircumstances, one witness to this conspiracy with all its terms. If all the Crown produced then was a second witness to the fact that one of the twenty nine people made a speech and that that was enough, it would then be clear that what the Crown was in fact seeking to do was to convict on the evidence of one witness, because then it would only be the witness who had been therein the room while the conspiracy was hatched who would connect each of the Accused with the conspiracy. And if, after that, one held that the evidence of another witness to the making of the speech was enough, it means that in effect

one would convict of treason, of the treasonable act on the evidence of only one witness.

MR. JUSTICE BEKKER :

May I ask you this, Mr. Kentridge. I am not quite aware exactly how this thing is going to work out when we get to the individuals, The Crown has set out to prove that the campaign towards the Congress of the People, the Anti-Apartheid Campaign, the Pass Campaign, that is all part of the liberatory movement, says the Crown. Now, Defence witnesses have admitted that they were all part of the liberatory movement, these various campaigns. Now the Crown contends and let us assume that the Crown is correct there, that that campaign involved violence - whether it does or not we will discuss later on - now if the Crown proves through the mouths of various defence witnesses, that these campaigns all link up to the liberatory movement, and on the assumption - and I was to emphasise this - on the assumption that this will involve violence, the Crown then produces a speech by one witness supporting for instance the Congress of the People. Why should there be a second witness to prove that this speech is part and parcel or in pursuance of the liberatory movement? Should there be a second witness?

MR. KENTRIDGE :

My Lord, of course a Defence witness in the box is as good asa Crown witness for the purpose of the rule. But the real point is, My Lord, one asks how the Crown establishes that the liberation movement

involves violence.

MR. JUSTICE BEKKER :

Well, I say that we can discuss later on.

MR. KENTRIDGE :

Well, My Lord, that is what has to be proved twice, with submission. Because, My Lord, it is true that the Crown has approached the facts in this way. It set out to prove that the policy of the A.N.C. or the liberation movement was a violent policy, and it then set out to prove that each Accused adhered to the A.N.C., but in fact as against each Accused what has to be proved is that he conspired to overthrow the state by violence. The policy of the liberation movement is one link in the circumstantial train against ...

MR. JUSTICE BEKKER :

Well, we can take it step by step. At the moment I am on this assumption. Assuming for purposes of argument that the liberatory movement, or in order to achieve the aims of the liberatory movement, would involve by inference, necessary inference some violent action against the state...

MR. KENTRIDGE :

And Your Lordship means that that is proved as against any particular Accused by evidence admissible?

MR. JUSTICE BEKKER :

Yes.

MR. KENTRIDGE :

My Lord, that would tend to prove the

conspiracy of violence...

MR. JUSTICE BEKKER :

In that case it wouldn't be necessary - tell me if it still would be necessary, if the Crown brings one witness testifying to a speech made in advancing the cause of the liberatory movement.

MR. KENTRIDGE :

My Lord, our submission is that that is exactly what would be necessary, because the proof of the violence in the liberatory movement is part of the proof of the conspiracy, the first overt act.

MR. JUSTICE BEKKER :

Even if on the first overt act, by necessary implication, violence would be involved?

MR. KENTRIDGE :

My Lord, yes, by inference, by necessary implication. In other words, if your chain of circumstantial evidence, and that is the whole point really, if your chain of circumstantial evidence on your proof that a man conspired leads to the conclusion that the liberatory movement was to use violence, then the first overt act is proved. Then when we get to the second overt act, we have to disregard any evidence used in proving the first overt act, and we have to look at the speech. Now the speech may show that it is in pursuance of the liberation movement, but that is not enough, My Lord. It has to be shown that it is in pursuance of the conspiracy charged and alleged, In other words, it has to be shown again that the liberation movement involved violence. And My Lord,

looking at it...

MR. JUSTICE BEKKER :

In other words, unless that speech in itself involves violence, it is colourless really.

MR. KENTRIDGE :

As Your Lordship pleases.

MR. JUSTICE BEKKER :

You see, it just struck me this way. Put simply - forget violence. A conspiracy is an agreement. Once the agreement is proved, and we are on that assumption, once the Crown proves by any number of witnesses the existence of an agreement, and a speech is subsequently made showing that that speech is made in pursuance of that agreement, ...

MR. KENTRIDGE :

Of that agreement..

MR. JUSTICE BEKKER :

Of that agreement, yes.

MR. KENTRIDGE :

Does that mean an agreement to use violence?

MR. JUSTICE BEKKER :

Yes.

MR. KENTRIDGE :

It is shown in the speech itself. Then of course it would show - it would manifest the hostile intent.

MR. JUSTICE BEKKER :

I am on the question whether there should be two witnesses testifying to that speech?

MR. KENTRIDGE :

My Lord, unless that speech in itself shows it is part of a violent conspiracy, in other words, unless it has the hostile intent manifest on its face, as none of these speeches have, then My Lord of course except for that one would need two witnesses.

MR. JUSTICE RUMPFF :

You say if the speech by itself shows that there was a conspiracy and that the speech was made in pursuance of the conspiracy, then you need only one witness?

MR. KENTRIDGE :

Yes, as Your Lordship pleases.

MR. JUSTICE RUMPFF :

But if it doesn't show that it was made in pursuance of the conspiracy which is the subject matter of the first overt act, then you require two witnesses?

MR. KENTRIDGE :

That is the submission, My Lord.

Mr. JUSTICE BEKKER :

And that brings it back to the question of violence.

MR. KENTRIDGE :

Yes, My Lord, it does. And My Lord, the reason why I say one can test it with the case of assuming it was direct evidence - assume that you didn't get the violence in the liberation movement out of the circumstantial evidence, but instead you had one credible - you had one direct witness, assume

the Court accepts it, going into the box who says I was present at a secret meeting where it was agreed that the liberation movement would use violence, with all the terms in the Indictment - you don't have to rely on circumstances at all. And then the next piece of evidence is a second witness who said the Accused made this speech. Well, My Lord, I submit it is perfectly clear it couldn't be good enough, because there would only be one man to convict the Accused with violence, to associate the accused with violence. And My Lord, one can test it in another way as well, My Lord. Even if it is a chain of circumstantial evidence. Assume there is only enough evidence for one chain, but it proves the overt act in Part B, and then you get one or even two policemen who give evidence that the Accused made a speech, talking about the liberation movement and supporting it, one still asks, what tells the Court that the liberation movement is violent? Only one chain of circumstantial evidence, My Lord. And that, we submit, can't be enough. My Lord, one can test it another way. Your Lordships have seen that the Crown going through individual Accused have dropped certain overt acts. Let us assume that the Crown decided for some reason or other to drop the first overt act in Part B.

MR. JUSTICE RUMPFF :

It couldn't, because it said that that was the basis of its case.

MR. KENTRIDGE :

Exactly, My Lord, but supposing that it

didn't charge it any longer as an overt act, and then let us just read the overt act in Part C by itself. What it says is that in pursuance of the ...

MR. JUSTICE BEKKER :

They would all fall away. If this falls away, then there is nothing done in pursuance of that...

MR. KENTRIDGE :

As Your Lordship pleases. But supposing the Crown had decided not to charge the conspiracy as an overt act, and merely to charge as overt acts speeches laid - made in pursuance of a particular conspiracy. Then I submit it would be abundantly clear, looking at any overt act in parts C, D and E that the conspiracy would have to be proved as part of the overt act. And simply because the Crown puts in the conspiracy as a separate overt act, can't affect the quantum of proof required on the other overt acts.

MR. JUSTICE RUMPFF :

Wasn't the argument in the beginning about this being one overt act ...

MR. KENTRIDGE :

At the beginning of this case does Your Lordship mean?

MR. JUSTICE RUMPFF :

There is some uncertainty - it may have been on the first Indictment, I don't know ...

MR. KENTRIDGE :

We submitted, My Lord, that all the

overt acts should be separate counts and numbered separately. Your Lordship pointed out that on the authorities, apparently one could have a number of overt acts charged as one...

MR. JUSTICE BEKKER :

Wasn't the argument that the Crown charged in this way to escape the provisions of the two witness rule?

MR. KENTRIDGE :

My Lord, I think the first point was that what Your Lordships held was that - what the Crown submitted was that there was one charge of treason with a number of overt acts.

MR. JUSTICE KENNEDY :

One overt act, one count of treason.

MR. KENTRIDGE :

My Lord, I recall the point that Your Lordship Mr. Justice Bekker makes. When we were arguing the question of joinder, my learned leader at that stage submitted that a possible source of prejudice was that the Crown could put in a number of overt acts, because there were a number of accused, and consequently it would be easier for them to overcome the two witness rule. Well, My Lord, that was on the assumption of course that - that was at the time we were arguing that an overt act in any event must carry its guilt on its face. But My Lord, Your Lordship Mr. Justice Bekker dealt with that, and I submit My Lord, with great respect, correctly, by pointing out that in any event the Crown could charge what overt acts it wanted

and then My Lord, in fact there is a part of Your Lordship's Judgment which seems to anticipate this position, because I see that at the foot of page 16 of Your Lordship's Judgment, Your Lordship said : "If more than one overt act is charged, in fact a series of overt acts presented under one count, the fact of the matter is that more than one overt act is charged. If perchance in such event the totality of overt acts so charged is for the purposes of the section to be construed as a charge of but one overt act, no prejudice arises. It only means that the Crown would fail in the final result, unless it requires - unless it complies with the requirements of the section". And I submit, My Lord, that is exactly the position we have reached here, that Your Lordship was possibly anticipating it.

My Lord, possibly the whole thing can be summed up this way. All parties in this Court and the Court's Judgment, agreed that an overt act must manifest hostile intention. In some way or other the overt act must manifest hostile intention. My learned friend Mr. Nicholas has argued considered on its own, the Court has held considered in its context. Consequently, when considering whether the second overt act is proved, the problem before the Court is to decide whether there has been a second manifestation of hostile intent. And My Lord, if the manifestation of hostile intent only arises from the conspiracy, you can't have a second manifestation proved unless you have the conspiracy proved twice.

My Lord, as a matter of interest, there is a connection between this aspect of the argument and the point that arose early on in the argument at the Exception stage on the question of vicarious liability. Your Lordships will recall that the then leader of the Crown Counsel informed the Court that the Accused were being held liable only for their own overt acts, and were not being held vicariously liable for the overt acts of others. And My Lord, that this approach was legally correct appears with respect from the approval by the Appellate Division in Henning's(?) case, that Judgment of Mr. Justice O'Brien, where he said "It is not sufficient to prove by more than one witness the occurrence of the overt act, there must also be more than one witness to prove the prisoner's connection with guilty responsibility." One can test it this way, My Lord. Assume again one had one direct witness to say that Accused No. 1 and Accused No. 2 plotted to blow up the Union Buildings. That is common purpose shown. And then supposing you have a second witness who says Accused No. 1 blew up the Union Buildings, I saw him. The reason why Accused No. 2 can't be guilty vicariously of that overt act, is that there would be only one witness to connect him with treason, namely the one witness who said he was present when the agreement was formed. And that is why, My Lord, if one looks at the cases, one sees that there is no vicarious liability in the broad sense for an overt act. That is to say that even if an overt act is committed in pursuance of a conspiracy, a

conspirator who didn't personally take part can't be found guilty of that overt act. That was found, My Lords, in Leibbrandt's case, if Your Lordships looks at pages 141 and 142 of the Judgment of the Special Court, Your Lordship will find that it was found as a fact that it was part of the conspiracy that there should be a wireless transmission to Germany and that Accused No. 2 knew about it. It was held that an attempt at the wireless transmission took place. But, because the Court found that No. 2 Accused personally did not take part, he was found not guilty of that overt act. One has an equally clear example of it in the case of Rex versus de Wet, 1915, O.F.S.P.D. p. 157.

Your Lordships will recall that the Accused, General de Wet, was found guilty of a conspiracy to levy war against the Union Government and make rebellion, and he was charged with nine other overt acts committed in pursuance of the conspiracy. On page 184 of the Judgment, the ninth count is dealt with, and this is what the Court said : "Now these acts were certainly committed by certain of the Accused's followers, but there is no evidence that this was done when the Accused was present or that he gave instructions for it to be done. There is no doubt that it was done in furtherance of the rebellion he had raised, but we cannot say that he actually himself did it or caused it to be done, and we think that we are not justified in finding him guilty on the ninth count." And I submit, My Lord, that is another illustration of the same principle. Unless you have a witness - unless you have more than

one witness to connect the man with the treason, it just won't work, My Lord. You could have one witness to say General de Wet was in the conspiracy, a second witness to say someone else blew up this train. But that is not good enough, because it is only one witness connecting with the conspiracy. And My Lord, if Your Lordships examine the judgments in Leibbrandt's case, particularly that part which deals with Accused Nos. 4, 5 and 6, which is to be found at pages 157 to 167 of the Judgment, Your Lordships there will find that they are acquitted purely on the application of the two witness rule. Now My Lord, in that case, as I pointed out, the overt acts charged were warlike acts. The Court found in the case of those three people, that they weren't connected directly with any warlike acts, any of the other overt acts, that is to say. It found by one witness or one chain of circumstance - circumstantial evidence that they were in the conspiracy. Now My Lord, if one examines the Court's Judgment and application of the two witness rule, I submit one will find it is abundantly clear that they were not acquitted on a point of pleading. My Lord, one ventures respectfully to speculate that the Special Court would have been astonished if it had been suggested that if for instance they had been charged with an additional overt act, some act colourless in itself, such as driving the Accused No. 1 from Potchefstroom to Johannesburg, or being in possession of some of Accused No. 1's foreign money that he brought with him to South Africa for the purpose of the

conspiracy. I speculate, My Lord, that the Special Court would have been astonished if it had been suggested that the Crown could have overcome the difficulty of the two witness rule by putting in some act like that, proving the conspiracy once, and having another witness to say that this Accused had some foreign money - had taken foreign money from Accused No. 1 for the purposes of the conspiracy.

My Lord, I would like to come now to the practical application of this. My Lord, I would like to repeat in this connection that although the Crown has set out to prove the policy of the A.N.C. andthen in its argument has dealt first with the policy of the A.N.C. and then with the adherence of each accused. The policy of the A.N.C. is of course not a fact up in the air, it is one of the links in the chain of circumstantial evidence against each accused. The offence of the Accused is not joining the A.N.C.; the offence of the Accused as charged is conspiring to overthrow the state by violence. The mode of proof is to show that a certain organisation had a policy of violence, and that the Accused joined it and adhered to it, well knowing what its nature was. Consequently, My Lord, as against each Accused, by evidence admissible against each Accused, it must be proved inter alia that the A.N.C. had a policy of violence, part of the evidence against each Accused on the first count.

Now My Lord, in the first place I would like to point out to the Court, in a case like this the enormous difficulties that accrue, even on the

Crown's approach to the section. My Lord, the Crown sees and accepts that any witness used on the second overt act must be left out of the reckoning when it comes to the first overt act of conspiracy. Now, for example, My Lord, one can take the case of the Accused Lilian Ngoyi. As far as she is concerned, apart from the conspiracy, the Crown relies on two other overt acts, attendance and speaking at a certain meeting in September, 1955, and attending and speaking at a meeting in June, 1956. Now, My Lord, the witness who attests to what she said at the first meeting is Detective Coetzee, and the witness who attests to what she said at the second meeting is Detective Schoeman. They are the two shorthand writers. My Lord, on the Crown's own approach, that means, in considering the conspiracy count, the conspiracy overt act, one can't take into account the evidence of Coetzee or Schoeman. Consequently, My Lord, in dealing with the case against Lilian Ngoyi, even on the Crown's approach, Your Lordships in considering whether the policy of the A.N.C. has been shown to be a violent one, must disregard all the evidence of Coetzee and Schoeman - not merely their evidence on that meeting, on those meetings, but must disregard all the evidence. As against another Accused, where their overt acts are proved by someone else, the Court takes into account the evidence of Coetzee and Schoeman. As against Lilian Ngoyi, the Court has got to decide whether without Schoeman's evidence or Coetzee's evidence, there is enough admissible evidence against her to prove that the A.N.C. has a policy of

violence. Somehow Your Lordships must take out of consideration that evidence. But it goes further, My Lord, because in considering the policy of the A.N.C. and also the adherence of Lilian Ngoyi to the conspiracy, the Crown relies on acts or speeches of certain co-conspirators. For example, My Lord, in the case of Lilian Ngoyi, one of the things relied on in her case is certain speeches made by a co-conspirator called Vundhla. But, in order to show that Vundhla is a co-conspirator at all, the Crown relies inter alia on the evidence of Coetzee and Schoeman. That means, when one is considering whether Lilian Ngoyi is within the conspiracy, one not only has to leave out the evidence of Coetzee and Schoeman against her, but if it is only on the basis of their evidence that a certain co-conspirator is proved to be a co-conspirator, then as against Lilian Ngoyi all the evidence concerning that co-conspirator must be left out. My Lord, the permutations and combinations even on the Crown's approach seem to be virtually insuperable, and My Lord, I may be permitted to point out with respect that although the Crown conceded that as against any Accused on the conspiracy charge one must disregard the evidence of the witnesses who are used on other overt acts, the Crown made no attempt to explain to Your Lordship how it would work out in practice.

MR. JUSTICE BEKKER :

Let us go back a bit, I am not quite sure whether I have got it all. The Crown relies on Coetzee and Schoeman...

MR. KENTRIDGE :

For two further overt acts.

MR. JUSTICE BEKKER :

Now you say that if Schoeman or Coetzee testified to a speech made by Vundhla whereat Ngoyi is present, that bit of evidence must be ignored completely.

MR. KENTRIDGE :

For the conspiracy, Yes, My Lord, because they are using Coetzee and Schoeman for the other overt acts. And My Lords, that is in terms of the clear wording of the section, quite apart from double proof of the conspiracy. I think my learned friends fully conceded that. My Lord, another example, even on the Crown's approach is the witness- is the accused Nokwe. His second overt act relied on is a speech proved by the witness Maselele. Now My Lord, we know that the witness Maselele was the main witness to speeches made at Alexandra township. That means as against Nokwe My Lord, as against Nokwe, when one is trying to consider whether the A.N.C. had a policy of violence, one will really have to cut out consideration of the Alexandra Township speeches. Again, a man called Motsele from Alexandra Township who is said to be a co-conspirator - that is also based largely on the evidence of Maselele. Consequently, it means when considering whether Nokwe - as against Nokwe the policy of the A.N.C. one has to consider whether one can even rely on Motsele being a co-conspirator. And My Lord, as against Nokwe, the three overt acts in

addition to the conspiracy are charged. That is proved by Maselele, Helberg and Strydom. Consequently, when the Court is asked to find as against Nokwe whether there was a policy of violence to which he adhered, the Court will have to see whether that can be done, cutting out entirely the evidence of Maselele, Helberg and Strydom. Now My Lord, that is even on the Crown approach. We submit that the conspiracy must be proved twice over, and as I pointed out there are two ways. Either one finds one chain and assures oneself that there are two witnesses to each link. But if there are not, then of course one has to find two chains. Now My Lord, naturally if the Accused in the witness box admits a fact as against him, it needn't be proved by two witnesses. It is a confession in Court. As against any other Accused, his evidence is merely the evidence of one witness, and of course throughout, needless to say, no witnesscan be considered at all unless hisevidence is accepted. If the man's evidence isn't accepted, it can't be used in any case. Now My Lord, one can have a fact, supposing one has the two chains - one can have the same fact in both chains, if it is proved by two witnesses. If two witnesses proved a speech, it can appear in either chain. But My Lord, as we know there are many facts relied on by the Crown which are proved by only one witness. For example, My Lord, there is the speech male by Ndimba in Port Elizabeth. As against the remainder of the Accused there is only one witness to that, that is Gazo. As against Ndimba himself, there is also the evidence of the Magistrate. But that means,

My Lord, in making two chains, the speech of Ndimba must go in one, but it can't go in the other. There are other examples. There are some documents the Crown relies on, for instance certain documents found in the possession of the Accused Nokwe with certain annotations on. There is only one witness, My Lord, to prove that those documents were found in his possession. S that can go into one chhain, but it can't go into another.

Now My Lord, how those chains work out, of course is something on which the Crown hasn't addressed Your Lordships. Our submission needless to say, My Lord, will be that there is not even one chain, let alone two, and My Lord, we don't propose to undertake the task of trying to see what various combinations and computations or permutations of chains could possibly be arrived at. The attitude of the Crown indeed has been that the Court must take all the evidence together to see whether there is a conspiracy. It must take all the facts and circumstances together. They never suggested, My Lord, that there could be two chains. My Lord, we submit that the Court won't be satisfied beyond a reasonable doubt even of one chain, but that once one starts dividing, however one divides it, it would be completely impossible to find two satisfactory chains.

My Lord, we submit with respect that it was for the Crown to satisfy Your Lordshipsthat there were two chains of circumstantial evidence to prove the policy of the A.N.C. and thus to prove the

guilt of each Accused.

My Lord, it was for the Crown, if they wanted a conviction, to clearly work out and to present to Your Lordships twenty-nine different double chains, as against each Accused. And My Lord, if they haven't done it, I respectfully submit that it is not something that can be done for them. To certainly can't do it negatively, My Lord.

My Lord, Your Lordships will recall that the Crown, notwithstanding submissions which we made in the past, chose to try the Accused in this way. My Lord, as the Crown said in its Opening, a good summing up of the position, they have chosen to present a complex case concerning twenty-nine accused and dozens of co-conspirators, twenty-five organisations, facts going over four years. And I respectfully submit, My Lords, that this Court will not shrink from a rigorous application of the two witness rule. It is a rule which is applied by the Courts ...

MR. JUSTICE BEKKER :

Well, is there any room for - you can't shrink, you have got to apply the rule.

MR. KENTRIDGE :

As Your Lordship pleases. The point I am simply making, the point I am making, My Lords, is this, that it is one of the difficulties that the Crown must face when its starts a treason prosecution. And if it undertakes a complicated prosecution based on circumstantial evidence, and it can't satisfy the Court in its evidence and argument that there are all

these double links, double chains, and in fact doesn't really attempt to do so, I submit, My Lord, that the Crown must fail on this ground alone, and we submit quite apart from the argument which we will submit to show that there is not even one chain, we submit, My Lord, that on this point alone the Crown must clearly fail, irrespective of the detailed examination of the evidence which is to come.

My Lord, that concludes my argument on this aspect of the case. My Lord, Your Lordships asked yesterday about dictionary definitions of the word "policy" which we undertook to find. We have got two definitions. The Oxford English Dictionary defines "policy" in the meaning which is most relevant to these proceedings, as "a course of action adopted and pursued by a government party, ruler, statesman, et cetera. Any course of action adopted as advantageous or expedient". And Webster's New World Dictionary of 1956, defines it as "any governing principle plan or course of action". Of course, My Lord, we submit on the particulars it is quite clear that what is meant is something decided upon. For instance, My Lord, it was the policy, the Crown says, to establish a communist state. I submit that simply means that it was something which was duly adopted. It was duly decided by the A.N.C. to establish a communist state.

MR. JUSTICE BEKKER :

Well, on that point, I meant to ask Mr. Nicholas, but it doesn't matter, when we talk about policy - there was a decision amongst the four organisations

to work towards the Congress of the People. That would be policy, would it not?

MR. KENTRIDGE :

Duly adopted, as Your Lordship pleases. I take it it was adopted by the proper organs...

MR. JUSTICE ELKER :

At one of the conferences of the A.N.C. it was announced that we are now working together with the other people towards the Congress of the - the Freedom Charter. That would qualify as policy, a decision at conference, we are going to embark on the Anti-Apartheid - that would be policy.

MR. KENTRIDGE :

As Your Lordship pleases.

MR. MAISELS :

My Lord, before we deal with the policy of the organisations separately, we propose, My Lord, submitting to Your Lordships at this stage the Defence argument on the question of communism, not merely in regard to what is said to be the general principles, but also in regards-in regard to its application to the individual persons in this case.

MR. JUSTICE RUMPFF :

Mr. Maisels, have you exhausted your law points?

MR. MAISELS :

For the time being, certainly. My Lord, we...

MR. JUSTICE RUMPFF :

Your general law points?

MR. MAISELS :

Yes, My Lord, generally. Oh yes, My Lord, we have got certain other points, for instance in regard to individual overt acts, what consists of association - what constitutes association, matters of that nature. And general questions of co-conspirators, but insofar as our general legal submissions on the case are concerned, My Lord, those have now been made.

MR. JUSTICE BEKKER :

General legal submissions affecting the case as a whole?

MR. MAISELS :

As a whole, yes.

MR. JUSTICE RUMPFF :

The other ...

MR. MAISELS :

The other deal with co-conspirators, questions of association, question of evidence and matters of that nature.

MR. JUSTICE RUMPFF :

Mr. Maisels, as the position at present is, the Court would like to hear the Crown on the legal points so far raised. The addresses by the Defence are fresh in our memory. If the Defence go over to the facts, the argument now addressed will be pushed into the background, and we prefer to hear the argument of the Crown on the law in answer to your points made before we go over to the facts. I know it may entail a short adjournment. I don't think the Crown is probably ready.

MR. MAISELS :

My Lord, may I make a suggestion in that connection. Your Lordship will appreciate that we on this side are working under some pressure, for a number of reasons. None of the points that have been raised are points which should not have been anticipated. The Crown didn't argue any law really in their address to Your Lordships, and they ought to be ready to deal with it. If they want a day or so, that is a different matter, but we would in those circumstances, My Lord, if Your Lordships would be prepared to hear us, at least try to get rid of some of the mass of argument which we would otherwise have to address, which may

take, My Lord, up to two months, at least. Now My Lord, we simply can't afford from an angle which I don't want to trouble Your Lordship with, to waste any time.

MR. JUSTICE RUMPFF :

I take it you are not quite ready now, Mr. Trengove?

MR. TRENGOVE :

No, My Lord, of course not. We didn't anticipate this proceeding being followed. If Your Lordships do want an argument at this stage, we would be quite prepared to address it to Your Lordships on the points of law, subject to a short adjournment.

MR. JUSTICE RUMPFF :

How long?

MR. TRENGOVE :

I would suggest until Monday morning, My Lord.

MR. JUSTICE RUMPFF :

Yes, well, in any event, if we could go on with the other argument, could the Crown then prepare itself...

MR. TRENGOVE :

My Lord, if we know now that Your Lordships want an argument within the next few days, we could prepare that.

MR. JUSTICE RUMPFF :

Yes, well, that is the position. We would like a reply on all the points raised by the Defence. And in the meantime the Defence can go on,

but the Crown now knows that we expect us to tell - we expect them to tell us when they are ready.

MR. MAISELS :

I may say, My Lord, that we are very sorry to have to do this to the Court, but we cannot avoid it.

MR. JUSTICE RUMPFF :

That is quite alright.

MR. MAISELS :

My Lord, we assume then that on Monday my learned friends will answer on the law.

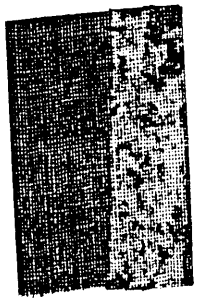
MR. JUSTICE RUMPFF :

Well, if we go on, it may be in the course of next week - when they are ready.

MR O'DOWD

MR. O'DOWD :

May it please Your Lordships. This section of the argument deals with the whole question of communism. My Lords, the starting point of my argument is that the issue of communism is relevant to this case only insofar as - My Lord, the issue of communism, and I think this is common cause, is relevant insofar - only insofar as it is relevant to the issue of violence. Now My Lords, what the Crown has succeeded in showing in this part of the case, is firstly that the Congresses produced some documents in which are to be found some propositions which coincide with propositions of the doctrine of communism. Secondly the Crown has shown that there is a communist doctrine of violent revolution, and thirdly the Crown has of course shown that the Accused were active members of the Congresses. But My Lords, these three facts by themselves are clearly insufficient to take the Crown to its desired goal, which is the proposition that the Accused believed in a violent revolution in South Africa at the present time. Of course, when I say the present time, I don't necessarily mean today or tomorrow, but I mean in the present epoch. It would be no good to show that a revolution in a hundred years' time was envisaged. My Lords, in order to take the Crown to that goal, I submit that the Crown would have to go through, and indeed it has attempted to go through, seven logical steps.



The first step, which is preliminary to anything else on this aspect, would be to show that

the documents upon which this part of the case is based do contain a fair reflection of Congress policy. Having shown that, the Crown would then have to establish that these documents which contain a fair reflection of the policy, contain propositions which belong to communist doctrine and to no other doctrine, or to use the phrase which has already been used in argument, propositions which are exclusive to communism. Then the third step, My Lords, would be to show that it is impossible to accept these propositions which are to be found in the documents without accepting the whole of the communist doctrine. The fourth step would be to show that the communist doctrine advocates a revolution, not merely in general, but in such a country as South Africa at the present time. Having taken those four steps, the Crown would then be in a position to say therefore the Congresses believed in a violent revolution in South Africa at the present time. Then the next step would be to show not merely that the Accused were active members of the Congresses, but that they were active members, with knowledge, of the Congress position with relation to communism and of the communist position in relation to violent revolution. And having done that, the Crown would then have reached its goal of showing that the Accused believed in a violent revolution in South Africa at the present time.

In my submission, My Lord, nothing less than those seven steps will do, and if any one of them is missing, the rest would be completely valueless.

The Defence submits that the Crown argument breaks down not only at one, but at several of these points, and the following is a summary of the submissions on each point. On the first point about the documents, the submission will be that the documents relied on by my learned friend Mr. de Vos do not contain a fair reflection of Congress policy. Secondly, I submit that there are no documents published by any of the Congresses which contain doctrines which are exclusive to communism, and in that connection the submission will be that there are only two such doctrines, to wit the dictatorship of the proletariat, and the role of the Communist Party. Thirdly, My Lords, we will submit that it is possible to accept those parts of communist doctrine which do appear in the documents without accepting the whole of communist doctrine, and the Defence evidence shows that the Congress did in fact not accept the whole of communist doctrine. Then on the question of the doctrine of violent revolution, we will submit it is not proved that communist doctrine advocates a violent revolution in South Africa at the present time, and finally on the individual positions - well, the submissions there actually vary from one individual to another, but broadly the argument will be that the Crown has failed to prove the requisite degree of knowledge on the part of individuals.

My Lords, I propose to deal with each of these points separately, but before going on to them, I want to refer to one passage in the evidence of Professor Murray, which is relevant to more than

one of these points, and which in my submission goes to the root of the whole Crown case on communism. My Lord, the passage is a very short one. It occurs at page 6593 of the record, and I read from line 7. This is cross-examination by my learned friend Mr. Kentridge, and he asked the witness :

"It would be extremely dangerous to draw any conclusion about a man's views on violent revolution from his views on other matters? --- Yes".

Now, My Lord, that of course is exactly what the Crown has been trying to do in the whole of this part of the case. The whole point of this part of the case is, to draw conclusions about the accused's views on violence from their views on other matters. They take the views on imperialism, fascism, capitalism, this, that and the other, and they say because you held these views, therefore you must have held a view on violence. Now My Lord, if the concession here made by Professor Murray is rightly made, that is really the end of the matter. You just can't do what the Crown has been trying to do in this part of the case. And in our submission this statement by Professor Murray was rightly made, and apart from other considerations which will emerge later in the argument, the correctness of the statement emerges from its immediate context.

My Lords, I now read from page 6591. Your Lordships will recall that in the course of the cross-examination of Professor Murray, a number of his own writings were put to him, articles which he had written at various times in the past, which he conceded contained matter

which was in line with communist doctrine on quite a number of points. At page 6591, my learned friend Mr. Kentridge adverts to these writings, and he says :
"Well, let me get back again to the example of your writings, Professor. At one stage you took a Marxist view on capitalism, exploitation, imperialism, class struggle, all of that? --- Yes".
"But at the same time, as you stated in one of your articles, 'Hoekom ek nie n kommunis is nie', you stated in that article, you didn't believe in violent revolution or the leadership of the Communist Party? --- Yes".
"Or the dictatorship of the proletariat? --- Yes".
"Now consequently if someone had read all your other articles, but not that part in which you said what you didn't believe in, he would not have been entitled to conclude that you were a communist in the full sense? ---He might have suspected me of it".
"Yes, but he would not have been entitled to draw the conclusion? --- No".
"And furthermore, when he read your article saying that you didn't believe in violent revolution, there would have been no reason for him to disbelieve that? --- Would you please say that again".
"Supposing someone read all your writings in order and finally came to the one where you said that you didn't believe in violent revolution, he would have had no reason to doubt your sincerity and honesty in making that statement? --- No, it depends on the setup".
"Well, I take it you made that statement honestly and sincerely? --- Yes".

And then the witness goes on to say : "There may have been other statements of course that might have made him suspicious about my sincerity".

"Yes, but the point I am making is that his suspicion would have been ill-founded? --- Without further information, possibly yes. My point is, there may have been other elements in my total situation which may have fed (?) the suspicion that it may have been a partly justifiable suspicion."

"Justifiable in the sense of being a reasonable suspicion? --- Yes".

"On the facts known? --- Yes".

"But it would have been false. You didn't believe in violent revolution? --- Yes".

"In other words, you are a person who believed in very many things that communists also believed in, but in spite of that you didn't believe in violent revolution? --- Yes".

"Or in the role of the Party, or in the dictatorship of the proletariat? --- I accepted for the time being the communist analysis of the capitalists prospect." Then comes the question which I read before,

"Yes, which rather suggests, taking your example, that whatever suspicions one might have, it would be extremely dangerous to draw any conclusion about a man's views on violent revolution from his views on other matters? --- Yes".

Now My Lords, I submit that this position is very significant. It seems clear that Professor Murray today, looking back on his position

of former years, feels that his then position was calculated to give rise to a substantial suspicion about his views on violence. Yet that suspicion would have been ill-founded. Now My Lords, at the time when Professor Murray wrote these articles, he was already an expert on Marxism. He was already a doctor of philosophy - I think he was already a professor. He certainly knew what Marxism was all about, he had certainly taken up his position well knowing to what extent he had borrowed from Marxism. And if the position of such a man can be that he borrowed from communism to such an extent that one may suspect him of believing in violent revolution, but yet in fact he doesn't believe in violent revolution, what conclusion can the Court safely draw from this type of expert analysis of a political position about a group of laymen, some of whom are barely literate? I submit, My Lord, that this position of Professor Murray clearly illustrate the dangers and the insuperable difficulties in the kind of enquiry which the Crown has attempted to undertake.

Now My Lords, going on to the seven steps in the argument separately, I gave as the first step, the question whether the doctrine - whether the documents were a fair reflection of Congress policy, but I want to leave the detailed argument on that to later, and to deal with certain other more general points. The first one is the key question of what is exclusively communist matter. My Lords, my learned friend has addressed quite a lot of argument to Your Lordships on this. He has submitted Heads of Argument running to

some two hundred pages in which he discusses at length what is and what is not communist matter. But the remarkable feature of those Heads of Arguments was that they did not mention at all those passages of the evidence which deal directly and expressly with this question. My Lords, the first such passage occurs in Volume 31, page 6072 to 6076. My Lords, I don't want to read the whole of those four pages. This was questioning by Your Lordship the Presiding Judge, and Your Lordship made the point that a large number of features dealt with by Professor Murray in chief were not exclusive to communism, and Your Lordship asked him what is the real acid test, and the conclusion is really reached at page 6076. I read from line 4. Professor Murray says this :

"In theory the difference between what I would call left wing bourgeois socialism and communism centres round the theory of revolution, things like the historical interpretation, the development must go along certain lines." And Your Lordship asks :

"Does the extreme left form of socialism not adopt that view at all? --- Not as socialism, no. The difference is reformism on the one hand - putting it broadly, reformism on the one hand and revolution on the other. Socialism will admit the class struggle, and decide to overcome it by trade union organisations, and the trade unions even co-operate with the capitalists. On the other hand, class struggle must lead to the proletariat and the break up of capitalism." I think "dictatorship of" must have been left out here.

Your Lordship asks :

"Does bourgeois socialism recognise the principle of the dictatorship of the proletariat? --- Not bourgeois socialism."

"Is that particular principle a particular communist doctrine? --- That is a straight out Marxist-Leninist doctrine".

"Is that, the dictatorship of the proletariat, to be found as a fundamental principle of any other political philosophy? --- Not to my knowledge, no".

My Lord, that passage establishes dictatorship of the proletariat as an exclusively communist tenet. There is also a suggestion here that there is a difference between reformism and revolution. In my submission that point is rather moreclearly formulated in a later passage. These matters are raised again in cross-examination by my learned friend Mr. Kentirdge, in volume 33, page 6579 and quite a number of following pages. I start My Lord at page 6579, where my learned friend reverts again to the idea of the dictatorship of the proletariat. My learned friends alludes to the passage which I have just read, and he says :

"I think earlier, perhaps in your evidence in chief, in answer to His Lordship the Presiding Judge, you indicated that the idea of the dictatorship of the proletariat seems to be a peculiarly communistic idea? --- Yes".

"If you look at independent Labour Party literature, or British Labour Party literature, however left wing, you don't find the idea of the dictatorship of the

proletariat expressed? --- Not in Labour Party. I think in the left wing Labour Party you will find a tendency to say that there must be strong government action once they are in power. They don't go as far as actually describing the dictatorship of the proletariat in the way Lenin did".

"No, this idea of the dictatorship of the proletariat seems to be essential to the doctrine of communism according to the quotation which you gave us? --- At one stage of its development, yes."

Then My Lord, some questioning followed in which the Witness was at first rather reluctant to admit that this idea was essential, but certain writings of Lenin were put to him, and the conclusion is reached at page 6534, lines 5 to 11. The witness points out that the communists co-operated with various people who perhaps didn't believe in the dictatorship of the proletariat, and my learned friend asked him :

"Yes, he was co-operating with them. But on the question of doctrine he would not have recognised anyone as a true communist in doctrine who didn't accept the dictatorship of the proletariat". "He" here, is Lenin, My Lords, Answer : "Primarily he would not".

"Yes, he would not have accepted him as a communist in doctrine? --- He may have accepted him as a Party member, but not as a communist in doctrine, there I agree".

To My Lords, that in my submission establishes that the dictatorship of the proletariat is an exclusive communist doctrine, and is essential

to communism in the sense that anyone who does not accept that is not a communist in the full sense.

Then My Lord, the second exclusive point which was put to the witness by my learned friend, was the role of the Communist Party, and that is dealt with at page 6584 to 6590 and I think the only passage which I need read is at page 6586, lines 4 to 12. My learned friend referred to a book of Lenin, called What is to be Done, and he asked the following questions :
"In What is to be Done, he.." - that is again Lenin - ".. laid down the idea of a small professional Communist Party which had to lead the revolution? --- Yes".
"Now surely ever since then that has been basic to communism, the recognition of the role of the Communist Party? --- Yes".
"Now that again I suggest is one of the things which might be regarded as essential to communism? --- Yes".
"Characteristic to communism? --- Yes".

Then My Lords, the cross-examination goes on to deal with the interrelation of these two points, the dictatorship of the proletariat and the role of the Party, with the communist idea of revolution, and that is really summarised at page 6590 lines 4 to 13, where my learned friend asks this question :
"Now this idea of the Party, the importance of the Party, the role it plays in communist theory, is really developed in this way, isn't it? That it links up, if I may use a phrase which appears in the evidence, it links up with the dictatorship of the proletariat and the idea of the revolution. The revolution must be

prepared and guided by the Communist Party? --- Yes".
"The dictatorship of the proletariat must be under the control of the Communist Party? --- Yes".
"In fact that is what makes it the dictatorship of the proletariat? --- Yes".

And then My Lords, on the following page, page 6591, the position is summarised as follows :
"By and large, unless you know what a man's views are in respect of the dictatorship of the proletariat, and the role of the Communist Party and violent revolution, you cannot be quite sure whether he is a communist or not? --- It again depends upon conditions you know, because there are certain prescriptions on strategy and tactics and common sense".
"No, I am talking about what he believes? --- As regards doctrine?"
"Yes, as regards doctrine? --- The thoroughbred communist would have to accept these principles, yes".

And My Lords, this theme is taken up again by Your Lordship Mr. Justice Bekker two pages later, page 6593, beginning at line 11 :
Your Lordship asks : 'Does it amount to this, that whatever manifestations of communism may be present, unless there is a reason to accept that he believed in violent revolution and/or the dictatorship of the proletariat, and/or the Communist Party ruling, you cannot call him a communist? --- No, I am again afraid of criteria, Your Lordship. I can imagine a situation, I think it has occurred in history, wherepeople haven't said a word about violent revolution, haven't said anything about

a dictatorship, haven't gone to that extent, but where they have acted in conjunction with other people in a way which made people accuse them of communism, when they were ultimately communists".

That is not a very satisfactory answer, My Lords, because it doesn't say whether these people to whom the witness refers really are communists or not. Your Lordship pursues the question, and Your Lordship says :

"Let me put it on this basis. Assuming a person accepts everything that the doctrine of communism prescribes, but he rejects the dictatorship of the proletariat and/or violent revolution and/or that the party must rule, can you call him a communist? --- If he openly rejects it?"

"He says to himself, I reject all that, but I accept all the rest? --- No, then I would not call him a communist in doctrine, certainly not".

"Not according to the doctrine? --- No."

So My Lords, in my submission the conclusion to which that passage in evidence leads is quite clear, that is that you have got to have these points, and if you haven't got them, then no other resemblance between what a man says and what communists say will prove that he is a communist. My Lord, of course what has just been said here, lands the Crown in a logical impossibility, and provides an additional reason for the concession made by Professor Murray to which I referred a few minutes ago. If one of the points which one has to know about a man before branding him as a communism is his view on violent revolution, obviously one cannot discover his view on violent

revolution by enquiring whether he is a communist. Unless of course, My Lord, he openly avows his belief in the role - in the whole of communism. If he says, I believe everything that Lenin says, including what he said in State and Revolution, then all one has got to do is look what Lenin said in State and Revolution and there it is. But, if one enquireson the sort of lines the Crown has done in this case, whereyou haven't got an open avowal, but you are looking for a belief in points a, b, c, d, e, of communism in order to deduce a belief in point x, which is violent revolution, that process is logically impossible, if what Professor Murray said here is correct. Because you can never infer the presence of the whole of communism unless and until you have got point x. Therefore, it is no use trying to build up the rest of the structure for the purpose of inferring the presence of the belief in violent revolution. And that, My Lords, justifies what Professor Murray saidwhen he said that it is dangerous to try to infer a man's view on violent revolution from his views on other subjects.

But even, My Lord, there is some answer - I don't know what the answer could be - to that logical impasse the Crown gets into, the most that the Crown can possibly contend on this evidence is that an inference of belief in violent revolution could be drawn if the other two exclusive features were present, that is the dictatorship of the proletariat and the role of the communist party. And unless the Crown can show that the Congress movement as a whole had adopted the doctrine

of the dictatorship of the proletariat and of the role of the communist party, I submit that the Crown cannot proceed to the further stage in its argument. My Lords, my learned friend has really made no attempt to demonstrate that these characteristic doctrines were adopted by the Congress movement. He has not done so, because he cannot do so. And among all the documents referred to by my learned friend, there was only one in which he said that the doctrine of the dictatorship of the proletariat was present, and I will deal with that later one, and I will submit that that doctrine is not present in that document. But even if it were, itis perfectly clear that you couldn't on the basis of a single document, which isn't the Constitution or anything remotely approaching that in status, - you couldn't on the basis of that one document infer that the whole Congress movement adopts this doctrine. So My Lords, there is really no serious attempt to show that the Congress movement had these two essential points of communism. And it is worth noting, My Lord, that among the eight Heads which my learned friend gave the Court at the beginning of his argument on communism, and which he said he was going to classify the communist material to be found in the A.N.C. documents, neither the dictatorship of the proletariat nor the doctrine of the role of the communist party appeared.

Now of course, My Lord, my learned friend has argued that a number of other points are exclusive to communist doctrine, and I will deal with his argument on that point, but, My Lord, I think it may be more

convenient before I go on to that, to deal with one other general point which in my submission goes to the root of the whole Crown argument.

COURT ADJOURNS.

COURT RESUMES.

MR. O'DOWD :

My Lord, the next question is whether the Crown has shown whether those parts of communism - whether the Crown has shown that it is impossible to accept those parts of communism doctrine which is manifested by the Congresses, without accepting the whole of the communist doctrine. This of course, My Lords, is closely related to the last point, and the question here really is this, whether the Crown has shown that communism is as it were an indivisible whole, which must either be accepted in toto or rejected in toto, and the submission is that the Crown has not shown that, but that on the contrary the evidence shows that communism is a part of a continues spectrum of belief stretching from the most moderate forms of socialism, through more and more extreme forms to communism, and perhaps anarchism as well, although that hasn't been dealt with to any great extent. But it is clear from Professor Murray's evidence that there not only theoretically could be, but there actually are people and parties who go most of the way with communism, but differ from it on certain limited issues. And in some cases the issues on which they differ are only those essentials which I referred to in the - under the

last head. Some of these mentioned in argument - in evidence, were the Independent Labour Party in Great Britain. That was dealt with at pages 6566 to 6568, also in volume 33. I will read a brief passage on that, My Lords, that is page 6567 commencing at line 13 : My Learned friend Mr. Kentridge had put to the witness certain documents which he recognised as reflecting the policy of the Independent Labour Party, and my learned friend concluded his cross-examination on that issue by putting this :

"Now what appears from them.." - that is the documents - ".. is that the Independent Labour Party did, insofar as its policy appears in these documents, - it is against capitalism, it believes that capitalism leads to war, and that only socialism will end war, it believes in workers' control of industry and industrial democracy, it believes in ending all imperialism, in giving freedom to colonial territories under British rule. It declared that capitalism is based on the exploitation of the workin class, and it asks for economic equality; it believes in the reality of the class struggle, it fears capitalist dictatorship, it is in favour of disarmament? --- Yes, that clearly appears from these parts". "And also from another pamphlet which I show you. It is definitely anti-communist. As you will see here it is extremely critical and hostile so far as the Communist Party is concerned? --- In this paragraph it criticises the Communist Party only because it is too closely associated with Russia, not very much in principle, other parts of its doctrine are quite close".

"Well one again the suggestion I make, Professor Murray, which seems to emerge clearly from what you have said about these and other things, is thatone can find the Party programme which talks about the class struggle, capitalist dictatorship, all these things I have mentioned, and it will be unsafe and unsound to conclude merely from that that the Party is communist? --- It would be unsafe to conclude that the Party is a Communist Party. The Party may have communist tendencies and adopt sections of the communist doctrine."

"As you said before, you get this almost infinite variety of shading over? --- Yes".

And My Lords, other examples which were given, were the position of the wellknown British Labour theoretician, Professor G. D. H. Cole - his position was dealt with at page 6558 to 6560 - I don't propose to read from that, the position is very much the same as what emerged with the Independent Labour Party. And then there was an organisation referred to, it arose because some of its documents were found in thepossession of the Accused, called the African Socialist - the Asian Socialist Conference. And that is referred to at page 6561 to 6563. There again Professor Murray examined certain documents purporting to emanate from this organisation, and my learned friend put this to him :

"And you will see if you look at that and the other document which I will leave with you, that this organisation is very anti-colonial, very anti-imperialist, it analysis imperialism as exploitation and oppression

and as a danger to peace, it is prepared to find that there are perhaps social advances made in the Soviet Union, it seems to welcome the emergence of the present Chinese Government, but it is definitely as you will see, not communist and indeed anti-communist. Have you come across that type of political thinking in the world? --- You meet that very often. Sometimes some communists work with it for the time being, but youget that kind of thing".

"And of course sometimes they do it openly and sometimes not openly? --- Yes".

"Is that not a form of thinking which you get particularly in Asia, in South East Asia? --- I am not very well up on Asia, but you get it".

"Or in Africa. I don't know whether you have seen very much of the West African or North African . . . . . ? --- Yes".

"Well, the point I am making is that in analysing a document like that you would guard against saying that this is communist. You would say it contains communist matter, parts of it are in line with communist doctrine, but you would never say it is communist? --- No, I don't think I did either".

And then the cross-examination goes on to make some similar points about the British Labour Party itself.

Now My Lords, these are merely examples and it is clear from what the witness himself says that many other examples could be found. Now my learned friend suggested that if an idea occurred in communism

and also somewhere else, and my learned friend suggested that the alternative sources which were mentioned in evidence are obscure ones, and he said that the probability is that the Accused got it from communism. Now, My Lords, there are several answers to that. Firstly, I submit it is not at all justified to say that this sort of cross-examination dealt only with obscure and unlikely sources. Some of the bodies quoted above could quite easily be sources of some of the idea of the Congresses. But secondly, My Lord, it can't be taken for granted that all the ideas of the Congresses are second hand. It may be that on some of the points with which they agree with communism the Accused arrived independently at the same conclusion. This seems by far the most likely explanation when one comes to such elementary common sense points as the organisation of youth and women's branches or the belief in mass action or something like that. My learned friend suggests that because that is also found in communism it must come from communism. I submit that that is quite unjustified. On many of these points it is perfectly plausible that communists and the Accused have simply arrived at the same conclusion because they are faced with the same problems and the solutions are common sense ones. But thirdly, My Lords, even if the Accused have adopted certain ideas directly and knowingly from communism, it does not necessarily follow that they have adopted communism as a whole. Some of the examples already given - well, the evidence doesn't go into the question

whether these people like the Independent Labour Party and the Asian Socialist Conference adopted their ideas from communism, or perhaps even vice versa, but if they did adopt them directly from communism, nothing follows from that. Their beliefs still remain distinct from communism, although coinciding with communism over a considerable field. And My Lords, on this question of adoption of ideas even directly and knowingly from communism, without necessarily being a communist, there is also some direct relevant evidence. Professor Murray mentions the point at page 5793. The question here under discussion was whether certain ideas were found both in communist and non-communist sources, and Professor Murray said they may be non-communist, to what extent they are liberal, left, I don't know. He was asked :
"Do you equate communist with liberal left? --- No, it is a tendency towards it along the sliding scale".
And then he is asked :
"Is it in accordance with liberal left doctrine to use the word fascist as descriptive of the policies of a particular government outside Italy? --- A liberal left man would come into touch with communist literature, and - and might, as I did at a certain time, accept that interpretation, the communist interpretation".
Of course, My Lord, that is obviously so. A person interested in politics, and particularly a person towards the left in his ideas, may read communism, and there is nothing to prevent him from saying, as Professor Murray did at one stage, well, some of these ideas seem

to be right, therefore I adopt them. But it doesn't follow that he thereby becomes a communist and a believer in everything, including violent revolution.

This point is again adverted to in volume 30, page 5811. This was apropos of the fact that in a book written by Professor Seaton Watson, who had been described by Professor Murray as an expert on communism, and a person who was consulted by the British Government, certain sentiments on the subject of fascism appeared, which , according to Professor Murray were in line with communist thinking. A passage from the book was read to him, and Professor Murray said that could be communist thinking. And he is asked : 'It could equally well be the thinking of an objective anti-communist observer on South African politics? --- He might find.." - that is the objective non-communist observer - ".. that the communist interpretation is the most objective to use in that situation."
Well, that again is the same point, My Lords. The non-communist observer may find that a certain communist interpretation is the most objective, the most reasonable, the most useful, and he may adopt that without adopting anything further. My Lords, a similar point emerged in connection with a document which was put to Professor Murray, which purported to be astatement made by one Sailor Malan, This is at page 5837 to 5840, and in that document the author called for a united front against communism. And Professor Murray was asked, is that phrase, "united front" as used in that document a communist idea, and he said yes, it is. Although the

context was that it had to be against communism, and therefore obviously the author was not only non-communist, but anti-communist. Of course My Lord, there is nothing unusual about that. It is commonplace for politicians to borrow ideas not only from those who think like them to a certain extent, but even from their worst opponents. And that is just another illustration of the fact that you can get the isolated communist idea or even whole complex of communist ideas adopted by a non-communist.

So My Lords, on these illustrations and many others which one could find in the evidence, it is clear that communism is not an indivisible whole, it is not something which one must either accept in toto or reject in toto, but it is a daily occurrence for people to accept parts of it and reject other parts. Therefore the presence of the whole cannot be inferred from the presence of any one part or any combination of parts short of the whole. And it follows that the presence of any one part cannot be inferred from the presence of any other part. And that again of course, My Lords, is what the Crown is trying to do. It is saying - as I pointed out a little while ago - one has in the documents such and such parts of communist doctrine, therefore one infers the presence of the whole of communist doctrine, therefore on infers the presence of the further part, namely violent revolution. That argument would only be valid if communism were an indivisible whole. If it is not, then the whole logical structure falls apart.

MR. JUSTICE KENNEDY :

Well, on Professor Murray's evidence, the Crown's own expert, there the various ideas contained in the ideology, can be separated.

MR. O'DOWD :

That is so, My Lord, that is the point I am making. And My Lords, I submit this is a further reason why Professor Murray was right in his concession about the danger of inferring a man's belief in violence from his belief in other points. And therefore, My Lords, there is no reason to reject the Defence evidence, which is clearly to the effect that whatever ideas one may find in the Congress ideology which coincide with communism, the Congresses did not accept communism as a whole. My Lords, I don't know whether it is necessary for me to refer to the Defence evidence on that. I submit that every Defence witness had this put to him, and they all said that the Congresses had not adopted communism as a whole.

Now My Lords, the next general point which has to be dealt with, is the question of the communist doctrine of violent revolution, and what exactly communism does say on that. Now My Lord, the Defence does not deny that there is a doctrineof violent revolution in communism. But in order to succeed, the Crown must show the applicability of this doctrine to the situation with which we are concerned. If the Crown were to show for instance that according to the Marxist analysis there will eventually be a revolution in South Africa, but that

this cannot be expected for at least a hundred years, such a doctrine would have no relevance to a charge of high treason. The Crown must show either that the communist doctrine of violent revolution admits of no exceptions, or that present day South Africa is not one of the exceptions.

My Lords, the proposition of the doctrine admits of no exceptions is untenable on the evidence, and in fact has not been contended for by the Crown. The Crown does admit that the evidence shows that there are some exceptions in the doctrine. In our submission, My Lord, the Crown argument as to the exceptions is not supported by the evidence. My Lord, the first point which has to be made is that on the evidence the doctrine of violence applies to the socialist revolution, not necessarily to the so-called bourgeois democratic or national democratic revolution. And that, My Lords, is dealt with by Professor Murray in volume 34, page 6625 to 6626. My learned friend was asking Professor Murray what exactly the bourgeois democratic revolution was, and he pointed out that one example of it is given in the Marxist classics, was the French Revolution, which was a violent revolution. Then my learned friend asks this :

"According to Marx and Lenin, I think a bourgeois democratic revolution took place in Germany in the 19th century or is that wrong? --- Yes, I think that is so".

"Well, what would that revolution have been? What was it in history, when was it? It was really a process,

as they saw it, not a violent revolution? --- Yes, it was a process".

"Certainly as far as what you call the first stage revolution, the bourgeois democratic or bourgeois revolution or national democratic revolution, in Leninist and Marxist theory it is not held that that revolution must be violent? --- No, it is a necessary revolution for the other to take place, that one need not be a violent one".

And the subject is taken further on the following page, 6626 :

"For instance, as far as England is concerned, I suppose at - England, at least since the war, has had a degree of socialism, and isnot only a bourgeois democratic state, but it is a bourgeois democratic state with elements of socialism in it, but there is no theory that that could only have come about through a revolution? --- Yes".

"And similarly, as you have said, in - India today would be regarded, or Ghana would be regarded as bourgeois democratic states, and there is obviously no communist theory that that happened by revolution in the violent sense? --- No."

Now My Lords, that extract from the evidence disposes of both the grounds on which my learned friend tried to get out of this difficulty in his argument. Your Lordships put to him this distinction between the bourgeois democratic revolution and the socialist revolution, and asked him whether it was not the position that the bourgeois democratic

revolution could be non-violent, and my learned friend's answer was that the bourgeois democratic revolution has to be violent as soon as an element of socialism is present, and he also seemed to suggest that the bourgeois democratic revolution has to be violent in modern times, whatever may have been the position in previous centuries.

Well, My Lords, that is certainly not borne out by what I have just read, where it is said that certain modern examples of the bourgeois democratic revolution, such as India and Ghana were not violent, and that the position in England, where you have got bourgeois democratic state with elements of socialism, is also - communism doesn't say that that has come about by violence. My Lords, my learned friend didn't quote any evidence in supportof his submission that the - any element of working class revolution or socialist revolution mixed in with bourgeois democratic revolution automatically brings violence. He merely asserted that, and I submit that his assertion is not borne out by the evidence. My Lords, I think it is clear from Professor Murray's evidence that the bourgeois democratic or the national democratic revolution is the one which, according to the doctrine, has to take place in semi-colonial countries, which is what South Africa is regarded as. That appears in volume 24, page 4681, and I read from line 13 - this is Professor Murray in chief. He is asked :

"Is there any connection between colonial and semi-colonial countries to which you have referred to before and the national democratic revolution to which you have

also referred to before? --- The theory there is that in the colonial and semi-colonial countries there will be the liberatory movement and the first stage of the policy of the Communist Party would be to co-operate with the liberatory movements, to bring about what is called the bourgeois democratic or the national democratic revolution, thereby to break the back of the capitalist domination and capitalist institutions, in the particular territory whether it is colonial or semi-colonial."

But the evidence doesn't stop there, My Lords, because it goes on to deal expressly with the question of how this aspect of the doctrine would apply to the objects set out in the Freedom Charter. My learned friend contended that because there ar socialist elements in the Freedom Charter, that would take the position out of the bourgeois democratic revolution in the strict sense and put it into the socialist revolution, which has to be violent. But My Lords, my learned friend's witness expressly contradicts him on that. Page 6629, - here my learned friend Mr. Kentridge was making the point that there is a rather thin dividing line between people's democracy as it appears in communist theory and bourgeois socialism. In both cases you may find a partial nationalisation of industry and such features as the redivision of the land, but what distinguishes the people's democracy from the bourgeois socialism is that under the people's democracy you have the Communist Party in control, and it aims at taking the matter further towards the complete dictatorship of the proletariat. And my learned friend pointed out that

- I read from line 11 :

"If you merely have the external features of a certain degree of socialism, nationalisation of mines et cetera, the redivisionof the land, universal franchise, as far as that is concerned it might be a people's democracy as you say, but it might not be? --- No."

Then my learned friend asks this :

"Now in communist theory as you have given us the authorities, there is nothing at all to say that what I call these external features of people's democracy, nationalisation or redivision of the land, that that can only come about by a violent revolution? --- Not the bourgeois revolution, no."

"In other words, professor, if you look at the Freedom Charter as it stands, you don't know what their idea may be about voting, we don't know the extent to which there will be a dictatorship but just taking the Freedom Charter on its face value, there is nothing in communist theory which says that that can only be obtained as far as it goes by violence? --- Not as far as their documents go, no."

"ell, My Lords, since it is clear that the aims of the Freedom Charter were the aims of the Congress movement, at least for the foreseeable future, what becomes of the Crown argument that on communist theory there had to be a violent revolution in the foreseeable future? In my submission, My Lords, the evidence quite clearly establishes that for the sort of objectives which is - which it is common cause the Congress movement had in mind, communist doctrine does not

call for necessarily a violent revolution. And My Lords, I submit that that is really the complete answer to the Crown on this point. But there is a further aspect of this matter which has been raised in the evidence, and which must be dealt with briefly, and - the point can be taken even further, because on the evidence it is not an inflexible rule of communism that even the socialist revolution must always be violent. This was conceded in general terms twice by Professor Murray, at page 6633, line 3 - there he was asked this : "As far as this theory of violent revolution is concerned, that is even in the sense of the violent dictatorship of the proletariat revolution, there have from time to time been differences in the expression of the view. I think you pointed out that Marx and Engels, once ? one thought that there could be a full socialist revolution in England and America without violence? --- Yes".
"But that Lenin dropped that view? --- Yes".
"Now I think you have referred to a book called the British Road to Socialism, and English published Communist Party publication? --- Yes".
"That seems to suggest that you could have full communist socialism in England without violence being necessary, though it is possible that you would have to have it? --- Yes".
"And then there was that speech of Kruschov's at the Twentieth Party Congress, in which he said that it might differ from country to country? --- I think the point that he made is that there need not be violence unless the dispossessed classes objected, then there

would have to be violence."
"Unless they objected violently? --- Yes".

And another reference on the same point, My Lord, in volume 30, page 5934, the cross-examination here was on the point whether a reference to non-violence in the documents was a contra-indication of communism. And Professor Murray said it wasn't. He was asked this at line 5 :
"Is non-violence compatible with communism? --- At certain stages non-violence has been preached as an expedient measure, as co-existence, in my interpretation at least. It is a neutral phrase, it does not mean - it does not bear much on the type (?) of paragraphs I read."

The point that the witness is making there is that it was a neutral phrase for the purpose of determining whether this document was communist or not. And the point is underlined, the witness is asked : "Method need not be violent? --- It is clearly stated on certain occasions and recently stated again, that the method need not be violent under certain very special circumstances".

Now My Lords, the speech of Kruschov to which reference has been made, will have to be referred to in detail in connection with the personal position of Mandela, because he referred to it in his evidence. I don't want to deal with it in detail now, and I simply make the general point that there is this possible exception even as far as the socialist revolution is concerned.

So My Lords, in my submission, the Crown case collapses on this central point, that the doctrine of violent revolution has not been shown necessary to be applicable to the situation with which we are dealing.

Now My Lords, these are the basic logical objections which the Defence say at present in the Crown argument, and I now proceed to examine in somewhat more detail some of the points which we made by my learned friend, and firstly the point which he said were exclusively communist, on which point of course he went a lot further than the evidence which I have just quoted. I submit, My Lord, that his argument on that point is really disposed of by the evidence which I have just quoted, because Professor Murray was quite clearly asked what are the exclusive features of communism, and if he had taken the same view of the matter which my learned friend takes, he would have said so. But alternatively, My Lord, one has to examine these various propositions in detail and I turn to the Heads of Argument on communist dogma which were submitted to the Court by my learned friend. The first allegedly exclusive point contained in his Heads of Argument was in paragraph (d) of Chapter 1. Now, the typed submissions handed in didn't say that this was an exclusive point, but my learned friend in his verbal argument did say the application of this paragraph, which refers to nationalisation of industry, that complete nationalisation was an exclusively communist idea. My Lords, he quoted no evidence in support of the proposition that complete nationalisation is an exclusively communist

idea, and I submit that that submission is without foundation. It is covered by the evidence which has already been quoted. Nationalisation is mentioned as one of the things which communism has in common with the Independent Labour Party, Professor Cole, the Asian Socialist Conference et cetera, and in dealing with the distinctions between those bodies and communis, Professor Murray never makes the point that they stand for only limited nationalisation whereas communism stands for total nationalisation. Indeed, he could not make that point, because the British Labour Party, although it nationalised only some industries during its term of office after the last world war, nevertheless stands for nationalisation as a general principle. And that emerged from a quotation of a work of Lord Atlee, which was mentioned in evidence, volume 33, page 6563. The book, The Labour Party in Perspective, had been identified by Professor Murray as being by Lord Atlee and containing British Labour Party ideas, and the following quotation was read : "It is part of the programme of the British Labour Party to secure for the workers by hand or by brain ? gain the full fruits of their industry and the most equitable distribution thereof that may be possible, upon the basis of the common ownership of the means of production, distribution and exchange." That of course, My Lords, though it doesn't appear from the evidence in so many words, is wellknown - is a wellknown general principle of the British Labour Party. And there is nothing to show that the Labour Party in principle places any limitation on that.

Now My Lord, I pass on to Chapter II of my learned friend's typed submissions, which deal with dialectical materialism, and this chapter has ten paragraphs in it, setting forth various aspects of the doctrine of dialectical materialism. Paragraph 10 says "Principles of dialectical and historical materialism as set out in paragraphs 1 to 9 supra are exclusively communist". Now Your Lordships questioned by learned friend on this submission, and what he eventually seemed to contend was that all the principles in 1 to 9, taken together, were exclusively communist. He conceded that Professor Murray didn't say so. His reply to that difficulty seemed to be that anything with which Professor Murray dealt with in chief, and which was not shown in cross-examination to appear in some other doctrine, was therefore exclusively communist. Your Lordships I think indicated that that submission was not very acceptable at the time. I submit, My Lord, that it is completely unacceptable, quite apart from the question of onus. That submission is disposed of by the evidence already quoted. When Professor Murray was asked what are the real exclusive points to distinguish communism from other versions of socialism, he could quite easily have said everything on which I have not yet been cross-examined. But he didn't say that. In any case, My Lord, the evidence establishes that there is nothing exclusive about these philosophical principles of dialectical materialism. Professor Murray quite clearly said that the dialectic - the . . . . . of the dialectic process came from Hegel, and went back as

far as Socrates, that is at page 6574, and far as materialism is concerned, one knows that that has also been a school of philosophy for a long time. On various of the particular points made in chapter 2, paragraph 5, My Lords, it simply sets out that the world is not constituted by mind (?) according to dialectical materialism, but mind is a reflex of the material conditions. That is simply the general statement of materialism as opposed to idealism, and I submit that there is no possible basis for the suggestion that that is exclusive to communism. In paragraph 8 one finds the communist theory of history set forth. The argument is that throughout history, except in the first or primitive stage when people supposedly lived on hunting, exploitation and the class struggle existed. After the primitive stage followed the stage of slavery, the slaves exploited by slave owners, and then followed the feudal system in which landowners exploited serfs. Then came capitalism with capitalists exploiting the proletariat. The final stage will be communism when production for profits and the class struggle and exploitation will have ceased.

Well, My Lord, this paragraph consists partly of trite propositions of history, that there was a stage of slavery, a stage of feudalism and a stage of capitalism. To those is added the idea of the class struggle which is conceded by Professor Murray and even by my learned friend not to be exclusively communist. And onehas only this final sentence, "the final stage will be communism", which distinguishes what is in this paragraph from anything else. My Lords, my learned friend

was asked whether he would not concede that everything up to the last sentence could be bourgeois socialism, but he refused to do so. My Lords, I submit that his refusal was quite unjustified. It is clear on the evidence that the idea of exploitation, the idea of class struggle and obviously these elementary propositions with regard to the various stages of history are not exclusive to communism.

Another point in this chapter which is obviously not exclusive to communism is paragraph 9, on the unity of theory and practice. It says that communism emphasises that theory and practice are united, are really identical for the mind reflects material development. Theoretical understanding is necessary for the purpose of understanding its position, and theoretical understanding is conditioned by the material conditions of the particular situation. My Lord, that seems to me, with respect, to be nothing more than a rather verbose statement of the proposition that one should be guided by theory, but one's theory must be of a practical kind, and one can hardly suggest that nobody but communists should ever have thought that.

My Lords, on the general approach to dialectical materialism, if my learned friend says that each of these paragraphs in chapter 2 by itself is exclusive to communism, I submit his submission is quite obviously untenable. If he says only that all these propositions taken together as a complete system are exclusive, then as will emerge later when we come to deal with the documents, most of the documents in which he finds

dialectical materialism must be deleted, because there is not one of those documents in which one finds all of these propositions in chapter 2. What my learned friend does in practice when he is applying dialectical materialism to documents, is he finds a phrase like "qualitative leap", and says that is dialectical materialism. And I submit that the submissions in this chapter is no support for the idea that one can take an isolated part of dialectical materialism like that and say that that is exclusively communism.

My Lord, I pass to chapter 3 of the - of my learned friend's submissions on dogma; There is a paragraph 5 where my learned friend is dealing with the so-called laws of capitalism, which are found in communist theory, where one finds the law of increasing misery with the position of the proletariat getting worse and worse, and the law of accumulation and concentration of capital, that the capitalist class becomes richer and smaller. My learned friend says in paragraph 5, that the three laws of capitalism mentioned above can also be found in concepts accepted by non-communist writers. This statement is however subject to the following qualifications. (i) There is nothing on record to show that these concepts are proper to another i.e. another - i.e. communist school of thought as distinct from mere individual writers. (ii) The law of increasing misery of the masses is not shown on record to have been accepted even by individual non-communist writers. Reference is merely made to the misery of the masses, e.g. in the writings of a non-communist like Professor

Murray himself. This distinction is significant for if the misery is not progressive, the ultimate collapse of the system becomes avoidable.

My Lords, I am not very sure what this paragraph is meant to mean. It is not clear whether my learned friend does or does not say that these laws are actually exclusive. But insofar as this paragraph may be taken to mean that, I submit that the reasons given are not supportable. Again one finds the attempt to throw the onus on the Defence that there must be something on record to show that these concepts come into another school of thought, and that is not correct, it is obviously for the Crown to show that they don't. Secondly, My Lords, this distinction which my learned friend seeks to draw here between things which one finds in individual writers, and recognised schools of thought, I submit there is nothing in that distinction. An individual writer may become the founder of a school of thought. Exactly when his disciples become entitled to the title of "school of thought" I don't know. But at all events, if the Congress were influenced by some individual writers, then one would imagine that they would be a school of thought following that writer. I submit, My Lord, that there is no basis shown for the suggestion that these laws of capitalism are exclusive to communism.

Then in the same chapter 3, there is a paragraph 7. It deals with the main contradictions which are said to be inherent in capitalism, according t communist doctrine. There is a distinction - a contradiction between the ever growing proletariat and the

ever growing proletariat and the capitalist class becoming continually wealthier; there is a contradiction between competing capitalist nati nalist states, inevitably leading to war. And symtomatic of the contradictions of capitalism are the repeated crises, periods of deflation and inflation and the waste of over production. And in paragraph 8 my learned friend says : The inevitable destruction of capitalism by the proletariat referred to in paragraph 7 above, has not been shown to be part of any other than communist school of thought, and is therefore an exclusive communist approach.

MR. JUSTICE KENNEDY :

Did the Court intervene at that stage and said that that is putting the onus on the Defence? Or there was some interventi n by the Court.

MR. O'DOWD :

Yes, I think that is so, My Lord. At all events I submit that that is the objection to that particular paragraph, that it is not for the Defence to show anything, and in particular it is not for the Defence to refute a proposition that the Crown evidence never suggested. If Professor Murray had said what appears in this paragraph, the Defence would no doubt have cross-examined him on it, but he didn't say it, and it was not necessary for the Defence to deal with that.

Then lastly, in this chapter, paragraph 11 says that the communist criticism of capitalism is connected with the communist concept of revolution. The theory is that the growing proletariat must inevitably rise and revolt against the capitalists, who will entrench

themselves in the institutions of state. This dogmatic acceptance of the inevitability of revolution is an exclusively communist concept. My Lord, there I don't dispute that there is a communist theory of revolution which is one of its distinctive features. Exactly what that theory is will be dealt with in a later part, and will emerge.

Now My Lords, going on to chapter 4 of my learned friend's submissions, paragraph 3, this deals with the division of the worldinto two camps. The paragraph reads : According to communism, the world is divided into two inevitably opposing camps. On the one hand the communist bloc, on the way, as it considers, to the final achievement of communism. This communism regards as the peace loving bloc. On the other hand, the imperialist or capitalist bloc, referred to in communist literature as the war mongering bloc of countries where capitalism exists. Acceptance of either proposition is exclusively communist. The later (?) imperialist bloc consists of the dominating imperialist powers on the one hand, and the exploited oppressed colonial or semi-colonial countries on the other.

Well, once again, My Lord, there is simply no suggestion in Professor Murray's evidence that these features are exclusive to communism. The passage from Professor Murray's evidence quoted in support of this paragraph simply says that these ideas do occur in communist theory. It is rather difficult, My Lords, to understand exactly what the

exclusive pr position or propositions in this paragraph are alleged to be. One starts with the proposition that the world is divided into two inevitably opposing camps. My Lords, the proposition that there are two opposing camps in the world, I submit is nothing more than a trite statement of fact. Then, the next sentence says that on the one hand the communist bloc is on the way to the final achievement of communism. Well, perhaps that is a controversial proposition which many non-communists would dispute, but it is difficult to see why a non-communist couldn't accept that - couldn't accept the proposition that the communist bloc is on the way to the achievement of communism. Then the next point is the characterisation of the communist bloc as peace loving and the non-communist bloc as warmongering. My Lords, on this point the Crown position is a little difficult to understand, because the Crown relies on the fact that there is a body called the World Peace Council, which is a communist front organisation, which is presently putting out propaganda on this very point, and according to the evidence of the nature of a front organisation, it is intended to attract the support of non-communists and the public in general. Its function is to put across certain aspects of communist theory in such a way that they attract non-communists, and it does that by concealing its own communist nature and pretending to be an impartial and unbiased organisation. Now, My Lords, does the Crown suggests that all these activities of the World Peace Council have been so much waste of time and energy? If not, why is it not

possible that a non-communist may have been deceived by some of the propaganda of the World Peace Council? I submit that it is quite indefensible to say in the same breath that a particular proposition is exclusive to communism, and that it is put forward by an ostensible non-communist body, which might be accepted by the public as non-communist.

Then My Lord, the same chapter, paragraph 6 deals with the liberatory movement, and it says that there is a liberatory movement which communists have to co-operate with and that only to the extent that appears . . . . . can communism be obtain and oppressed people really achieve liberation. And the paragraph ends with the following sentence : "The idea of liberation only through the final victory of communism is exclusively communist". Well that, My Lord, I have no quarrel with. Obviously if you look for the final victory of communism, you mustbe a communist. But of course, My Lords, in dealing later on with the documents, you have to see whether the documents which my learned friend brings under this heading really do say - really do advance the idea of liberation only through the final victory of communism or whether those documents in fact merely talk about liberation. The point to be made for the present is that the Crown does not contend that the idea of liberation as such is exclusively communist.

Then paragraph 7, sub-paragraph (c), of the same chapter, is dealing with the concept of imperialism, and it says this : The concept of imperialism

as the highest stage of capitalism is nowhere shown to be non-communist. It is submitted that this description of imperialism is directly in line with the dialectical materialist concept of history as consisting of certain set stages moving ever upwards. This is an exclusively communist view. Well, My Lord, I am not very sure what the second and third sentences of that paragraph mean, but it seems that what my learned friend is intending to say in this paragraph is that the concept of imperialism as the highest stage of capitalism is exclusively communist, because it is nowhere shown to be non-communist. The short answer to that is that it is nowhere shown to be exclusively communist.

My Lords, in the types submissions as they originally appeared, there were alleged to be exclusive elements of communism also in sub-paragraphs (e) and (f) of paragraph 7, but those were abandoned in the course of my learned friend's argument.

Passing on now to chapter 5, the first paragraph to be dealt with is paragraph 6. It reads as follows : Imperialism will only be removed by the use of force, and therefore war and revolution aimed against imperialism is justified and necessary. This view in its dogmatic acceptance of the necessity of violence to overthrow imperialism is exclusively communist. My Lord, it is rather difficult to deal with these paragraphs because they so seldom say what exactly the exclusive proposition is supposed to be. If this paragraph means that the view that violence is necessary to overthrow imperialism is exclusively communist, then the

evidence of Professor Murray does not support it. In the extract from the evidence given in the typed submissions in support of this paragraph, there is one that reads as follows - it is a quotation from the Comintern Programme - : Fundamental slogans of the Communist International in this connection must be the following : Convert imperialist war into civil war; defeat the home imperialist government. My Lord, it is very unhelpful to have a quotation which contains the words "in this connection" without being told in what connection. If one looks at the full quotation at page 4702 of the record, one sees that the connection is the existence of the so-called imperialist war. When such a war has broken out, these slogans set forth here are supposed to be the slogansof the Communist Movement. But this quotation doesn't purport to lay down any general rule about what happens to imperialism. And the other quotation given, is from the Communist Manifesto. It is the famous quotation beginning, "The communists disdain to conceal their views and aims..." and it says that the forcible overthrow is envisaged. But of course, My Lord, the Communist Manifesto doesn't deal with imperialism at all. Professor Murray's evidence was to the effect that the theory of Lenin imperialism was only devised by/at a later stage in the development of communism.

My Lords, paragraph 7 on the following page says that it is an exclusively communist view to see the liberation movement as an international movement, connoting wherever it exists not merely liberation from

national oppression, but also ultimately liberation from class oppression. In this aforesaid view, the liberation movement in undermining imperialism, serves as an instrument for world communism, and as such deserves support. My Lord, the view that the liberation is an international movement is not only not an exclusively communist view, but it is not a communist view at all. My learned leader Mr. Maisels has already quoted the extract from Professor Murray's evidence in which he pointed out that communists don't see it as an international movement in the sense of an organised movement, but simply as a tendency in international affairs consisting (?) of a number of movements. As far as the last sentence is concerned, that the liberation movement serves as an instrument for the achievement of world communism, that can be conceded to be a particularly communist view, because it implies the objective of world communism. Of course, My Lord, there again it would be no good without the implication that world communism is the aim.

Chapter 6, My Lord, on fascism, the paragraph 3 does not in terms purport to set out an exclusive feature of communism, but my learned friend seems to be attempting in some way to elevate this proposition to a status a little higher than that of just consistent with communism, and says the concept of the united front against fascism is a particularly integral part of the policy of the Comintern. No other known political party has ever concept - has ever accepted this concept as its own, although

possibly it may have been used by other parties. That isn't borne out by the evidence, My Lord. My learned friend says in this paragraph "no other known political party has ever accepted this concept as its own", and the evidence which he quotes in support of that in the same page of his typed submissions - there Professor Murray is asked :

"Do you know of any other political body that took over that slogan as its own in the political field? --- No, I don't know of such a party".

My Lord, there is a difference between the proposition that Professor Murray didn't know of such a party and the proposition that there is no other known political party. At all events, My Lords, that isn't really put forward as an exclusive proposition.

Then in the same chapter, paragraph 7 on page 9, that was abandoned by my learned friend in his verbal argument. And paragraph 8,

Then chapter 8, the only point here is made in paragraph - I beg Your Lordship's pardon, I am going on to chapter 7. The only exclusive concept alleged in this chapter is in paragraph 7, where it says that the concept of the withering away of the state and the dictatorship of the proletariat are exclusively communist, and the concept of a classless society emerging from this process of the withering away of the state is similarly an exclusively communist concept. My Lord, as far as the dictatorship of the proletariat is concerned, the Defence agrees with that. As far as the withering away of the state is concerned, that is a

somewhat academic conception which is really bound up with the dictatorship of the proletariat, it is supposed to be the end to which the dictatorship leads and one can concede that that is also exclusive communist. Then the concept of the classless society, provided one emphasises the words in this paragraph, emerging from this process, is also exclusively communist, provided the classless society is seen as emerging from the dictatorship of the proletariat leading in turn to the withering away of the state and the classless society, that I wouldn't quarrel with. But, My Lords, of course the classless society in itself, without the dictatorship of the proletariat coming first, is not shown to be - as far as one sees is not contended to be exclusively communist.

Now in chapter 8, My Lords, the first paragraph, paragraph 1 deals with the communist concept of morality, and my learned friend added a verbal submission that the attitude to morality here set forth is exclusively communist. There again, My Lords, there is no evidence to support it, Professor Murray didn't say that thiw as exclusively communist, and the attitude here set forth was really just an application of the idea that the end justifies the means. It says that you can use whatever method you want to to achieve your ends. My Lord, my learned friend simply said in argument that the attitude to morality set forth in this paragraph was exclusively communist. Of course insofar as this paragraph says that or implies that the objectives to which one can use any method, are the objectives of

communism, that may be exclusively communist. But the mere idea that the end justifies the means, you can use any method, there is no basis for saying that that would be exclusively communist.

Then paragraph 7 of the same chapter, My Lords, this is on the role of trade unions, and it plays a very large part in the subsequent stigmatisation of documents. It reads as follows : Communism teaches that every communist should belong to a trade union, even a reactionary one. Communists should attack reformism in the trade unions, defend trade union unity nationally and internationally on the basis of the class struggle; subordinate all tasks to the struggle for the dictatorship of the proletariat. According to communism, trade unions should therefore not merely take active part in politics, but should aim at the defeat of reformism, i.e. the idea of obtaining reforms through parliament. They should insist on the working class unity, even at the cost of loyalty to the national state. Thus e.g.g trade unions should not support so-called imperialist wars. On communist theory also, trade unions should not attempt to reconcil/differences based on class,. . . . . to capitalists, but should assume the inevitability of continuous class struggle leading ultimately to the victory of the proletariat. The mere idea of trade unions taking part in political movements is communist, but is not exclusively communist. The anti-reformist trade union policies as set out above are exclusively communist. My Lords, if one takes the whole of that paragraph as it stands, including the

reference to the dictatorship of the proletariat as the task to which everything must be subordinated, then of course it is exclusively communist. But, nothing less than that is shown anywhere in the evidence to be exclusively communist. My learned friend did attempt to show in re-examination of Professor Murray that there was an anti-reformist communist attitude in the more general sense which could be characterised as exclusively communist. Thenrelevant extract from the evidence is set out in my learned friend's typed submissions, page 16 of this chapter, the quotation comes fr m page 6798 of the record, and the evidence reads as follows :

"You mention here the use of trade union organisations in terms of the two interpretations of socialism, bourgeois socialism on the one hand in the sense of non-communist socialism, and the communist socialism on the other? --- Yes".

"Do those two different interpretations in any way affect the whole question of tactics and strategy of on the one hand the bourgeois socialists and on the other hand the communists? -- Yes, I think it does, for bourgeois socialism trade unions are used often to co-operate with the capitalists, at times to oppose them. And on the other hand Karl Marx pointed out that while trade union organisations were very important for developing class consciousness, they could become reactionary movements, and that a strong revolutionary party was necessary to lead the labour movement on to its revolution - to lead the proletariat on to its revolution. There are two definitely

differing attitudes towards trade unions in the two doctrines." Well, My Lords, that suggests a difference between communism and bourgeois socialism. But it does not clearly set out an exclusive doctrine of communism on which one can definitely put one's finger. It is simply a statement that there is a lifference of emphasis. And My Lords, I submit that this quite fails to justify what one will see in examining the documents is in effect the stand of the Crown, that as soon as you find the phrase anti-reformist or criticism of reformism, you have got communism. What it really amounts to is that the paragraph 7 as set forth gives the correct test that the communist attitude towards trade unions subordinates everything to the struggle for the dictatorship of the proletariat. If you can show that that is present in a statement about trade unionism, then you have communism. But if you can't show that that is present, I submit that nothing can be inferred on the evidence as it stands merely from the phrase "anti-reformism" and from some general attitude which could be described as anti-reformist. Obviously the question of anti-reformism is a matter of degree. One gets less extreme political parties who simply want to make minor changes in the existing situation, and there is a continuous shading over towards those who want to bring in very drastic alterations in the present situation. Exactly where along that spectrum you draw a line and say on this side is reformism and on that side is anti-reformism is very much a matter of opinion, and the only accurate test in distinguishing these different attitudes to trade unionism

documents, that the Crown really regards the mere use of the phrase people's democracy as unequivocal evidence of communism. In the submission of the Defence that is not justified. It may be that the Crown is correct in saying that there is no existing state which is known to political scientists as a people's democracy, or is even known to the general public as a people's democracy other than certain communist states. But My Lord, that doesn't dispose of the Defence evidence, which is to the effect that in Congress circles, the phrase people's democracy is used to mean simply a democracy for all the people. There is a very great body of defence evidence on that - I don't want to refer to all of it - but I could start ...

MR. JUSTICE KENNEDY :

I think Mr. O'Dowd, Mr. de Vos altered paragraph 7, page 2 of his Heads, when he came to deal with page 13 by striking out "there is no evidence of any existing people's democracy which is aat the same time a non-communist state," altering it to "all known people's democracies are communist"

MR. O'DOWD :

Yes, I beg Your Lordship's pardon, that is quite correct. My Lord, that alters the submission in such a way as to avoid any suggestion of putting the onus on the Defence, but it remains in essence the same point that the term "people's democracy" is generally applied to certain communist states. My Lords, as I said, the evidence is that the Congress movement had a different view of this phrase. Dr. Conco

is to use the dictatorship of the proletariat as the the criterion.

COURT ADJOURNS.

COURT RESUMES.

MR. O'DOWD :

My Lords, I proceed to chapter 9 of the Heads of Argument on Dogma. The only point to be made here is that the Defence agrees with the statement which appears right at the beginning, paragraph 1 describes fronts or tranamissions as bodies not professedly communist. Whatever else the so-called front may or may not be, My Lords, it is common cause that they are not professedly communist, and in my submission it follows from that that no inference of communism can be drawn from support of these bodies, unless it be shown that the person supporting has some form of inside knowledge of the allegedly communist nature of these bodies.

Then Chapter 10 of the Heads of Argument deals with the doctrine of revolution. My Lords, I have nothing further to say there. The question of the Defence submissions on the doctrine of revolution have already been adequately set forth.

My Lords, there is no chapter 11. The next chapter is No. 12, and it deals with the question of people's democracy. Now, My Lord, in this chapter my learned friend makes the point that there is no known state other than a communist state which is referred to as a people's democracy. That is said in paragraph 7. And it emerges from the later treatment of

deals with this at page 10866. He is asked in chief : "What did you understand that phrase 'people's democracy' to mean? --- I understood that phrase 'people's democracy' to mean a democracy for all the people - representative of all the people irrespective of race, particularly referring to South Africa." And he goes on to say that "true" democracy and "real" democracy and - can be used interchangeably to mean the same thing.

My Lords, I don't want to read all the Defence evidence on the point, but the same point is made by Luthuli at page 11809, Nkalipi at page 15647, Mandela at page 15876, Maolaba at page 17221/3, Yengwa at page 17658/9, and Matthews at page 18150. They all agree that when the Congress Movement uses the phrase "people's democracy", it simply means a democracy for all the people. Now of course, My Lord, this meaning I submit is consistent with the plain meaning of the words, and there is no reason for suggesting the idea that an ordinary person who hadn't been familiarised with the specialised meaning of the word in communist theory would accept it in that sense. And furthermore, My Lords, there is a document before the Court, which seems to be a possible source of this Congress movement acceptance of the phrase "people's democracy". That was in fact referred to by Dr. Conco as an origin of his understanding of the phrase "people's democracy", and the document is Exhibit A.A.N.M? 14. It is entitled The Basic Policy of the A.N.C. Youth League. Now My Lord the evidence about this document is that it is an important document which was devised by the Youth League

(CONTINUED ON PAGE 23964)

in the early days of its existence, which was very extensively discussed by the Youth League, and was in fact what it is purported to be on the face of it, that is a statement of the basic policy of the Youth League. Dr. Conco, at page 10853, line 20, makes the point that it formed a basic study of the African National Congress Youth League principle. The document was dealt with in some detail by Mandela, in Volume 74, he deals with it from page 15761 to 15771. He testifies that he was one of those who helped to draft it; that it was adopted by the Youth League after wide discussion. Therefore My Lord, it would seem that this i a document which may have helped to mould the thinking of many A.N.C. people.

MR. JUSTICE KENNEDY :

Do you say then in regard to the term "people's democracy" that it is capable of two interpretations?

MR. O'DOWD :

Yes. And My Lord, the point about this document is that it uses the term "people's democracy", the document itself is - this passage from it is read in at page 10865 in the course of the evidence of Dr. Conco, and the relevant passage begins at line 25 It is a passage on the basic position of African Nationalism. It says that Africans can admit Europeans to share the fruits of Africa, that this will be based on the preparedness of the Europeans, once they agree to an equitable proportional redistribution of the land, and to the assisting of the establishment of a free

people's democracy in South Africa particularly, and in Africa generally. And My Lord, it is clear that this document is not a communist document, and is indeed an anti-communist document. The fact that I think it is not a communist document must be common cause, because my learned friend does not refer to it even as being consistent with communism. There is one paragraph in it which was explained by Mandela, one of the authors of the document, as being actually an attack on the Communist Party. That is the paragraph headed . . . . . of Foreign Methods. It is referred to at page 15768/9, and the evidence is as follows.

"I would just like to take you back to your document. It has a paragraph headed . . . . . of Foreign Methods. It reads, if you recall it : 'There are certain groups which seek to impose on our struggle cut and dried formulas'? --- Yes."

"Now what was the object of that paragraph? Who was being criticised in this paragraph? --- This clause referred to communists. The Youth League was strongly anti-communist in its orientation, and this clause referred to communists." Then he quotes the clause in full. "There are certain groups who seek to impose on our struggle cut and dried formulas which sofar from clarifying the issues of our struggle, only serve to obscure the fundamental fact that we are oppressed not only as a class but also as a people, as a nation. Such wholesale importation of methods and tactics which might have succeeded in other countries like Europe,

where conditions were different, might harm the cause of ourstruggle andpeople's freedom. Unless we are quick in building a national and militant liberation movement."

So My Lord, if one assumes the position of an A.N.C. member is not made - who has not made any particular study of communism, but had read and even studied this document, why should such a person not think that people's democracy is a non-communist term? I don't deny My Lords that the term may be communist in origin. It is possible that it may originally have founds it way into A.N.C. parlance through an A.N.C. member who was also a communist. And from the point of view of political science, the communist use may be the only correct one. But My Lords, this would not be the first time in history that the meaning of a political phrase has become corrupted in the course of its use by non-experts. And in my submission it is quite clear that on the evidence, the Defence evidence which the Crown has not in any way succeeded in refuting, this term as used by Congress is not necessarily an indication of communism.

In Chapter 13 of the Heads of Argument on Dogma, one finds the two camps doctrine referred to again, but I have dealt with that. Paragraph 2, My Lords, suggest that a certain attitude towards Russia is exclusively communist. It reads : "The primary loyalty of the proletariat is to its own interests, it has become international as a result of imperialism. Inasmuch as Russia stands for the protection of working

class interests, primary loyalty of the proletariat must be to Russia. This attitude, as a matter of logic is exclusively communist". Well, My Lords, of course Professor Murray did not say and I don't think this paragraph is meant to contend that any support for Russia is exclusively communist. Obviously, as a matter of logic - to use my learned friend's own phrase - the significance of support for Russia must depend entirely on the basis on which that report is given. If a Russian supports Russia for reasons of patriotism, that is no evidence of communism at all. If an Egyptian supports Russia because Russia supported Egypt at the time of the Suez crisis, that would equally notbe evidence of communism. But if it is clear from somebody's expression of support for Russia that he supports Russia because Russia is a communist country, and because he gives his primary loyalty to a communist country qua communist country, well that does imply support for communism as such. And if this paragraph is intended to say nothing more than that, then there would be no quarrel with it. But again, My Lords, in dealing with documents, we see that the Crown does rely on support for Russia in documents which doesn't comply with these requisites.

The n My Lords, Chapter 14 has a paragraph 2 and 3, which deal with the Second and Third Internationals. Paragraph 2 begins by setting out some history of the Second International, and towards the end of that paragraph occurs the following : "It is submitted that the attitude of communists towards the

Second International, especially in condemning its reformist tendencies, is in the context of socialist schools of thought, communist or non-communist, exclusively communist". And paragraph 3 can be taken together with that. That says that "The Third International was established in March, 1919 on the initiative of the Bolsheviks under Lenin. It was an international revolutionary proletarian organisation, communist and Marxist-Leninist in character, therefore opposed to class (?), peace (?) and reformism. The attitude for - of support for the Comintern as well as the anti-reformist and anti- Second International basis for this attitude, is submitted to be exclusively communist". My Lords, I submit that my learned friend has made the issue quite unnecessarily complicated in these two paragraphs. The Comintern according to the evidence, the Third International, was a Union of Communist Parties, therefore support for it was tantamount to support of the Communist Party. Therefore, provided we are talking about complete support and not just support on some isolated issue, such support would clearly make a man a communist. As for the Second International, the position is quite simple. If from the way a man talks of the Second International and opposes it, one can infer that he supports the Third International, as I have said completely and wholeheartedly and not jut on some isolated issue, then the point is established. But obviouslynot all who as opposed to the Second International are communists.

Then My Lords, I have nothing to say

about the miscellaneous points in Chapter 15, and that concludes the submissions on my learned friend's allegation of what is exclusively communist.

Now My Lords, I pass on to deal with the documents which my learned friend relied on in respect of the various organisations. By way of introduction to this part of the argument, My Lords, I submit that one must bear in mind exactly what the issue is between the Crown and the Defence, on the question of communism and the Congresses. The Defence has never contended that no breath of communistinfluence has ever touched the Congresses. The Defence witnesses have admitted that there are and always have been communists in the Congresses and that some of them have held high positions. My Lord, we do not try to contend that such people have entirely suppressed their beliefs in working in the Congresses, we do not try to contend that they have had no influence. In one or two limited sectors of the Congress movement, like some of the youth sections, one may even say that the communist influence is a perceptible one. But the Crown case is quite different. It goes much further. The Crown contends, and must contend if it is to make anything out of this part of the case, that the Congresses are communist organisations. My learned friend said the A.N.C. and the others are communist organisations under a communist high command, working for a communist revolution, as part of the world wide communist revolutionary movement. So My Lord, the issue is not simply can you show any trace of communism in the Congresses, but the issue is, are the

omnibus organisations with a communist element in them, or are they out and out communist organisations? And in my submission, My Lords, my learned friend's argument on documents would have been far more appropriate to a case where the issue was merely, is there any trace of communism about these organisations. If he really wanted to prove what he set out to prove, the thoroughgoing nature of the communist organisation, I submit that he would have had to do one of two things. Either, to take all the documents and show Your Lordships that in such and such a proportion of the total, one finds exclusively communist matter, or show Your Lordships that such and such exclusive elements of communism run through every document on a particular subject the Congress has ever produced. Or at the very least, he would have had to make some selection of documents which is a significant selection from the point of view of proving the nature of the organisation as a whole. If he were to take, say in the case of the A.N.C., the Constitution, the book Africans Claims, the Basic Policy ofthe A.N.C. Youth League, the 1949 Programme, all National Secretarial Reports, all National Presidential Addresses andhe were to prove that such a collection of documents - in them there runs a consistent approval of certain key features of communism, that might have taken him to his goal. But My Lords, we haven't for anything remotely approaching that. What my learned friend has in fact done is he has simply taken an assortment of documents, a very small number in relation to the total, some

documents have no distinguishing feature, except that they all happen to be the ones in which my learned friend has found some element of communism. And in my submission, even if my learned friend's submissions on these documents were one hundred per cent correct, even if everything which he says is exclusive to communism is in fact exclusive, and even if wherever he says that one of these exclusive principles appears in a document it does so appear, the situation thus created would still be completely consistent with the Defence case that you have some communists in these organisations, but that they don't constitute a high command or anything of that kind.

MR. JUSTICE BEKKER :

What type of document have you in mind when you say that?

MR. O'DOWD :

My Lords, I am going on to the documents themselves in a moment. But My Lord, if one takes for instance an African Lodestar, and one shows that an article in that is communist, one doesn't show that the same communist theme is to be found in everything that the A.N.C. said, how does that exclude the possibility that one of the communists in the A.N.C. wrote an article in the African Lodestar, but that the A.N.C. is still not as such a communist organisations. If you have got an organisation which has various elements in it of which one is the communist element, you would expect to see the influence of this communist element appearing in some documents. But to distinguish that

position from the position that the Crown is contending for, you have got to show that this isn't just one element among others, but it is the dominant element. And that I submit is what the Crown fails to show, even taking everything which has been said on documents at its face value.

Now passing on, My Lords, to the A.N.C., my learned friend dealt with forty documents. Well that in itself is a pretty small collection from the total. Of those he said that twenty two were exclusively communist, whereas the remaining eighteen were merely consistent with communism. My Lords, I propose not to address any detailed argument on those which are merely consistent. I merely have one submission to make on that, and that is that the proposition that out of all that was produced by the A.N.C. over a period of five years, you can find eighteen documents which are consistent with communism, is a proposition which takes the Crown nowhere.

The proposition that twenty-two of the documents are exclusively communist is not very much better, but in any event those I do propose to examine separately.

MR. JUSTICE BEKKER :

Do you say they are not exclusively or do you submit that they are not exclusively?

MR. O'DOWD :

My Lords, I contend that on the basis of what I have already said, none of these documents are in fact exclusively communist. The principles which my learned friend purports to find in them, are not exclusive principles of communism. So that my detailed

argument on the documents is really in the nature of an alternative argument, that even if what I said so far is wrong, what my learned friend finds in the documents documents is in most cases not there.

My Lords, the twenty-two so-called exclusive documents of the A.N.C. are made up as follows. Two of them are National Conference Reports. Those are A.37 and Z.K.M. 6. Two are Provincial Presidential Addresses, both from the Transvaal, A.40 and A.309. Oneis a Youth League Provincial Presidential Address from the Cape, that is T.T. 36. One is a Youth League branch Secretarial Report, V.M. 15. One is a set of Youth League Conference resolutions, T.T. 28. And those seven are the total of what one might call organisational documents, in the sense of documents having some definite official status as opposed to propaganda, educational matter and so forth. Then My Lords, there are three sets of lecture notes, the first being the wellknown three lectures, A.84 to A.86; the second being R.F. 71; and thirdly L.L.M. 137. Six of the documents are Youth League bulletins, five of them are the African Lodestar. Those are A.204, A.206, J.D.M. 9, J.D.M. 10, 1 J.M. 63(a) and M[illegible]B.Y. 6. Now pausing there, My Lords, I submit it is significant that my learned friend finds merely one third of his total references in one small sector of this movement. We know that there were quite a number of A.N.C. journals, there was Mayibuye Afrika, Inyaniso, Congress Voice, and there was one Isizwe which was apparently not an official organ but has some connection with the A.N.C. Now My Lords, if the A.N.C. was the

sort of organisation which my learned friend says it was, why doesn't one find something approaching an equal amount of communism in all these journals? Surely the communist high command should have seen to it that its views were expressed in all the journals of the A.N.C.? Instead, one finds five allegedly communist passages in African Lodestar, one in Afrika, one in Isizwe and none in any of the other journals. Now My Lords, which situation is that more consistent with? The situation of a uniformly communist organisation under a communist high command, or the situation of an omnibus organisation with a communist element in it. I submit it is more consistent with the latter hypothesis. And on the Crown hypothesis one doesn't see why there would be this inbalance in the communist nature of different A.N.C. journals. Then the remaining six A.N.C. documents, can only be described as miscellaneous. A. 111 is a letter from the Transvaal Action Council to the A.N.C. B. 115 is a Message from the A.N.C. Transvaal, we don't know who it was to. M.K. 7 is a booklet by Kotane,. W.M. 22 and G. 1150 are articles in Liberation.

Now My Lords, I want to deal with these documents in what I submit is their order of importance. The first one is A.37, which was the Agenda Book of the A.N.C. National Conference for the year 1954. It is No. 3 on the list of communist documents for the A.N.C. handed in by the Crown. My learned friend said that this document as a whole, meaning thereby - Your Lordships will recall it is a composite documents containing not only an Executive Report, but also a Presidential Address

an Address of welcome by Dr. Naicker, a number of messages and miscellaneous items. My learned friend says that it is exclusively communist. He deals with the - with Dr. Naicker's Address, and that in itself he says is merely consistent with communism. That being so, I d.n't propose dealing with that in detail. Luthuli's speech is also said to be consistent only with communism. My Lord, the Secretariat Report is alleged to be exclusively communist, and the two points relied on are reference to fascism and a reference towards Trade Unions. My Lords, the reference to fascism cannot be the actual exclusive point ...

MR. JUSTICE RUMPFF :

We don't want to hear you on that document.

MR. O'DOWD :

As Your Lordship pleases. My Lord, the next document is Z.K.M. 6, which is submitted - that is No. 36 in my learned friend's list, and it is submitted to be an exclusively communist document on three grounds. The first is point made is that there is a passage which attacks Bantu Education, and the author complains inter alia, that an African child 'must not read Karl Marx or learn of Lenin or Stalin or Mao-Tse-Tung", and the document goes on to refer on the same basis to Rossouw and the French Revolution, India, Pakistan and the Gold Coast. My learned friend compares that with paragraph 1 of Chapter I of his Heads of Argument on Dogma, which simply states that the classics of communism are Marx, Engels, Lenin, Stalin and Mao-Tse-Tung. His paragraph

doesn't say that any suggestion that these people should be studied is exclusively communist, and obviously it is not. The most that can be said about this passage in the document, My Lords, is that the author believes that some knowledge of communism was part of proper education. One may surmise that ...

MR. JUSTICE KENNEDY :

Well, this document may well be saying you are preventing us from reading a full history ...

MR. O'DOWD :

As Your Lordship pleases. I submit that if one reads that passage as a whole, that is clearly what it means. And the fact that the author brings in these communist classics as part of that proposition may show that he has got some sort of sympathy with communism, but it certainly doesn't show that the document would be understood by any reasonable reader as being an advocacy of communism, or as indicating that the organisation is communist.

My Lords, my learned friend has another point on this same passage, which reads as follows in his typed submissions : "This passage is submitted to be exclusively communist in its stress on the idea of struggle and violent revolution (vide French Revolution), plus the reference to classical communist sources". My Lord, that again simply reverts to the fact that the author says that a number of things which Bantu Education may prevent them from reading about is the French Revolution. My Lord, really, to read into that a stress on the idea of struggle and violent revolution, from which

one can infer an advocacy of the rather complicated and specialised communist . . . . . of revolution, is - it can only be called fantastic. All that the author is saying, as Your Lordship just put it, is that they must be allowed to learn about the history of the world. I submit that few educationists would disagree with the proposition that a study of the Rrench Revolution is part of the study of history.

Then My Lord, the next point made by my learned friend in his sub-paragraph 2 is - the passage there referred to is exclusively communist in its catagorical statement that colonial people will not obtain freedom by constitutional methods, but through the hard fight by revolutionary tactics. Now My Lord, that passage deals with Kenya and what happened there in the view of the author, and it comes to the conclusion at the end that the colonial people will only gain their freedom by the hard fight and revolutionary tactics. Now My Lord, the question whether that is an advocacy of violence or not will be dealt with in detail at a later stage by my learned leader, but all I am on at this stage is the question whether that necessarily imports the communist idea of revolution. In my submission obviously it doesn't because, this is simply a conclusion which the author draws from his view on a particular situation. He says because of what is happening in Kenya, we can see that the colonial people - one doesn't know whether he means all or only some, but anyway, they will have to have a hard fight by revolutionary tactics. That My Lord, does not purport

to say that because of the nature of capitalism or because of the nature of imperialism, there has to be a violent revolution. It is simply a conclusion on a particular set of facts. It may be a conclusion which a communist would come to, but one can't say that the reasoning here indicates that the conclusion has been reached on communist grounds. Therefore, My Lords, in my submission that document fails to support my learned friend.

Then My Lord, the third document which I propose to deal with is A.40, and that is the fourth document on my learned friend's list, and it is the Presidential Address delivered to the A.N.C. Transvaal in 1954, and the only exclusive point which my learned friend makes is that there is a passage which is said to be anti-imperialist, and in praise of the U.S.S.R., China and the new democracies. My Lord, my learned friend omits to mention that there is praise also for India and it is clear that the reason in this document for praising these countries is not that the U.S.S.R. is the fatherland of the proletariat, or anything of that kind, but that it, together with other countries, has protected the interests of the colonial peoples. My Lords, the document itself is in volume 2, page 293, and it says that the imperialist capitalist powers are intensifying the oppression and so forth, and that the enslaved masses everywhere are very much indebted to the progressive powers such as the U.S.S.R., China, the new democracies and India for the role they are playing in international politics.

MR. JUSTICE KENNEDY :

And India? Then it can't be exclusively communist.

MR. C'DOWD :

As Your Lordship pleases. That is the only point on that document. Then My Lords, the other Transvaal Presidential Address is the document A.309, No Easy Walk to Freedom, that is No. 12 on my learned friend's list, and in the case of that document, the point really made by my learned friend is that this document is an advocacy of violent revolution, and therefore he says it is a communist document. My Lord, the question whether it is an advocacy of violent revolution will have to be argued at considerable length at a later stage, and I don't want to anticipate that argument, but really from the communist point of view, this document falls in a different catagory to others, because if the document is violent, one doesn't really need communism to get to the proposition that the author is a believer in violence. Where one has a document which is actually alleged to be violent, the question whether it is communist or not is really irrelevant, because the only purpose of asking whether the documents are communist, is to find out whether the author believes in violence. So My Lords, I leave that document to be dealt with in the general part of the argument on the question whether it is or is not an advocacy of violence.

Then the Youth League Presidential Address relied on is T.T. 36, No. 34 on my learned

friend's list, and the first point made by my learned friend in his sub-paragraph 1 is that there is a passage which reflects the chapter on unity of theory and practice from the dialectical materialist part of the dogma. Now Your Lordship will recall in relation to this chapter 2 of the dogma on dialectical materialism, which is here relied on, there is some doubt whether my learned friend did or did not contend that any one of the paragraphs of that chapter taken by itself was exclusively communist. Here he has clearly taken one of those paragraphs by itself, paragraph 9 on the unity of theory and practice. In any event, My Lord, even that paragraph refers to the materialistic basis of the belief in unity of theory and practice. It says that Marxism believes in the unity of theory and practice because mind is merely a reflection of matter and so forth. One doesn't find anything of that kind in the document. The document is at volume 22, page 4271, and the relevant passage simply reads as follows : "Political . . . . . education inside our Congress Youth League is being intensified. All key workers throughout the land should be made to understand the close union of theory and practice. It is a . . . . . feature by which Congresses are distinguished from all other political parties." Well, My Lords, there is no exposition of dialectical materialism there. It is a trite exhortation for political education, decked up with the phrase "union of theory and practice", which phrase may perhaps be derived from communism. Perhaps the author of this document found it in a communist book, perhaps he heard it from someone who in turn got it from a communist

book, but all we have there is this phrase, and it doesn't reflect any belief in dialectical materialism. The second point made by my learned friend ...

MR. JUSTICE KENNEDY :

I remember raising a query on the second point at the time.

MR. O'DOWD :

Yes, My Lord, YourLordship suggested that this is the most hackneyed quotation of all the possible quotations from Marx, and I submit that is the position. One can't infer anything from that.

Then My Lords, the next document is also a Youth League document, that is V.M. 15, and it is No. 18 on my learned friend's list. My Lord, here there is - the question which arises is about the factual status of this document. It is a manuscript secretarial report of the New Brighton Branch of the A.N.C. Youth League. It was dealt with in evidence by Ntsangani at page 16275 and the following pages. His evidence was that this report had been submitted to the New Brighton Branch, but had been rejected by it, because it failed to deal with the affairs of the branch. This position was dealt with in argument by my learned friend Mr. Trengove, at Volume 112, page 22134/9, it was on the personal position of Ntsangani, I think. My learned friend said that this evidence should be rejected, because the reasons given by Ntsangani for rejection of the report was unconvincing. Well, My Lord, the first point to be made about that, it is all very well to say that Ntsangani's evidence should be rejected,

but rejected in favour of what contrary evidence? There is no evidence at all to show that this report was accepted by the branch, or - all that we know about this report from the Crown case is that it was found in manuscript. It had never been roneod or anything like that, and so My Lords, Ntsangani's evidence really stands alone, it is the only evidence as to the status of this document. And even if it were unsatisfactory evidence, one couldn't really say what alternative hypothesis had to be accepted. In any event, My Lords, I submit that Ntsangani's evidence is not in any way unsatisfactory. If one reads this report, one sees that it is in fact a rediculous document to be submitted to a local branch of the Youth League as its Annual Secretarial Report. It does in fact fail to discuss the activities of the Branch, and instead it rambles on for pages about all sorts of issues, like Christianity and capitalism and . . . . . and Ceylon and the Anglo-Iranian Oil Company, and various things. My Lords, my learned friend Mr. Trengove made a further point that this document attacks persons called "enemies in our midst", ... and Ntsangani himself in his speeches was fond of attacking people whom he called "traitors". Therefore my learned friend seems to suggest that the report could not have been rejected, because of this particular point it coincides with Ntsangani's own views. My Lord, I submit that that is not a suggestion which will commend itself to Your Lordships. The fact that the report does fail to deal with the affairs of the branch

is borne out by an examination of the report itself, and there is no reason to reject Ntsangani's evidence. Therefore, My Lords, my submission is that this is a document which should not be regarded as an official A.N.C. document, and should not be taken into account at all. But in any event, there is nothing in the document from the point of view of the communist dogma. The third point which my learned friend relies on is a phrase "irreversible advances of the logic of economics". Well, I don't know what that means, My Lords. My learned friend submits that this refers to the concepts of dialectical and historical materialism, on the continually onward and upward movement. But that I submit is mere surmise, My Lords. It may mean that, but it seems rather more likely to be an ill-digested concept which the author himself didn't have any clear idea about. Then My Lords, one gets from remarks made in the document about "the renegade Trotsky", who was an egotist in people's democracy of Russia, and afterwards got together with Tito to form a Fourth International. My Lords, that may be a garbled version of something which the author had read from a communist source, but there is really nothing in it. My learned friend has not even contended that to sympathise with Stalin against Trotsky is an exclusively communist idea.

Then finally, My Lords, there is a reference to the classless society in this document. It is held out as an objective. Well, that certainly indicates left wing socialism, that belief, but as was mentioned a little earlier, the section of my learned

friend's dogma mentions classless society as exclusive only in conjunction with the dictatorship of the proletariat. In my submission that is the correct conjunction, and where the conjunction is not present, as it is not in this document, the concept of classless society is either left wing socialism or communist.

Then My Lords, there are some resolutions of the A.N.C. Youth League relied on, that is Exhibit T.T. 28, and it is No. 30 on my learned friend's list.

CASE REMANDED TO THE 10TH MARCH, 1961.

COURT ADJOURNS.

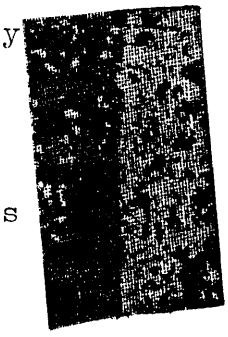
MR TRENGOVE

9th MARCH, 1961: COURT RESUMES:APPEARANCES AS BEFORE.

BY MR. TRENGOVE:

M'lords, may I be allowed to refer to Your Lordships' request to the Crown yesterday and ask you, M'lords, for some direction. M'lords, as we understood the learned Leader for the Defence, except for minor matters on the law of Conspiracy and so on, that their argument on the law has been completed. M'Lords, it is of some importance for us to know whether or not that is the position because, as Your Lordships will appreciate, we normally have the right of replying on matters of law at the end of the case and we would be able to dealwith the position as a whole. At this stage, I take it, m'lords, that on the points that we do address Your Lordships on, our argument on the law would have to be our final argument on that aspect except for matters which may arise at a later stage.

Now, m'lords, I have had the opportunity of reading the record of the first argument for the Defence by my learned friend Mr. Maisels. M'lords, may I just refer to one portion of it - there are similar other instances - After dealing with the facts, my learned friend Mr. Maisels said, dealing with the fact that the Crown's case was one of contingent retaliation - that that was not covered by the Charge Sheet. My learned friend then goes on to Page 23,593 - to say, m'lords, "That, m'lord, is the Crown case". "That is the case now argued . I am not, as I say, m'lords, going at this stage to deal with the question of how this is to be done - ith the various difficulties with regard to probability,as to whether in any event this would constitute the crime of treason." Now, m'lords, that seems to leave



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the door open for my learned friend to argue that in any event if Your Lordships feel that that matter is covered by the Charge Sheet, he would still in a later stage in his argument argue as to whether that type of contingent retaliation can or cannot be treason and at the end of his argument we gained the impression that his argument on the law, on that aspect of the law had been completed. Now, our reply, m'lords, will to a certain extent be influenced by the attitude that my learned friend takes as to whether that does or does not constitute treason. M'lord's, we would ask Your Lordships for a direction as to whether - what our position is if we deal with this on the basis that not having had the benefit of the argument of my learned friend as to what the legal position is, assuming that that contingent liability is covered by the Charge Sheet, as to whether or not that is treason.

Now, there are other instances in my learned friend's address where he also says that they are not arguing certain matters now - which leaves us in an invidious position, m'lords, as far as that is concerned. We don't know exactly how far to go.

MR. JUSTICE RUMPFF: We really wanted a reply on the matters raised. Obviously, if in the course of further later argument a point of law is argued by the Defence, the Crown has the right to reply thereto. So, Mr. Trengove, the first point now that you have raised is a point raised by the Defence in regard to what the Defence alleges the Crown case to be and what it alleges the Indictment to be?

MR. TRENGOVE: Yes.

MR. JUSTICE RUMPFF: Now that may, as far as you are concerned,

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that may in reply involve two points. It may imply in the first instance a reply to the Submissions that that is the Crown case, what the Crown case is really; and a further reply by you that if that is the Crown case that that is High Treason.

MR. TRENGOVE: Yes, of course.

MR. JUSTICE RUMPFF: Do you follow?

MR. TRENGOVE: Yes.

MR. JUSTICE RUMPFF: That may follow necessarily on that particular course. That is all that I can tell tou at this stage as far as this particular aspect of the case is concerned. So that we expect you to argue in reply to the submissions made on this particular point raised and, if necessary, for your case, to argue whether in the Crown's view (if that is the Crown's case) what the Crown says its case is,is Treason in law.

MR. TRENGOVE: Insofar, m'lords, as these points have been raised, to that extent we reply to them and no further?

MR. JUSTICE RUMPFF: Yes, no further. If the point is not raised you needn't deal with it. In addition, I think it is necessary to tell you this, or it is advisable to tell you this, we don't think, as at present advised, that you need prepare an argument at this stage on the one point raised by Mr. Nicholas, namely that an overt act in isolation should manifest the hostile intent.

MR. TRENGOVE: As Your Lordship pleases.

MR. JUSTICE RUMPFF: You realise aht that point is?

MR. TRENGOVE: It is not the other point of Mr. Nicholas's - the one point only. He raised the point of policy and he also raised the point that our judgment given on a previous occasion was wrong and that an overt act standing in

- isolation -

isolation should manifest the hostile intent.

MR. TRENGOVE: As Your Lordship pleases.

MR. JUSTICE RUMPFF: To that particular point you need not reply.

BY MR. O'DOWD:

May it please Your Lordships. I was dealing with the A.N.C. documents and the next one is "T.T. 28" which is No. 30 on my learned friend's list of documents - and it consists of certain Resolutions which were apparently passed by the African National Congress Youth League in 1953 and the Resolutions to which my learned friend's argument specifically referred were Resolutions No. 12 - dealing with International Affairs - and 13, dealing with the death of Stalin.

M'lords, as far as Resolution No. 12 is concerned, it is in the record at Page 4,260 and it is very much the same sort of thing that one finds in other resolutions - "Conference condemns the attempts by the United States and its Allies to maka Africa a bastion wall against the Soviet Union. The Conference serves notice on all Imperialist Powers that the Africans will never enter into war against the Soviet Union but on the contrary resolves to intensify the struggle against all Powers who have Colonies in Africa." M'lords, insofar as that simply expresses an antagonism to the United States and some degree of support for the Soviet Union,- it is covered by what was already said - there is possibly one additional element in this Resolution - that is that it goes as far as singling out the Soviet Union as a country with which "we will never go to war".

Now, m'lords, that I wouldn't dispute is consistent with the communist attitude towards the SOviet Union

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but I submit that it is also consistent with an ordinary pacifist attitude. If a person believes that war as such is evil and one should never go to war against anybody, then he would be prepared to support this Resolution on the basis simply that the Soviet Union is a country against which a war is most likely to arise in the near future and that is a contingency against which a pacifist would want to provide.

In this connection, I would like to refer Your Lordships to one passage of the Defence evidence in which the witness Maloao, who was a member of the Youth League - though not, perhaps, an active member at the time that this Resolution was passed, explained his general attitude towards issues of this kind. The passage is at Page 17,204 - I will begin at line 16 - The witness was asked:- "Have you made any study of Communism" and he said "No, I haven't made any study of Communism."

"Are you keenly interested in International Affairs"? -- "I haven't been interested in International Affairs until recently.

"Were there others in the Congresses who were more interested in International affairs than yourself?" -- "There were, yes".

"Have you any views about peace - whether it is preferable to war?" -- "Well, in broad terms, I prefer peace to war. I think every sensible person would prefer peace to war".

"Now if you were at a Congress or a Youth League meeting and someone proposed a Resolution on International affairs and persuaded you that this resolution was in favour of peace, what would your attitude be?"? -- I think I would support it."

- M'lords -

M'lords, I submit that there may have been many people in the Congress Youth League who have that sort of attitude. It is conceivable that resolutions of this kind originated with someone who had some degree of communism in his views but the real question which the Crown must answer before it can say that on the ground of a resolution like this, the Organisation as a whole is communist, the question is, is the resolution of such a kind that everyone who voted for it must have done so for communistic motives. I submit that for a resolution of this kind that could certainly not be said and it is perfectly feasible that persons might have supported it for the same sort of reason that Maloao gave in that passage of evidence.

Then, m'lords, Resolution 13, is the Resolution on the death of Stalin - which certainly does refer to Stalin in fulsome terms. Again, m'lords, it may well be that a Communist or a communist sympathiser was responsible for bringing this reolution before the Conference but, m'lords, what can one really infer from the fact that the Conference approves an obituary testimonial of this kind. It is customary on such occasions to be guided by the maxim 'de mortuis nil nisi bonum'.

MR. JUSTICE RUMPFF: Does that apply to Hitler, too?

MR. O'DOWD: M'lords, it might apply to Hitler among people who though by no means Nazi supporters were somewhat more sympathetic to his views than others. Similarly, it might apply to Stalin among people who were not actually communist supporters but who had no great objection to the role of Russia in world affairs and to some of the features of communism. Of course, one wouldn't expect this resolution to be passed by strong anti-communists but I submit that one can't safely say that any non-communist present at

this conference must necessarily have opposed this resolution.

MR. JUSTICE RUMPFF: There comes a time where a person personifies his policy.

MR. O'DOWD: Yes, m'lord.

MR. JUSTICE RUMPFF: That does happen in history, I suppose?

MR. O'DOWD: Yes.

MR. JUSTICE RUMPFF: That is why I am asking you a question particularly in regard to Hitler. If any particular society were to adopt a resolution concerning Hitler in the same fulsome manner, then, I take it, one would be entitled to make some inferences from that in regard to the policy that Hitler wanted to apply to the world.

MR. O'DOWD: Some inferences, yes, m'lord.

MR. JUSTIC" RUMPFF: Yes, it is a relative thing - but some inference - what exactly, I don't know. To put it at a high level, perhaps, one must have some suspicion about it....

MR. O'DOWD: M'lord, I submit one might have a suspicion or one might even be convinced that somebody at that meeting was a positive sympathiser with Hitler and nobody at that meeting was very much anti-Hitler.

MR. JUSTICE KENNEDY: Yes, but I don't know if it necessarily follows that because one does speak of certain leaders in terms of excessive praise that you are necessarily a communist or a nazi.

MR. O'DOWD: No, m'lord, it doesn't ...

MR. JUSTICE KENNEDY: You may agree with some of their policies but I don't know to what extent you would agree.

MR. O'DOWD. M'lord, it indicatessome degree of approval of some of what Stalin did and says in the role that he played in society but it doesn't necessarily follow that these people accepted the theories, the ideology which

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guided Stalin either in toto or even in any very substantial part. One must bear in mind the reasons which the defence witnesses have given for their generally sympathetic attitude towards the Soviet Union. They regarded it as a power which stood on the side of the colonial peoples, and I submit that that sort of motive and the related motive which was mentioned that Russia is believed to have no colour-bar, all that sort of thing enters into the picture. And, of course, m'lords, one has to bear further in mind in asking what inference can be drawn from this resolution, that nothing going even to this length, nothing else going even as far as this, is found among any other resolutions of the Youth League published in any other year. There is simply this isolated one in 1953.

Now, m'lords, those documents conclude the category which I have described as "Organisational documents" that is documents having some official organisational status and in my submission all that emerges from them is that there issome sign of communist activity in the Youth League in 1953.

Then, m'lords, the next category in which I classified documents was the category of "Lecture Notes" and the first Lecture Notes brought under this category are "A. 84 to A. 86", that is the lectures "The World we live in;" The Country we live in" and "A Change is needed". Now these lectures are to be the subject of a detailed argument at a later stage which I don't want to duplicate but in brief the submission will be that the lectures do contain some traces of communist influence and that as far as we know they were, in fact, written by a communist but the submission will be that they do not reflect A.N.C. policy so I leave those just with that submission for the present.

- Where -

MR. JUSTICE KENNEDY: Where are they? What numbers are they in the Schedule?

MR. O'DOWD: I'm sorry, m'lord, I don't appear to have noted that. Could I give Your Lordships the number later?

MR. JUSTICE KENNEDY: Yes.

MR. DE VOS: No. 5 of the A.N.C. Schedule.

MR. O'DOWD: Thank you. M'lords, the next lectures are the Youth League Summer School Lectures - EXHIBIT RF 71 - No. 23 on my learned friend's list - and Your Lordships will recall that this document consists of four lectures together with a foreword and an introduction and the Crown stigmatises only one of the lectures - that will be the one contributed by J.G. Matthews.

Now the first point to be made about that is that even if this one lecture is a communist lecture and if the remaining three are not contended by the Crown to be even consistent with communism, I submit that the total picture is again consistent with the defence case that there were some communists in the Congress but not everyone was a communist, and not consistent only with the Crown case that the Congresses were under a communistic high command. This Summer School was dealt with by two Defence witnesses (Conco and Yengwa) (Conco at Page 11,288 and Yengwa at Page 17,480) and both of them said that the purpose of this summer school was to discuss a variety of point of view and they said that for that purpose they invited certain persons to give lectures; they allowed those persons to lecture on whatever they liked and didn't censor the lecture in any way or insist that they should select nothing but agreed Youth League policy.

Now, if the Crown is right in saying that "Here we have one communist lecture" and three of which the Crown says

- nothing -

nothing and therefore are presumably non-communist, I submit..

MR. DE VOS. M'lords, I explained in the course of my argument my interpretation of the wordr"consistant" and that I contended that there were no contra-indications of communism and the word "consistent" was used by myself in the sense of matter going left-wards but not exclusively in a communist direction. So there is a specific meaning to the word I used. I explained that fairly fully at a certain stage.

MR. JUSTICE RUMPFF: Yes.

MR. O'DOWD: Well, m'lords, the point remains that whereas these three other lectures contain contra-indications or not, they are not contended to be communist and if that is the position it would seem to support what Conco and Ywenga said as to the purpose of the Summer School and to be quite consistent with the Defence position that you had a communist element.

Now as far as the lecture itself is concerned, it certainly is an extreme left-wing lecture. It certainly is socialist and indicates some approval of the Russian Revolution. It is consistent with communism, m'lords. I don't dispute that but I do submit that in the light of what I have already said as to what is not exclusively communist, that no exclusively communist elements have been shown to be present in this lecture.

Then the next is the lecture "What every Congress Member should know" - EXHIBIT LLM 137 - No. 28 on the Crown Schedule. Now, m'lords, this is the solitary document in which the Crown alleges that the doctrine of Dictatorship of the Proletariat is to be found, and I deal immediately with that point. My submission is that the doctrine of Dictatorship of the Proletariat does not appear in this

- lecture -.

lecture. The only other point in the lecture on which the Crown relies is the use of the term "People's Democracy" which has already been fully dealt with. M'lords, the passage which is relied upon as reflecting the Dictatorship of the Proletariat is at Page 930. It comes towards the bottom of the page at the end of the Lecture. The lecture refers to the Congress aims to have a government of People's Democracy. It says: "In a People's Democratic State the Power of State will be emphasised by the people; that is by the working people of all colours together with all other democratic classes who will work for the changes set out in the Freedom Charter. This will be a government of the people as a whole, of oppressed and exploited classes, used to achieve their maximum well-being and to prevent the few exploiters from gaining state power."

Well, of course, m'lords, this doesn't expressly say that the dictatorship of the proletariat is aimed at and in order to give it that interpretation one has to interpret the word "people" in what Professor Murray says is the "communist way", that is as meaning only proletarians loyal to the communist party. If one gives the word "people" that interpretation then, of course, this could be a veiled description of the dictatorship of the proletariat but the document doesn't define "people" in that way, and obviously one cannot assume that the word is used in that sense unless there is some other clear indication that the document is preaching communism. If the ordinary meaning is given to the phrase "people as a whole" this is perfectly consistent with the defence evidence as to the congress idea of People's Democracy.

Then the Crown relies on the last phrase which I have just read saying that one of the objects of the

People's Democracy is to prevent a few exploiters from re-gaining state power. Now it is true that according to the evidence on Dictatorship of the Proletariat that is one of the objects of the Dictatorship of the Proletariat, to prevent the old exploiting class from regaining power but it doesn't necessarily follow that anyone who says that the old class must not regain power is talking about the Dictatorship of the Proletariat, because any political movement which aims to bring about changes in a country will naturally hope that the clock will not be put back in the future, that its opponents will not regain power. There are numerous ways of trying to bring that about. If one is a democratic party one tries to prevent one's opponents from gaining power simply by seeing to it that one's own propaganda and organisation are good enough to achieve that. If one is not a democratic party one does it in other ways but this lecture is completely ambiguous as between those various possibilities.and, of course, it does not touch at all on the characteristic features and aims of the proletariat - of the dictatorship of the proletariat which are not merely to prevent the old ruling class from regaining power but, according to Professor Murrary, to usher in the classless society by the entire elimination of the capitalist class as a separate class, and as I pointed out in dealing with my learned friend's submissions on dogma, his paragraph dealing with the dictatorship of the proletariat correctly links it with the withering away of the State and the classless society; and there is no suggestion of that here.

So, m'lords, I submit that this lecture cannot be held to contain the doctrine of the dictatorship of the proletariat.

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Then, m'lords, the next category was the'Youth League Bulletin' of which there are six in the Crown's list and I don't want to deal with those separately because there are no points in them which are not covered by what I have already submitted as to what is exclusive and what is not exclusive but generally on the position of...

MR. JUSTICE KENNEDY: What are their numbers in the list?

MR. O'DOWD: I am sorry, m'lords, I will have to get that - because I haven't attempted to deal with them separately.

MR. JUSTICE RUMPFF: Are they on the A.N.C. list?

MR. O'DOWD: Yes, m'lord.

M'lords, there is evidence by several Defence witnesses as to the status of the bulletin 'African Lodestar' and what it was intended to do and to be. I refer, for instance, to the witness Resha (at Page 16,855). In this passage the witness Resha who was, of course, a leading official of the Youth League and had knowledge of this position was asked, appropos of the Lodestar:-

"Can you explain, Mr. Resha, why in your official organ you allowed this type of propaganda to be spread amongst the youth?"

(That was dealing with the particular article about attacking the British Government) and Resha said :-

"Actually this is what happened with the Lodestar. Although the Lodestar was an official organ of the African National Congress Youth League in the Transvaal it published the point of view of individual writers. In fact, not even - I'm sorry - In fact, even the editorial was the point of view of an individual who at a given time was appointed editor. "

M'lords, similar evidence was given by Maloao

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who was also at one stage one of the Transvaal Provincial Executives of the Youth League. He deals with it at page 17,219. His evidence is as follows:-

"Now I want to mention briefly two publications of the African National Congress Youth League. Do you know a publication "African Lodestar"? -- Yes, I do." Was that a publication of the Youth League in the Transvaal? -- It was produced by the Youth League in the Transvaal.

Now during your term of office on the Provincial Committee of the Youth League in the Transvaal, did the Committee discuss the contents of the Lodestar? -- The Executive as such never discussed the articles that were to be produced in the Lodestar. It was left to the individuals who were responsible for its production.

Who were the individuals? -- We used usually to let one or two members of the Executive, to be assisted by independent people. They could find the people; they could co-opt the people for assistance in the production of this and they were the people who used to combine the articles.

Did you regard everything that appearedin Lodestar as an official expression of policy? -- No, not necessarily. "

M'lords, that is the evidence of the two Defence witnesses who were most directly connected with the African Lodestar. It is confirmed by other Defence witnesses whose evidence I don't propose to read but the references are as follows:- Luthuli deals with it at Page 11,974; Mandela at Page 15,989; Yangwa at Page 17,589 and Matthews at Page 18,246.

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Now, M'lords, the Crown, in dealing with this evidence, says that the Youth League put out this material to the public and cannot escape the responsibility for it. That may be so in effect. If the publication of these journals constituted some offence it may well be that persons other than the author are responsible for that offence but the question here in issue is whether the views in the Lodestar, in fact, reflected the views of the Congress as a whole, and on the evidence there is no ground at all for saying that every article in the Lodestar necessarily did so. I mean, quite apart from anything else, we are dealing purely with a journal of the Youth League in the Transvaal which is quite a minor sector of the A.N.C. movement as a whole and even as far as the Youth League in the Transvaal is concerned, we have got this evidence that people were permitted to write in the Lodestar from an individual point of view and in the light of that position, I submit that the fact that some articles in the Lodestar might reflect communist influence would not prove the Crown case. Again the Crown has not contended that that applies to all the contents of the Lodestar. If there are some communist articles in the Lodestar, the position would still be consistent with the Defence case. And, of course, m'lords, the further point is that even if the Crown's submissions on these articles were correct, the Crown has not gone to the length of suggesting that the articles in the Lodestar were so obviously communist that the ordinary member of the Youth League who, perhaps, hasn't an expert knowledge could not have failed to see their communist nature. On the contrary many of the points relied on in thesearticles are somewhat obscure points which would only be spotted as being communist by an expert. Just to give one example, in

in A 206,(No. 10 on the Crown's list), one of the points relied on is the phrase "sharpening of contradictions" is used and that is suggested to be a reference to dialectical materialism. As I say, the various points are covered by what is already submitted and I don't propose to take those documents any further.

Dealing now with the last group of documents which don't fall under any particular heading, A 111, (No. 8 on the Crown's list), is a letter signed by one S. Shell on behalf of the Transvaal Provincial Committee of the Congress of the People and addressed to the A.N.C. One doesn't quite know on what basis that is said to be a reflection of A.N.C. policy, but in any event the only point in it is the phrase "People's Democracy" which, I submit, has been disposed of.

B 115 (No. 19 on the Crown's list) is a statement signed by P. Mathole as Transvaal Provincial Secretary, containing congratulations to the Chinse people on the 7th anniversary of the foundation of the Chinese Republic. There is no evidence as to the publication of this document beyond the fact that it was found in the Indian Congress office. One doesn't know where this message was meant to be sent and if it was, in fact, sent at all, but in any event it contains nothing but a general expression of admiration for China and for the fact that they routed the Imperialists and established a social order in which exploitation had become a practice of the past. I submit that that takes the matter no further than any other document and is covered by what has already been submitted.

MK 7, (No. 21 on the Crown's list) is the booklet "South Africa's Way Forward" by Moses Kotane. The Crown

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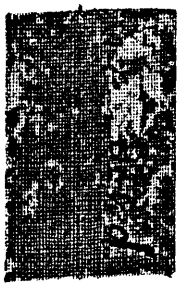
10 MARCH 1961 (CONT)

MR O'DOWD



seeks to connect this with the A.N.C. only by reason of the fact that it was published in 'Advance'. The question of the relationship of Advance to the A.N.C. will be argued later but it is at least clear that Advance was not an official organ of the A.N.C. So, M'lords, the position we have here is that an individual who was at one time but not at the time of publication of this document an offical of the A.N.C., publishes certain views under his own name in a newspaper which is not an offical organ of the A.N.C. Now, m'lords, how can that, as such, be said to bind the A.N.C. or necessarily to reflect its policy. The fact that it appeared in Advance and that the A.N.C. supported Advance is another question and I will come later to the general position of the A.N.C. and Advance. But the mere appearance of an article by an individual not signed in any official capacity but just under his individual name, I submit can't be held necessarily to reflect the policy of the A.N.C. As far as Kotane personally is concerned, there is evidence that he was a very prominent member of the Communist Party in South Africa and although, in my submission, the - this particular document doesn't contain any exclusive elements of communism, I don't dispute that the author is as far as is known a Communist. My submission is that this really has nothing to do with the A.N.C.

WM 2,(No. 22 on the Crown's list), is an anonymous article in the magazine 'Liberation', and on the face of it has no connection at all with the A.N.C. beyond the mere fact that it is published in Liberation. M'lords, the relevance of Liberation,as such,as a publication, to the policy of the A.N.C. is again a separate topic which will be dealt with later. This particular article clearly has no additional connection with the A.N.C. beyond the mere

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fact of its publication in Liberation and my submission on it is that it has no connection with the A.N.C.

G 1150, this is also an article by Liberation. In this case it is published under the name of the author. It is No. 38 on the Crown's list - and the author is J.G. Matthews. M'lords, here again, assume the most the Crown could possibly make of this article-that it shows J.G. Matthews to be a communist, then the position is the same as Kotane's article. We have the fact that one of the communists in the A.N.C. expressed his views under his individual name in a magazine which is not an official organ of the A.N.C. Now how does that take the position beyond what is common cause - namely that there were some communists in the A.N.C. I don't, of course, concede that the document - this articles - does show J.G.Matthews to be a communist because from what I have already submitted, I submit that there are no exclusively communistic views in this article.

Finally, m'lords, T.M. 73 (No. 26 on the Crown's list), Is an article in the journal 'Isizwe'. There is some conflict on the evidence as to the exact status of Isizwe. Ntsangane, at Page 16,265, testifies that Isizwe was not an official A.N.C. journal but was published by one Mathe who had been a Cape Provincial Secretary. It was published by him as an individual venture. Dr. Conco on the other hand, at Page 10,908, said that he believed it was run by the Cape Provincial Executive. It is probable that Ntsangane had better knowledge of the position as he was in the Eastern Cape and Dr. Conco wasn't. Conco was rather uncertain about the position of the journal but, in any event, whatever this journal may be, it doesn't necessarily

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embody the policy as laid down on the national level but the article, which is an editorial, contains nothing but the use of the phrase "People's Democracy" and, in my submission, that has already been dealt with.

That concludes the allegedly exclusive communist A.N.C. documents and my submission on the documents as a whole is that they do not come anywhere near to proving that the A.N.C. was a communist organisation or was under a communist high command.

Passing on to the Indian Congress,.....

MR. DE VOS: M'lord, may I just say that the Crown did not attempt to infer from the A.N.C. documents in the Schedule only but also referred to certain other factors - for instance....

MR. JUSTICE RUMPFF: I think you can deal with that a little later, Mr. de Vos.

MR. DE VOS: I raised this point merely, m'lord, because the inference seemed to have been that the total inference of what my learned friend said....

MR. JUSTICE RUMPFF: I think you can deal with that later Mr. De Vos.

MR. O'DOWD. M'lords, I pass on to the documents of the South African Indian Congress. Here there were 21 documents dealt with of which 11 were said to contain exclusively communist matter. The remaining 10 were said to be merely consistent and again I propose to deal deparately only with those which were alleged to be exclusive.

Now of the 11 exclusive documents, there is only one which is, on the face of it, an official document of the Indian Congress itself as opposed to

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the Indian Youth Congress. That is N.I.C. 84 (No. 8 on my learned friend's list), and in my submission it can be very quickly disposed of. It is minutes of a Natal Indian Congress Conference and the only portion relied upon is a passage from a speech by one D.A. Seedat. The passage appear in the record at Page 3,698. There is a heading in the minutes reading "Discussion of the General Secretary's Report" and under that discussion one finds a speech by Seedat, and as far as one can see from these minutes, Seedat was speaking merely as a delegate to the conference. So, m'lords, the utmost that this proves, assuming it were to show that Seedat was a communist, all it proves about the organisation is that at that particular conference, the conference of 1955, there was one communist delegate. But again, I certainly don't concede that this speech does show Seedat to be a communist. All it says is that it expresses a favourable view of the U.S.S.R. and China. That, m'lords, is the sum total of what is extracted from official Indian Congress documents and there is no lack of such documents before the Court. Your Lordships will recall those very thick agenda books of the South African Indian Congress Bi-ennial Conferences. There are several records of Natal Indian Conferences. There is not quite so much relating to the Transvaal Indian Congress but amongst all this material there doesn't seem to be anything except this speech of Seedat's.

Then there are three more allegedly exclusive communist documents which my learned friend connects indirectly with the Senior Indian Congress. The first is again M.K. 7 - "South Africa's Way Forward" by Moses Kotane and it is No. 13 on the Indian Congress list. Now there is no allegation, of course, that Moses Kotane was

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ever connected with the South African Indian Congress and this is held against the Indian Congress purely because of a reference to it in one document and together with this it will be convenient to take R.F. 68 (No. 18 on the list) which is a series of lectures purporting to have been delivered at the Durban Study Circle by one H.J. Simons as to whom there is no evidence whatsoever. Both these documents, South Africa's Way Forward and the Durban Study Circle lectures are held against the Indian Congress because of a single reference in a Natal Indian Congress News-letter. The news-letter is EXHIBIT N.I.C. 102 and it appears in the record at Page 3,701. There is a paragraph in this news-letter which reads as follows:- "Lecture notes: Lecturers are urged to use the articles by Moses Kotane published in the Advance as notes for their next series of lectures. These articles have been published in book form and are available. Limited copies of the following are still available: Lectures delivered by Jack Simons at the Durban Study Circle's Summer School; Notes on economics and politics; Speaker's Notes on the Western Areas Removal Scheme is in the course of preparation."

MR. JUSTICE KENNEDY: Would you mind reading that again?

MR. O'DOWD: "Lecture notes: Lecturers are urged to use the article by Moses Kotane published in the Advance as notes for their next series of lectures." That is the reference to the Moses Kotane document - and then it says "Limited copies of the following are still available: Lectures delivered by Jack Simons at the Durban Study Circle Summer School;"

Now, m'lords, we don't know by whom this N.I.C. news-letter was written.

MR. JUSTICE KENNEDY: Is there no evidence of its basis?

MR. O'DOWD: No, m'lord, thefe was no Defence witness who dealt directly with the internal affairs of the Natal Indian Congress.

MR. JUSTICE KENNEDY: Is there no Crown evidence..

MR. O'DOWD: The Crown evidence is merely that it was found in the Natal Indian Congress office. We don't know by whom it was written or on the authority of what committee of the Natal Indian Congress. We don't know how widely it was published. We don't know what lecturers were being urged to use M.K. 7, assuming in favour of the Crown that this does refer to M. K. 7..

MR. JUSTICE KENNEDY: Or in what way?

MR. O'DOWD: Or in what way, m'lord. And, of course, we don't know whether they adopted the suggestion. And as far as the other document is concerned, all that the news-letter says is that copies of a document - which again may be the same document - "are available". There is not even a question of their being urged to use the document. So, m'lords, I submit that it is not possible to infer that South Africa's Way Forward or the Durban Study School lectures embody even the Natal Indian Congress's policy let alone South African Indian Congress policy. Incidentally, m'lord, when my learned friend Mr. Hoexter was arguing the position of the Indian Congresses he arguedthat these documents were admissible with reference to the Natal Indian Congress only.

Now that brings us again to the three lectures A 84 to A 86, and there again they will be dealt with in detail at a later stage but my submission will be that there is not shown to be any link between these lectures and the South African Indian Congress beyond the mere fact that the South African Indian Congress was represented on the National Action Council which produced the lectures.

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There is some evidence which has been dealt with by the Crown and which I don't think is disputed that the lectures were used in Natal by the Natal Indian Congress - or two of them at any rate - I think the evidence only relates to A 84 and A 85. There is no evidence of A 86 being used in Natal. But, again, for reasons which will be more fully developed at a later stage, the submission is that these are not official policy documents.

Now, m'lords, that is the sum total of the evidence emerging from documents against the Senior Indian Congress. Not one official South African Indian Congress document, not one official Transvaal Indian Congress document, one speech by an individual member of the Natal Indian Congress and one recommendation of communist matter in a Natal Indian Congress news-letter and some use of the three lectures in Natal. Now, before I pass on to the Indian Youth Congress, I just want to make the further point that my learned friend has not dealt at all, except in his general submission that there are no contra-indications to communism in the document, that he hasn't dealt at all with certain features of the Indian Congress documents which, in my submission, on the evidence, clearly are contra-indications of communism. M'lords, there will be detailed argument submitted at a later stage on the Indian Congress which I don't want to anticipate but in my submission that argument will show a strong religious element in the Indian Congress and aheres to the principles of Ghandi and that in the field of foreign policy the main inspiration of the Indian Congress was India.

Now on the question of Ghamdism, Professor Murray indicates that that is not a conclusive contra-indication but it is a definitely non-communist element

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and does provide some contra-indication. That is at Page 6,722 to 6,724 in Vol. 34. It is put to the witness:

"It is also being suggested to you that an indication in the document that the Philosophy or Works of Ghandi are admired - again for what it is worth - tends to be a sign of non-communist influence? -- Yes. "

And then the witness has put to him certain passages - the works of Stalin where Stalin condemns Ghandi - and in the Commintern programme and the following is put to the witness at Page 6,724:-

"All I want to suggest from that is that theGhandist tradition in philosophy or political philosophy of political method is very sharply to be distinguished from the Marxist-Leninist School? -- Yes."

And as far as religion is concerned, Your Lordships will recall that there was a long discussion of that in the evidence which I don't want to go through in detail but the conclusion reached was that though religion can't be said to be entirely incompatible with communism, it is, of course, a non-communist influence. If you find religion that is a sign of an ideological influence that isn't communism. Then, as far as India is concerned, my learned friend asserted that in the Indian Congress documents China occupies a more prominent place than India as a country admired by the Indian Congress. Now that submission the Defence disputes and the detailed argument on it will be presanted as part of the main Indian Congress argument; but the submission will be that while there may be a few Youth Congress documents in which China occupies a rather prominent place, as far as the South African Indian Congress itself is concerned, and such official documents as its presidential addresses and Executive Reports, the position is really

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exactly the opposite - that the Indian Congress supports China because India has certain favourable attitudes towards China and one finds it said "We support India in her view that China should be admitted to the United Nations...." and so forth. Further references will be given in detail later, but I submit that it will be demonstrated that India did occupy the major position as a source of inspiration outside South Africa for the Indian Congress.

M'lords, in this connection I must deal with a small point made by my learned friend where he really tried to have it both ways on the significance of referendes to India. He said that one is dealing with a communist attitude in a document like C 281 (A), which I will come to just now, which condemns India as a country which has only formal independence; but he also says that praise for India is consistent with communism because communists regard India as a potential communist state. M'lord, as far as the doctrine of formal independence is concerned, that is dealt with by Professor Murrary at Page 5,450 and I have got no quarrel with that evidence of Professor Murray. In my submission the communist attitude towards a non-communist ex-colonial country is, in fact, as Professor Murray says in that passage. For the other alleged communist view, my learned friend suggests that India is regarded as a country which is - may become a people's democracy in future. Now, m'lords, of ourse, communism, as far as I can see from Professor Murray's evidence, regards all countries as countries which may become communist in the future, and I submit that there is no warrant ih the evidence for the suggestion that India is particularly singled out as being exempt from the general

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criticism of non-communist countries because it is regarded as potentially communist. In any event, the Crown cannot have it both ways. Either there is a definite communist Attitude towards India or there is not. The Crown, if it wants to say that there is, must decide what that attitude is. If there is no definite attitude the Crown must not rely on any statement made about India. Now, M'lords, of the 11 allegedly exclusive documents referred to under the Indian Congress, 7 actually relate to the Indian Youth Congress. The relationship between the Youth Congress and the Senior Congress were dealt with by the witness Cachalia. He deals with it at Page 15,048.

MR. JUSTICE KENNEDY: He adopted a very scornful attitude towards it, if I remember?

MR. O'DOWD: Yes, I think he thought they were just very much beginners in the art of politics and he was asked whether he knew of any big divergence between the objects of the Natal Indian Congress and the Transvaal Indian Congress and the Youth Congresses and his reply was: - "As far as the Transvaal Indian Youth Congress is concerned. they are not part of the Indian Congress as such. It is an independent organisation.

Well, m'lords, his statement that it is independent doesn't presumably tend to mean that there is no connection between them. It is clear that there was an overlapping of membership and that people were active both in the Senior and in the Youth Congresses but there is nothing to contradict his evidence on what the formal relationship was and it doesn't appear that the Senior Congress exercised any particular control over the Youth Congress.

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Now, m'lords, in judging the statements of the Youth Congress, I submit one should bear in mind that one is dealing here with a youth organisation consisting probably of persons whose political views have not been finally crystallized; persons who, perhaps, are apt to become very enthusiastic about things which they haven't entirely got used to and one won't draw the same sort of inferences from, for instance, an article in the magazine New Youth as one might draw from the same statement if it appeared in the secretarial report of the Senior Indian Congress.

Now of the 7 documents - Indian Youth Congress documents - relied upon, all are, in fact, articles in the magazine New Youth. Those are B 6 (No. 2 on the Crown's list; S.A. 78 (No. 10); D.M. 31 (No. 14); and B 100 (No.20); and all thsse come from issues of New Youth which are described on the front page as "Independent Youth Monthly". Your Lordships will recall that some early issues of New Youth were described as the "Official Organ of the Transvaal Indian Youth Congress" whereas later issues had this legend on the front cover "Independent Youth Monthly". The Crown has submitted that even after it bears the legend of independence on the cover, it can still be assumed to be connected with the Indian Youth Congress. That, again, m'lords, will be dealt with in more detail when we argue the Indian Congress in full. For the present, the only point I want to make is this: that there must have been some point in the change in the description of New Youth. Whatever connection may still have existed, it sppears that for som reason the Youth Congress no longer wanted its name to be linked with New Youth. That being so, how can it be assumed that New Youth necessarily represented

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the views of the Youth Congress as a whole? I submit that there is simply no evidence that it did. The 4 articles which are stigmatised in my submission contain nothing but references to people's democracy and praise for the U.S.S.R. and China. Some of the praise for the U.S.S.R. and China, goes fairly far. It is enthusiastic - more so than one perhaps finds in the average congress document but there is nothing there to show that the reason for the enthusuiasm for the U.S.S.R. and China was a fully informed acceptance of the ideology of communism as a whole and there is nothing there which, in my submission, is exclusively communist.

That leaves 3 more Youth Congress documents - N.M. 14 (No. 15 on the Crown's list); is the Secretarial report to the Transvaal Indian Youth Congress for the year 1955. The passage of which the Crown complains is at page 2,670 of the record. It, in my submission, merely contains a criticism of the Western Powers and the phrase "peace loving people of the SOviet Union, China and the countries of Eastern Europe." Well, m'lords, that is simply the sort of thing which has been frequently dealt with. It is again not suggested that these countries ought to be supported because they are proletarian states. It is suggested that they are peace loving. Perhaps the Secretary who wrote this report had been reading some of the literature put out by the Peace Council for the purpose of attracting non-communist support for these points of view.

B.N. 19 (No. 16 on the Crown's list) is a Secretarial report for the Natal Indian Youth Congress for the year 1953, and there's nothing in it except a condemnation of people alleged to be imperialists and the fact that the Korean war is discussed in such a way as to imply sympathy

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for the North Korean side. Well, there again, it is the sort of thing which one finds in the Peace Council propaganda and one can't assume that the person who wrote this document accepted these propositions because he was a communist. It may simply be because he had been convinced by propagands on these particular issues.

And, finally, there is B 240 (No. 19 on the Crown list) and that is a press release dated in September, 1956, and it purports to be a report of the proceedings of a joint meeting of the Transvaal Indian Youth Congress and something called "The South Africa-China Friendship Society," and it is just a rather verbose resolution expressing favourable sentiments towards China. As my learned friend said in his summary of it, it congratulates the Chinese for establishing a people's republic and condemns the imperialists for keeping China out of U.N.O. and lauds China's example to keep on struggling against cololialism. And that is all that there is in that document.

So, m'lords, in my submission, all that the Crown has shown by these documents - it has really shown nothing as regards the Senior Indian Congresses. All it has shown as regards the Youth Congresses is that in three documents taken from three separate years, and in some issues of New Youth, there is an acceptance of the Soviet point of view on certain international issues. It really amounts to nothing more than that, m'lords, and I submit that one can't draw an inference against the organisation from that.

COURT ADJOURNED:

COURT RESUMES: APPEARANCES AS BEFORE:

MR. O'DOWD (CONTD):

M'lords, I come now to the South African Congress of Democrats and here there are 16 documents referred to of which 9 are said to be exclusively communist and 7 merely consistent. Once again I deal only with the 9 which are said to be exclusive.

C 52 (No. 4 on the Crown's list) and B 281 (No. 9 on the Crown's list) can be considered together. As my learned friend has pointed out in his argument, there is evidence aliundi that the authors of both these documents, L. Bernstein and J. Hodgson, are former members of the Communist Party of South Africa and as far as the status of the documents is concerned, the Crown evidence is merely thatthey were found in the C.O.D's offices in the possession of some individuals. To this has now been added the evidence of Helen Joseph who says that....

MR. JUSTICE KENNEDY: Found in the possession of some individuals? They were found in the possession of the organisation were they not?

MR. O'DOWD: Yes, in the office and in the possession of some individuals. Mrs. Joseph says at Page 14,544 and 14,539 that both documents were read to the inaugural conference of the Congress of Democrats and were later circulated to branches for discussion. They were not, however, adopted by the inaugural conference or by the organisation at any other stage. So, m'lords, if these documents were exclusively communist they would merely confirm what is shown by other evidence that two persons with communist views did play a fairly prominent part in the affairs of the Congress of Democrats. As far as the

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is a resolution apparently passed by the Congress of Democrats National Conference in 1956. The only allegedly exclusive communist feature on which the Crown relies is the reference to the People's Democratic Government. This concept has been dealt with before. Mrs. Joseph testified that the Congress of Democrats had the same notion of People's Democracy as the African National Congress has - thereare several references to that in her evidence - for instance at Page 14,478. In my submission, read in the light of that, this resolution referring to People's Democracy cannot be held to be exclusively communist.

Then the three sets of lecture notes - A 84 to A 86 - the position is the same. There is evidence on record by Mrs. Joseph that these lecture notes were used for the purpose of discussion by the Congress of Democrats. That is at Page 14,000 - 14,004. There again the submission is that on this evidence and the general position - which will be dealt with later - these are not Congress of Democrats policy documents.

Then C 281 (A) (No. 10 on the Crown's list), is a lecture note entitled "National Liberation Struggle in Asia". The status of this document is again dealt with by Mrs. Joseph and she states that it was a discussion doucment and not a policy document. That is Page 14,456. She was asked :

"Mrs. Joseph. may I refresh your memory, you have already said that the lecture "National Liberation Struggle in Asia" was issued by your organisation? -- Yes, as a basis for discussion.

As a basis for discussion and as a reflection of your policy? -- No, m'lord, those discussion notes were not necessarily a reflection ofoour policy. They were informative lectures as a basis for discussion. I don't recall

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that they were ever sent out as a reflection of our actual policy." Then it was put to her:by Crown Counsel:-

> "I put it to you that you would not issue speakers' notes in that form unless you wanted to influence the readers in a certain direction? -- No, m'.ords, I can't accept that. The discussion notes were sent out on topics which were current at the time and our aim would always be for our members to study and to be provided with factual information and to come to a conclusion. "

Now, m'lords,no doubt the cross-examining Counsel here was partly justified in his suggestion that speakers' notes would not be put out unless somebody wanted to influence readers in a certain direction but the question is, was it necessarily the organisation's considered decision that readers should be influenced in a certain direction? Or was it a question of an individual being permitted in the course of discussions within the organisation to attemot to influence readers in a certain direction which he personally believed in and I submit that the position is known to be the latter one. The notes themselves do to some extent bear out the suggestion that they were intended for discussion in that in some points there are views put forward in a tentative way with an indication that a contrary view exists. For instance, m'lords, the document itself is at Page 1766 - line 27 of that page. Thefe is a paragraph headed 'India' and it says:-

> "For centuries the main base of the British Empire, India has been experiencing great changes. Considerable lack of agreement exists on the character of those changes but one viewpoint has it that the republic of India and Pakistan are examples of the technique of formal independence."

M'lords, also it is true that the lecture does not go on set

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out the other view points. On that point of view one could no doubt accuse the author of a bias in the direction of that view point but the fact remains that it does read like something which was meant to stimulate discussion and I submit that is what it is established to be.

As far as the contents are concerned, it certainly is an extreme left-wing document. There is the point of formal independence just mentioned; there is a reference to the importance of the working classes in the theory of Socialism and there is reference to China which, in the view of the document, is regarded as the most important of the Asian states and it is certainly consistent with communism and may have been written by a communist but again the exclusive features are, in my submission, missing.

Then next the Crown refers to C 999 (No. 14 on the Crown's list) and this is the lecture which has already been referred to under the A.N.C. - "What Every Congress Member Should Know". As far as theconnection of that document with the Congress of Democrats is concerned, there is nothing beyond the mere fact that it - that a copy was found in the Congress of Democrats' office. The evidence of Mandela on this document (at Page 15,857) was that this was an A.N.C. lecture. It was used by the A.N.C. It wasn't suggewted to him that it was passed on to any other Congress. Mrs. Joseph was cross-examined on the document (at Page 14,251) where she said thatthis lecture was not in conflict with Congress of Democrats policy but she wasn't asked whether it was ever used by the Congress of Democrats. Her statement that it is not in conflict with the Congress of Democrats policy must, in my submission, must, of course, beread with her statement that she did not understand this lecture to advocate a communist

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state. What she would have said as to its relationship to Congress of Democrats policy if she had understood it to be a communistic document is not known. One assumes that in view of what she said about communism and the Congress of Democrats she would not have made that same statement.

Then that leaves among the Congress of Democrats documents only two copies of the bulletin "Counter-Attack". This was a Congress of Democrats journal. It is one which seems to have appeared at quite frequent intervals. There are large numbers of copies of Counter-Attack in the exhibits so, m'lords, two communist articles in Counter-Attack is not a very impressive total for the purpose of showing that this journal was used as a medium of communist propaganda. In any event, my submission is that these two articles are not exclusively communist. The one is C 1016 (No. 15 on the Crown's list). M'lord,this really duplicates another document because whatthis issue of Counter-Attack purports to do is to set out an extract from a resolution passed by a Congress of Democrats conference and as far as one can judge from the brief extract given, it is the same resolution which was contained in C 980 - which I have just dealt with There the only is the reference to a People's Democratic government;and that leaves D.C.T. 5 (No. 16 on the Crown's list) and this is an editorial in Counter-Attack and my learned friend submits that it urges extra-parliamentary action for the establishment of a democratic system where the opening of the people's parliament would evoke happy smiles - and that does occur in the document - and my learn friend says that that is a reference to people's democracy. Well, m'lords, the term 'People's Democracy' and it seems that it is that actual term on which the Crown relies in this connection - doesn't occur here. If it is established

aliundi that 'People's Democracy' was what the Congress of Democrats wanted, then, no doubt, this article meant to refer to that but it doesn't refer to it on the face of it. In my submission, the evidence of the Congress of Democrats' documents proves nothing more than that there were soms communists who played a part in that organisation.

Coming on to the South African Congress of Trade Unions, here there are only 7 documents. If one counts the different lectures of the lecture series D. 31 to D. 35 separately 4 of the 7 documents are, in fact, four different lecures from that series. Of the remaining 3 only 1 is said to be exclusive and that is a single article in the publication 'Workers' Unity'. I submit that this is covered by my submissions that I have already made - No. 6 on the Crown list - LLM 73. It is simply a brief reference to the history of the world saying that the history of oppression and exploitation covers a great part of the history of mankind. My learned friend says it accords with the communist theory of history and no doubt it does but there is nothing in that which couldn't belong to some other theory of history. Then as far as the series of lectures D 31 to D 35 are concerned, there is not very much evidence about their status. They were found in the office. They were not found anywhere else. The Crown relies for evidence of their status on an Exhibit LLM 151 which is minutes of a Congress of Trade Unions Conference and that says that the National School was held. It doesn't expressly say that these lectures were delivered there. There are also references in these minutesto the fact that lectures have been prepared and these may be the lectures. These again are certainly left-wing lectures which one can

see some features consistent with communism in; their support for the Red International of Labour Unions - an organisation which existed in past years as against the Trade Union Organisation affiliated to the Second International and there are various other features. M'lords, in my submission, there aren't exclusive features in the light of what I have already submitted but in any event I submit that the mere existence of these lectures is quite insufficient to prove the character of an organisation - more particularly one which consists of numerous constituent bodies, The S.A.C.T.U. was an organisation to which trade unions were affiliated and one doesn't know quite what the Crown means by saying that the S.A.C.T.U. was a communist body. Does it mean that every one of the affiliated trade unions was communist? Or merely that the executive committee was communist? But in any event, in order to draw any inference from this very ambiguous material, I submit one would have to know a great deal more about exactly what was done with these lectures and on whose authority. That we do not know.

The South African Coloured People's Organisation - there were originally three documents relied on there of which one was withdrawn by my learned friend in the course of argument and that left only two which are A 84 to A 86 - the three lectures. Now, m'lords, the position there is that there is no evidence that these were either approved or used by the Coloured People's Organisation. Lollan dealt with them in his evidence at Page 15,301 - 8, and he said that they - when they were issued by the National Action Council they were sent to the headquarters of the Coloured People's Organisation in Cape Town and that was the last that was heard of them by the members of the Coloured People's Organisation, Transvaal, and there is nothing to contradict that, m'lord, so in my submission there is no evidence to connect this

organisation with these lectures and that leaves only one document - C. S. 19 - which mylearned friend doesn't say is exclusively communist. In any event, it is connected with the Coloured People's Organisation only in that it was issued by the Transvaal Consultative Committee. So, m'lords, I submit that the evidence against the COLoured People's Organisation really is nil.

Then the Peace Council and the Society for Peace and Friendship with the Soviet Union - I don't propose to deal with them in any great detail because in my submission the Crown argument on them really shows nothing more than that they had a pro-Soviet bias in their approach to international affairs. It doesn't show thatthey had any views at all on most of the subjects with which communist doctrine deals and on the important subjects with which communist doctrine deals from the point of view of this case. In any event, m'lords, the submission will be that these organisations are very unimportant to the case and I simply rest on the general submission that in the light of the argument already addressed, the exclusive features are not present and nothing can be inferred.

Now there was also a reference in the argument to International Front Organisations and these my learned friend concedes that he has not proved anything about their actual nature in facts. He hasn't produced any evidence which is admissible to prove what those organisations, in fact, were and, in fact, did. So that all we have is the general statement of Professor Murrray to which I have already referred showing what a Front Organisation should be in terms of communist theory. I have already made the point that on that theory these organisations are not supposed to be avowedly communist but are supposed to conceal their

communist nature and to attract the support of non-communists with certain limited aspects of communist policy. Now, M'lords, if that is so and if the organisations referred to do, in fact, operate in terms of that policy, that doctrine, then I submit one cannot infer anything against a person who supports or participates in those organisations because he may be one of the non-communists whose support these organisations are specifically intended to win and the only thing which the Crown attempts to add to that position is that it says that if you look at the Congress documents, documents in the possession of the Congresses and issued by the Congresses, which refer to these organisations, you can find communism in those documents. But, m'lords, in thus speaking, my learned friend to show what the Congresses knew about these organisations was, does it in a rather strange way because he does not rely on any statement which actually says what the Congress movement thought of these organisations. He doesn't point to any statement in which Congress says or that any Congress possessed a document, which says the World Federation of Democratic Youth is a communist front organisation or the World Peace Council is a communist front organisation. The way my learned friend sets about it is to examine various documents, to take out of them statements about the World Federation of Democratic Youth and its attitude towards facism, its attitude towards imperialism, its atttitude towards the Soviet Union, towards Liberation and so on. My learned friend says if you look at all these extracts in the light of expert evidence on the political side, you can see that these organisations must have been communist but as far as I

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understand it, it is not suggested that the African National Congress or any of the other organisations with which we are concerned ever did draw up a schedule of the views of the World Federation of Democratic Youth on all these issues; examine them in the light of expert evidence of political science and conclude that they were communist front organisations, and the submission that if they had done that the conclusion that they were communist, I submit, is an irrelevant submission.

There is evidence about the Congress view of the World Federation of Democratic Youth according to which it was regarded, rightly or wrongly, by the African National Congress as a harmless organisation which existed to unite youth of all countries on a non-ideological basis. That appears from Luthuli - Page 13,692 - 13,693; Mandela - Page 15,826 and 16128; and Maloao - Page 17,205.

Now, m'lords, there is one document which does deal in terms with the question whether the World Federation of Democratic Youth is or is not communist and which answers that question in the negative, and that is N.R.M. 49, which was referred to by my learned friend for various other inferences which he sought to draw from it but the fact remains that insofar as that document set out an actual Congress attitude to the World Federation, the attitude was that it was not a communist organisation.

MR. JUSTICE KENNEDY: Is it in Mr. De Vos's list on the W.F.D.Y.

MR. O'DOWD: Yes, m'lord, he referred to it quite a number of times in that big schedule in which there were various headings and extracts were taken showing the attitude in connection with those various headings.

MR. JUSTICE KENNEDY: Yes.

-MR. O'DOWD -

MR. O'DOWD: So, m'lords, as far as that is concerned, it doesn't appear that, in my submission, there is any real evidence that the Congresses knew or believed that these organisations were communist bodies.

Then, m'lords, as far as the evidence on the Communist Party of South Africa is concerned, my submission is that such evidence of its policy as has been placed before this Court is so incomplete that one really can't get a fair view of what the policy of the Communist Party was, particularly on the vital issues of the Dictatorship of the Proletariat and Violent Revolution. The few extracts which my learned friend succeeded in proving from a magazine called 'Freedom', which he admitted could not in themselves be regarded as formal expositions of the Communist Party Policy but were merely material from which its policy might be inferred.....

MR. JUSTICE KENNEDY: Where is this referred to, Mr. O'Dowd? Is it in the same list as all the organisations?

MR. O'DOWD: He submitted in regard to each organisation a separate schedule comparing ....

MR. JUSTICE KENNEDY: Yes, I know - in that bundle?

MR. O'DOWD: ..... the policy of the organisation to the policy of.....

MR. JUSTICE KENNEDY: Oh! I understand, yes.

MR. O'DOWD. ... that came with the submissions on each separate orgainsation. Your Lordships will recall that there was lengthy arguments on the admissibility of certain documents with regard to the Communist Party but all that emerged from that was that the Communist Party, in my learned friend's submission, had certain views about facism, liberation and subjects like that and he contended

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that there was a resemblance between those policies and the African National Congress policy. Well, m'lords, in my submission nothing can be inferred from such a resemblance. The policies dealt with are not the key policies, the characteristic policies of communism, they are simply what one might call peripheral aspects of communist policy and the fact that the African National Congress Policy may resemble the Communist Party's policy on certain points may mean that the African National Congress took those from the Communist Party. It might even mean that the Communist Party took them from the African National Congress but unless the thing goesas far as the showing of a resemblance on the exclusive features of communism I submit that there is nothing in it.

Then, m'lords, on the general position of 'Advance', 'New Age', Fighting Talk' and 'liberation', the relationship between these publications and the Congresses will be the subject of a separate argument at a later stage in which the submission will be that you can't assume that everything which appears in those publications reflects the policy of the Congresses.

MR. JUSTICE KENNEDY: Have you dealt with the Federation of South African Women?

MR. O'DOWD: M'lord, the documents on that, I think my learned friend had to abandon them all if I remember correctly.

MR. JUSTICE KENNEDY: No, not so far as my notes disclose. There still remains the document R.R.5. Is that correct. Mr. De Vos.

MR. DE VOS: Yes, m'lord, that is correct.

MR. O'DOWD: Well, m'lord, I regret I appear to have

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overlooked that document - if I may deal with it when we deal with the Federation in general.

MR. JUSTICE KENNEDY: Yes.

MR. O'DOWD: Then, m'lords, on the publications 'Advance", 'New Age', Fighting Talk' and 'Liberation', there is again aliundi evidence that certain former communists were associated with these publications. The Crown has given the details of that evidence and I don't dispute it. So that there is an indication that some communist influence can be expected to be found in those journals and in my submission the argument on the contents of those journals takes the matter no further than what one would expect from knowing that these communists were associated with them. Once again there is nothing germane to what I have submitted to be the exclusive hall-marks of communism and there are only references dealing with the same sort of material which appears in these various documents which has been dealt with. So, m'lords, I don't propose to go through those extracts. I content myself with the submission that the Crown has not shown exclusive communist material, as the Defence submits it to be, in them and nothing more can be inferred than the existence of some communist influence among the people responsible for those journals.

M'lords, the Freedom Charter itself will be the subject of a separate argument and I think it will be more convenient to deal with that all as a single subject. The Defence relies on Professor Murray's evidence that the Freedom Charter, as it stands, is consistent with bourgeois socialism and further submissions on the Freedom Charter will be made at a later stage.

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Now, m'lords, my learned leader did indicate yesterday that we intended to deal at this stage with individuals from the communist point of view as well but we had second thoughts about that and we feel that it would be more convenient to deal with the individual cases, person by person, at the end and not to split up the two aspects, and therefore, m'lords, that concludes what I have to submit on communism in general and my learned leader now has a further topic to deal with.

MR. JUSTICE RUMPFF: Just before you go, I just want to know what your submissions are in regard to the argument addressed to us by Mr. De Vos on communism in the sense that he presented to us a thesis (if I may call it that) containing a number of paragraphs in which various aspects of communism are dealt with according to the evidence - in the view of the Crown.

MR. O'DOWD: Yes, Your Lordships are referring to the long thing consisting of 14 chapters?

MR. JUSTICE RUMPFF: The chapters, yes. In each chapter a number of submissions are made and then there is a reference to the evidence of Professor Murray and other documentary evidence. What is your submission on all those?

MR. O'DOWD: M'lords, I have been through the parts in this memorandum in which certain things are said to be exclusively communist and I have made my submissions on that. Insofar as it merely states that certain other things occur in communist doctrine, there might be various small points which one could make against it if one went through it in detail but the Defence doesn't feel it necessary to dispute those.

MR. JUSTICE RUMPFF: Yes, apart from what you have already

MR MAISELS

advanced, you say the Defence doesn't think it necessary to dispute the submissions made?

MR. O'DOWD: As Your Lordship pleases. M'lords, that is, of course on the basis that, as I submitted at the beginning of my argument, the relevancy of this whole....

MR. JUSTICE RUMPFF: Oh, yes, that is a different aspect. I am merely on the - if I may call it - the dogma of communism. It starts off by saying....

MR. O'DOWD: That is the only evidence on communist dogma and subject to small points which we don't feel are worth debating, my learned friend's submissions do reflect the evidence.

MR. JUSTICE RUMPFF: Yes. Yes, Mr. Maisels.

MR. MAISELS:

May it please Your Lordships.

M'lords, I now propose to pass to a consideration of the policy of the African National Congress. Your Lordships are aware that the central issue in this case is the policy of the organisations and more particularly, of course, the policy of the African National Congress and I would like to remind Your Lordships of two passages in the record of this aspect of the matter.

The first is a passage in the judgment of Your Lordship Mr. Justice Bekker at the time of the application to quash the indictment and I refer to Page 26 of that judgment: Your Lordship said this:- (Quoting from an argument that I had submitted); This was my argument, m'lords:- "It is clear from the summary of facts, if anything is clear, that the basis of the case against the Accused is that they were members and supporters of organisations which - I am going to use a general term -

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"were revolutionary in object and because they knew and supported and played a prominent part in the activities of those organisations that they are said to have conspired to overthrow the State and it is therefore fundamental to the case to find out what the policy was and the facts upon which it is said for the Crown the organisations had those policies." Then Your Lordship proceeded: "I have no fault to find with this assessment of the situation or the submission as a whole. In fact, I share Counsel's view on that which is said to represent the basis of the case against the Accused."

Now, M'lords, in addition to that, Your Lordships will recall that at the opening of the trial proper, of the evidence, the Accused, after pleading, elected to make a statement in terms of Section 169 (5) of the Code and at page 138 - or at the foot of page 137 and the top of page 138 - the following passage appears:- "It has already become apparent during the preliminary stages of this case that the central issue is the issue of violence. While no admissions are made in regard to any of the Crown's allegations, the Defence case will be that it was not the policy of the African National Congress or of any of the other organisations mentioned in the indictment to use violence against the State. On the contrary, the Defence will show that all these organisations had deliberately decided to avoid every form of violence and to pursue their ends by peaceful means only. The Defence will rely for its contentions as to the policies of these organisations upon their constitutions, the resolutions taken by them at their conferences and the pronouncements of their responsible leaders. If necessary, these leaders will be called as witnesses for the Defence. The Defence will place before

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"this Court the material relating to these organisations from which their policies might normally be expected to be deduced." And then we deal with certain speeches and we say:- "That insofar as such speeches were, in fact, made in the terms alleged, the Defence will say that they may have represented the notions of individuals but not the policy of the organisation." M'lords, that was the basis upon which this case has been fought by the Defence and in considering this issue we have begun by making certain submissions to Your Lordships as to what is meant by the policy of an organisation and we will consider in the argument to follow what sort of evidence is necessary to prove it and what sort of evidence has been presented in the present case. M'lords, it has been submitted that the policy of an organisation means those decisions by which the members are bound in accordance with the constitution. When a person joins an association - the submission has already been made to Your Lordships - he agrees to be bound by the constitution and by such decisions as may be made by the governing body which is empowered by the constitution to make binding decisions.

M'Lords, in the case of the African National Congress, that body was - and the evidence will be placed before Your Lordships in due course - that body was the National Conference and no other. The Crown case, therefore, necessarily involves the proposition that at some time the National Conference of the African National Congress made a decision to overthrow the State by violence. That, m'lords, is fundamental to the whole of the Crown case. Now it is not disputed by the Defence that the existence of such a decision can be proved by evidence

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other than the evidence of a witness who was present when such a decision was taken. Now the words "By circumstantial evidence" and this apparently is what the Crown has attempted to do in this case. It may legitimately do so but there are certain comments which must be made initially in regard to such an approach. M'lords, circumstantial evidence contains two possible sources of error; errors arising from the fallibility of testimony and, secondly, errors arising from the fallibility of the inference; especially in a case where the volume of evidence is so great; especially in this type of case where you have this great volume of evidence but at the same time this volume of evidence does not constitute the whole picture - it is easy to see patterns in it which are not really there. The Court, of course, m'lords, will bear in mind that a single fact inconsistent with the Crown inference, will destroy the Crown inference, while no amount of fact consistent with that infefence will suffice to establish it unless they also exclude all other reasonable inferences.

The second matter, m'lords, for comment at this stage is that there are certain points upon which it might reasonably have been expected that the Crown would have produced direct evidence. These points will be dealt with later. They arise in various aspects of the case; in various of the so-called links upon which the Crown relies.

Thirdly, it will not be forgotten that the Defence has called direct evidence. Some of the Defence persons are persons who must have been present at any decision taken by the African National Congress to adopt the policy of violent revolution. They have denied that there was any such decision. We shall comment upon the failure of the

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Crown to put to these witnesses any precise hypothesis either as to the contents of the decision or the time or place of its adoption. Your Lordships will recall that has never been put anywhere in the whole of this case. A section of the evidence which will be dealt with in detail is the evidence of the so-called "Violence Speeches". We propose analysing these speeches thoroughly - an examination which, of course, may involve several weeks - six to eight weeks - an examination of these speeches.

MR. JUSTICE RUMPFF: Why do you mention the time, Mr. Maisels?

MR. MAISELS: Because it is a horrible thought to me, m'lord.

MR. JUSTICE RUMPFF: I thought you had also accepted the inevitable in this case, that time is not of the essence.

MR. MAISELS: I don't know, m'lord, whether the Accoused would go all the way with Your Lordship on that remark but I merely mention that it will have to be, and is intended to be, a thoroughly exhaustive analysis of the speeches.

MR. JUSTICE RUMPFF: Yes.

MR. MAISELS: Because our approach is not going to be quite the same as the Crown's nor are we going to tackle the problem in the same way. We are proposing to deal with the speeches by 'reporter' as it were. To take Reporter A and deal with him and take Reporter B and deal with him in the volume of the speeches. Now this analysis of the evidence will naturally involve consideration of the credibility of the witnesses who reported these speeches - in most cases. The submission to Your Lordships will be that the long-hand reporters do not give a sufficiently full and accurate version of the speeches to justify the foundation of any inference upon their evidence.

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With regard to the balance of the speeches, the argument will be that most of them contain nothing from which an inference of violent policy could properly be drawn. Many speeches - many - contain references to death, to sacrifice and similar words which might be construed as references to violence by the African National Congress or its followers but which are plainly capable of other meanings. It will be submitted that such phrases have been adequately explained by the Defence witnesses. There are, admittedly, a few speeches which the Defence concedes contain suggestions of violent action. These have also been dealt with in the Defence evidence and the evidence is that these speeches do not,and did not, reflect the policy of the African National Congress and that is what the Court will be asked to find.

M'lords, in examining the soeeches, Your Lordships will be asked to bear in mind that no speech made by a particular individual, by any particular individual, can be regarded as direct evidence of the African National Congress policy. Not even the President General and certainly not anyone else had authority to lay down policy in his speeches. Speeches are thus only material from which policy may be inferred. The Crown argument is no doubt intended to be that if speeches of a certain kind are consistently made from A.N.C. platforms one can infer a decision at a high level to make such speeches and one can further infer a decision to do such things as the speeches suggest. But the word "consistently" is essential to this argument. It is only from a series, from a consistent series, of speeches of a similar kind, made all over the country over a definite period, that one would be justified in inferring

a policy decision. No inference of policy can be drawn, or could be drawn, from the sporadic appearance of a certain theme in speeches. Such sporadic appearance would obviously not eliminate the hypothesis that some members of the African National Congress believed in a particular doctrine in question while others do not and we shall argue that even taking the Crown case at its highest, and accepting the Crown interpretation of many doubtful speeches, the Crown has done nothing more, has shown nothing more, than the sporadic appearance of violent ideas in A.N.C. speeches. The speeches placed before the Court are only a fraction of the speeches which must have been made during the indictment period and the 'Violence Speeches' in themselves are again only a fraction of the speeches placed before the Court. The speeches placed before the Court are not necessarily the most important fraction of the total made. They are simply the fraction on which the Crown found most support for its case. The submission will be that the Court should not draw an inference as to the policy of the A.N.C. as a whole from such material. Another point which will be argued is related to this one which I have just mentioned. Just as the Crown has failed to show, in our submission, that the policy for which it contends runs through all the material produced by the A.N.C. over the indictment period so it has failed to challenge defence evidence which positively establishes that the alleged policy of violence was unknown in large sectors of the A.N.C. Organisation and, m'lords, this is vital, this is a vital point which doesn't seem to have been dealt with at all - because if you have a policy of violence presumably it is to be known by the organisation as a whole. We shall

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argue that this policy was unknown by the organisation as a whole. We shall argue thatthis policy was unknown,by evidence which wasn't challenged in this Court, by larger secotors of the A.N.C. population. Your Lordships will remember we produced before the Court rank and file members of the African National Congress. They were called towards the end of the Defence case. They weren't really cross-examined except to show that there may have been others who knew A.N.C. policy better than they did. . Of course there may have been, m'lords. That is hardly the point. It is not the point at all, in fact. The point is that we are here trying to infer A.N.C. policy from what the A.N.C. did and said. These witnesses deal with what the A.N.C. did and said over a large part of its organisation. The Court will be asked to consider what can be left of the conspiracy after the area dealt with by these witnesses has been excised. M'lords, whilst on the subject of the cross-examination of defence witnesses, we shall make particular reference to the cross-examination of Professor Matthews. The argument will be thatthis was a witness who had an unrivalled direct knowledge of the sources of A.N.C. policy. There was no better qualified witness who could have been brought to give evidence on that subject. His record in the African National Congress and the details will be placed before Your Lordships later. But plainly it cannot be disputed that he had an unrivalled direct knowledge of the African National Congress policy. If,too, his evidence destroys the Crown case completely yet his evidence was not challenged in cross-examination upon the vital points and very half-heartedly (if I may say so) challenged in argument. He apparently,according

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to my learned friend Mr. Hoexter, who argued this part of the case, knew enough to be a conspirator but not enough to be a reliable witness on policy. My only comment on that, having regard to his knowledge, is to say "Really, is that what the Crown contends with regard to Professor Matthews.

And we turn next to the consideration of the African National Congress policy from a more positive point of view. The submission will be that there is no mystery about this policy - no mystery at all. And there is no need for the elaborate piecing together of inferences from unlikely sources. There is on record both direct evidence for A.N.C. policy and indirect evidence from very important sources and this evidence, the submission will be to Your Lordships, establishes beyond doubt that the A.N.C. policy was, in fact, a policy of non-violent extra-parliamentary action aimed at putting moral and economic pressure upon the Government and the White electorate of this country. In this connection an important source to which we will refer, is the writings and speeches of the two principal leaders of the African National Congress during the Indictment period, namely Mr. Luthuli and Professor Matthews. M'lords, the utterances of an acknowledged leader, as we conceded previously, are an impoftant fact from which policy can be inferred, more especially if it be shown that such utterances were known to the National Conference at the time of their election or re-election and there, m'lords, is one statement of Mr. Luthuli's which is particularly important from this point of view and I refer to EXHIBIT A.J. L. 30, which appears on the record in Vol. 54 at Pages 10,860 to 10,865. It is a booklet entitled "Our Chief Speaks"

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which was before the National Conference which first elected Mr. Luthuli as a President General of the African National Congress. The Crown's evidence and the argument are alike singularly lacking in information about the last months of 1952 which the Indictment might have led one to believe would be a crucial period. The Defence, however, has been able to produce this booklet which was issued at that time which provides better evidence than anything else before the Court of what the A.N.C. policy really was precisely at the beginning of the Indictment period. This Exhibit will be dealt with in detail and the submission will be that it clearly expounds a non-violent policy. We shall then proceed to examine the statements of Mr. Luthuli which are before the Court and to show Your Lordships that certain concepts are consistently through them and I am referring to statements ante litem motam. I am referring to statements made at the time when he could have had no idea there was going to be a charge of high treason. I am referring to statements made both inside of South Africa and outside of South Africa which bear the same imprint notwithstanding my learned friend Mr. Trengove's rather uncharitable description at one stage of statements made outside of the country. I shall show Your Lordships that there is one consistent concept running right throughout all these statements and that is the concept of non-violence and an idea of sacrifice which, in his case, is plainly rooted in Christian Doctrine. Now such consistent themes running through the utterances of the President General over a period of years are of far more significance than the outbursts of lesser men which show no such consistency even on the individual level.

As to Professor Matthews, the submission will be

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that his importance in the Congress - second only to that of Luthuli in position - his knowledge of Congress affairs is probably to some extent greater than that of Luthuli's because he had a longer association with it - we will show that in regard to Professor Matthews his utterances, too, are consistently non-violent. But, m'lords, all individual utterances, however, as we stated before, submitted before, are merely inferential evidence of policy and we now turn to consider the real sources of A.N.C. policy.

Now the Constitution establishes - Your Lordships will be given the references later in the detailed argument - that the National Conference is the source and theevidence confirms that it functioned as such. The Crown has not been able to produce or to suggest any other source of policy. Reference will be made to three major policy documents which were approved by the National Conference. Those three are the booklet "Africans Claims", "The 1949 Programme of Action" and the "Freedom Charter". In the light of the evidence, it cannot be disputed that these are the basic policy documents. Yet only the third of these, that is the Freedom Charter, was originally relied on at all in the Crown case and the second, "Programme of Action" at a much later stage and I shall deal with that now.

The document "Programme of Action"-most directly relevant to policy or methods of struggle is the Programme of Action. Now this document, on the face of it, does not envisage violence and does envisage the kind of non-violent methods which have been repeatedly described in the Defence evidence and it is therefore not surprising that it was not relied on by the Crown in pleadings or evidence and was read into the record by the Defence. At the stage of argument,

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however, my learned friends appearing for the Crown had realised that it couldn't deny the importance of this document and that its non-violent nature would have to be explained away. The Crown, therefore, set up an elaborate structure of interpretation in terms of which the programme adopted by the National Conference in 1949 was to receive a meaning other than its plain and ordinary meaning because of things which were said by bodies or persons other than the National Conference at times other than 1949 and we hope to be able to persuade Your Lordships that the programme should be read in its plain and ordinary meaning and that it is entirely in favour of the Defence. But, m'lords, most important of the glosses which the Crown seeks to put upon the Programme of Action is to the effect that the African National Congress knew - and that is the fundamental aspect of the Crown case - that the African National Congress knew that the methods envisaged in the Programme would necessarily lead to violence. M'lord, the Crown is very fond of the phrase "They knew". The most obscure speaker or writer only has to enunciate a proposition for it to become in the eyes of the Crown something that 'They knew'. Our submission will be that the knowledge of an organisation consisting of thousands of members scattered all over South Africa cannot be proved from any piece of paper that happens to be found in the possession of one of those members. Much of what the Crown relies on as proof of knowledge is nothing more than propaganda expressing the views of individuals in highly metaphoric language. Can it be taken literally? And even if it is taken literally, it canIt be attributed to the A.N.C. as a whole. We shall invite the Court's attention, m'lords, to what we submit is a far more reliable source of A.N.C.

- policy -.

policy, namely the defence evidence given on oath. The evidence deals expressly with the question whether violence was regarded as an inevitable outcome of the methods used in the Programme of Action. The evidence is that it was not so regarded.

The Crown has further suggested.....

MR. JUSTICE RUMPFF: The violence that you refer to here and on which you say the Crown relies is violence by the masses as the result of violence by the State?

MR. MAISELS: Yes, m'lord. I shall show your Lordships when we deal with that in detail that that is really what was submitted by my learned friend in argument on Programme of Action in detail. The Crown has further suggested that violence follows from the methods envisaged in the Programme of Action by virtue of the logic of the situation. The contention appears to be this: that if you use civil disobedience against a brutal facist government violence must so obviously result that you can be presumed to 'envisage it'. 'A natural and probable consequence' says my learned friend. The Defence will submit that this is not so as a matter either of experience or of logic. The matter is dealt with in one sentence in Gardner & Lansdown in Vol. 1 at Page 480/1 of the 6th edition, where the learned author says this:- "it is the universal but rebuttable presumption of law that a man intends the reasonable and probable consequences of his acts. This view may be based upon two grounds: firstly, that from the common course of human affairs the act in question must to a reasonable mind be prima facie taken to have been done with the intention of the particular consequences which in universal experience usually follow an act of that character." A man fires a gun down Eloff Street - universal experience is that somebody is to be hurt. But

one hardly applies this approach to the particular problem now under consideration. There are many possible results of non-violent resistance to a government, whatever the nature of its government. The Defence witnesses have said that they hoped - what they hoped and intended the result of their resistance to be and it will be submitted that these hopes and intentions are far more reasonable and credible than the Crown theory of a plan for massacres leading to retaliation and eventual overthrow of the State. It will be observed that the essential feature of this plan, if it is to be treasonable at all is the retaliation which waw to follow upon police violence against the masses. The Crown is a little bit vague about this retaliation. We have neverreally been told how it would work or when or anything about it because the reason is there is no evidence to support the Crown on this material point. Your Lordships will be referred to direct defence evidence, credible evidence, to the effect that if police violence took place there would be no retaliation. That is supported by many documents and isn't contradicted by any evidence at all. And it is noteworthy in this connection that a feature upon which the Crown relies for its interpretation of the Programme of Action is the Defiance Campaign. We agree that this Campaign does show the methods of the Programme being put into practice. We agree with that and we agree that that should be looked at to see what those methods really were. Where we differ from the Crown is in the fact that we want to look at the Defiance Campaign as it actually was. The Crown prefers to look at it as it might have been. Perhaps it might have been all sorts of things but it was, however, m'lords, an entirely peaceful campaign of civil disobedience. It shows, if anything is shown, that the

African National Congress and the South African Indian Congress which was associated with it at that time, were in earnest about non-violence. It explains their faith in non-violence. It gives the lie to the Crown's flights of fancy about the consequences of non-violence. We rely strongly upon the Defiance Campaign as a practical demonstration of the policy as we see it.

MR. JUSTICE RUMPFF: What have you to say in general on the three stages of the Defiance Campaign?

MR. MAISELS: M'lord, a detailed argument will be addressed to Your Lordships on the Defiance Campaign and the three stages. Your Lordship will re-call the cross-examination of Professor Matthews on it. The matter will be dealt with in great detail, m'lord. We will deal with that in detail but one thing is plain - that at no stage, whether the first, second or third, was it ever intended that they should lead to violence. It was never intended at all and, indeed, cannot be seen as a natural and probable consequence. We shall analyse that matter we hope to Your Lordship's satisfaction.

Now the other two major policy documents - the Crown doesn't rely at all upon the Campaign and we rely upon it as showing the legitimate nature of the African National Congress's aims and the continuity of those aims throughout the years. M'lords, there is an importance in this. Your Lordships will see when we analyse that in detail, the phrases, the sacrifices, the mass liberation movement - all those words that have now become swear-words almost - or smear-words, pehaps - have been used by this organisation peacefully pursuing its objects over the years. Certainly since 1943 which is the date when that document

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was drafted.

As for the Freedom Charter which is the other major policy document, that has declined sadly in importance I am afraid in the eyes of the Crown since this case began. Apart from the communist aspect which I shall deal with very briefly, m'lord, in due course, the Crown bases only one argument on it. As we understand it, m'lord, it is suggested by the Crown that the changes involved are so radical that they could only be obtained - or perhaps the African National Congress believes they could only be obtained by violence. There are many answers to this argument but the simplest is given by the Crown witness, Professor Murray. He points out that if the franchise were once granted to the non-Europeans any other reform, whether it is in the Freedom Charter or in any other Charter, would then follow by perfectly constitutional means. Thus we will submit to Your Lordships that none of the demands of the Freedom Charter really take the matter any further than the basic demand for equality which has been the A.N.C.'s policy since 1912. That is the basic demand. That is the basic point of this whole thing.

MR. JUSTICE BEKKER: What about the economic demands?

MR. MAISELS: If franchise rights are given.....

MR. JUSTICE BEKKER: What I have in mind is 'Schedule 71 A' where the difference between African claims and the Freedom Charter are discussed and there the point is made that economic claims....

MR. MAISELS: As Your Lordship appreciates, economic claims and economic consequences follow from parliamentary legislation and we will deal with that aspect fully in the course

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of the argument. Of course, m'lord, we shall submit in regard to the Freedom Charter that it arises naturally out of the grievances of the people and has no sinister significance whatsoever. There is one point that I omitted to make in regard to the Defiance Campaign. It is not, Your Lordships will appreciate, for the Defence to prove that the Defiance Campaign would not lead to violence. The Crown must prove that it must have led to violence and in agreement that it should, we shall show Your Lordships the different stances - to put it mildly - adopted by the Crown in regard to its attitude to the Defiance Campaign.

The remaining direct source of the African National Congress is the ordinary resolution of the Annual National Congress. We shall comment on the fact that although the Conference, in fact, met regularly, the Crown has been unable to rely on its resolutions. Now these are the only documents which in themselves embody A.N. C. policy. We do not dispute, however, that inferences as to policy can be drawn from other documents but again in order to draw such an inference, we shall submit the Court must take into account a numberof factors. With respect to any given document it is necessary to ask what the status was of the person who wrote it; what was theoccasion upon which he wrote it; the purpose for which it was written; whether it is consistent with all the other documents which touch on the same point? Before the Court will assume that any statement other than a National Conference Resolution reflects policy it will have to be satisfied that such a statement is not the opinion of an individual or of a clique; that it is not a tentative view put forward for discussion; not an attempt to change policy and not, as it is in most cases relied upon by the Crown mere rhetoric

of ephemeral propaganda.

In the light of these considerations we shall consider a number of documents which the Crown has relied on. The documents upon which considerable emphasis has been placed by the Crown are, firstly, A 309 - "No Easy Walk to Freedom" and A 84 to A 86 - the three lectures. Next follow a number of documents classified as the Crown has classified them under the heading "Liberatory Struggle - Propaganda for a New State" and last come the publications known as 'Advance','New Age', 'Fighting Talk' and 'Liberation'. On all these documents considered together and making due allowance for rhetoric, for individual aberrations, the submission will be that thefe is nothing inconsistent with the Defence version of the African National Congress.

When dealing with the documents placed under the heading of the "Liberatory Movement", we shall consider the whole position of the Crown's allegations on the subject and we shall show that the allegation that an international communist inspired liberatory movement actually existed, an allegation that was once described by my learned friend as being the kernel of the Crown case, has collapsed ignominiously at that. And this collapse has left the Crown with the task of making something out of a hotch-potch of propaganda statements on a variety of situations in other countries. That is what is the result. By making a careful selection of these statements which suited, the Crown has contrived to suggest that the theme running through these foreign policy statements is a theme of approval of violent revolution. We submit, m'lords, that that is not the position at all.

- MR. JUSTICE BEKKER -

MR. JUSTICE BEKKER: Mr. Maisels, on the question of policy, when you said that these documents, writings, utterances may be inferential evidence of policy - on the submission of Mr. Nicholas that policy-for policy you have got to look at the Constitution - how does propaganda give rise to an inference of policy? That is your submission.

MR. MAISELS: No, I said that you could look at it to see.

MR. JUSTICE BEKKER: TO see what?

MR. MAISELS: To see if there has been a resolution adopting a policy which was not reflected in any official document - it may be adopted at some secret conference. You could look at it and see whether there had been - whether there was a consistency. You could look at it because although it had been said there was no secret policy one must assume on this that there must have been some secret resolutions which have not been placed before the Court otherwise, m'lord.....

MR. JUSTICE BEKKER: My difficulty is this: assuming the policy of the African National Congress is non-violent and assuming everybody thereafter said the policy is violent...

MR. MAISELS: Everybody?

MR. JUSTICE BEKKER: Everybody - all the leaders say it is violent, how can you draw an inference from their statements that it is violent if the constitution is non-violent?

MR. MAISELS: That is a matter, m'lord, which my learned friend Mr. Nicholas argued. It is a question of a unanimity of opinion - evidence....

MR. JUSTICE BEKKER: I am aware of that. I am quarrelling with the statement you made here. You said - and that is what I want to know - you said utterances, documents, is

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inferential evidence of policy.....

MR. MAISELS: May be looked at. In their absence - let us take this position: let us assume that no - that there was no direct evidence to the contrary, no constitutions, no documents to the contrary - all you had was a mass of evidence which led one way...

MR. JUSTICE BEKKER: I don't quarrel with that but we have got a constitution here. If there is no constitution I can understand the position.

MR. MAISELS: Well, perhaps, m'lord, on re-consideration we have conceded too much. I would like to consider that.

MR. JUSTICE BEKKER: I don't know. As you please, Mr.Maisels. I want to understand the submission.

MR. MAISELS: M'lord, we took the situation in this way. We take our stand on what are called the Resolutions of Conferences which are the constitution, the documents which I have mentioned, the Programme of Action, the Freedom Charter, African's Claim.....

MR. JUSTICE RUMPFF: Mr. Maisels, I take it that although a constitution may contain a provision about something, the organisation may develop a policy in regard to details generally....

MR. MAISELS: May adopt a policy....

MR. JUSTICE RUMPFF: May adopt and develop it in due course after a matter has been put, for instance, by leaders - may have been dealt with in a speech at a conference; may not have been disputed, rejected; may have been accepted as a policy over a course of years although it may be that a number of the individual members of that organisation may not know about it.

MR. MAISELS: That is not the policy, m'lord.

- MR. JUSTICE RUMPFF. -

MR. JUSTICE RUMPFF: Why not?

MR. MAISELS: Because the constitution lays down what the objects are and how you adopt policy..

MR. JUSTICE RUMPFF: Yes, but I am putting it to you that this is a policy about a detail not inconsistent - let us put it this way - not inconsistent with what is contained in the constitution.

MR. MAISELS: Then, if Your Lordship pleases, that would merely be an exective administration of the policy as laid down. If it had been consistent then there would be no difficulty at all.

MR. JUSTICE RUMPFF: Yes, let us start off on the basis that it is not inconsistent - on that basis, obviously, minor details in regard to the putting into effect of the policy, for instance, may be developed and may be adopted in the course of time without it ever appearing in the constitution in writing.

MR. MAISELS: Correct - but then of course, Your Lordship appreciates the policy is the same; it is merely the implementation or method which within the terms of the policy is being carried out.

MR. JUSTICE RUMPFF: Yes, that is then, I take it, the gist of your argument here and your quarrel with the Crown, to say a policy contained - a policy found in the constitution or resolutions of an organisation contains a certain principle, then to suggest that that principle has been abandoned or that an opposite principle has been adopted, you must show more, much more, than mere speeches etc.?

MR. MAISELS: Yes, m'lord. One would have to get - the evidence must be so overwhelming as to lead the Court to the conclusion that that policy or resolution must have been reversed,

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changed, rescinded.

MR. JUSTICE BEKKER: And sanctioned by the consenting parties?

MR. MAISELS: That is so, m'lord; rescinded by the authoritative body - by the constitutional body - to do so.

MR. JUSTICE BEKKER: I suppose it is possible, as in contract, as in ordinary contract, where you pay your rentals late regularly that the contract is thereby amended?

MR. MAISELS: No, m'lord, as Your Lordship pleases, I think that is a slightly different principle.

MR. JUSTICE BEKKER: Well, now, I want to put this to you: Is it not possible - because here we are dealing with a contract - on the authority of 'Wilken's case, it is an ordinary contract, an agreement. Now if a course of conduct over years is followed it can only be regarded as policy if it is shown that all the contracting parties were aware of that particular course of conduct.

MR. MAISELS: Yes, m'lord, exactly, because what is happening then - if one is in a certain sense implying a term, implying that something else has happened - and one has the well-known test - it must necessarily lead - it is not a bad way of looking at it, in fact - it must necessarily lead to the inference that something else had happened, namely that all the members had agreed or that there had been a proper constitutional authority by the National Conference.

COURT ADJOURNED TO MONDAY, 13th MARCH, 1961.

MR. MAISELS

MR. DE VOS: My lords, the accused Moretsele is absent this morning. I take it my learned friend on the other side may have some information about his position, to give to the Court.

MR. MAISELS: Well, I'm informed he died, my lords. That's the position, my lords.

RUMPFF J: Yes, I saw something in the paper to that effect.

MR. MAISELS: Other accused have told us that that is so.

MR. DEVOS: My lords, one other matter before my learned friend continues. Subject to what the Court may direct the Crown proposes to argue the legal points as requested by the Court on Wednesday morning, if that would suit the Court.

RUMPFF J: Well, may we just ask Mr. Maisels - how long do you expect to be on the African National Congress?

MR. MAISELS: Your lordship will appreciate that on the African National Congress it would involve not only the documentary side and general arguments on probabilities; that part I think, my lord, would take about another week or two.

RUMPFF J: Well, the point is this; we would like to hear the Crown not before you have completed your argument on the general part of the African National Congress. In other words, if you require till after Wednesday then we would prefer the Crown to wait, until you have completed that part of your argument.

MR. MAISELS: There may be a convenient stage; perhaps I could indicate to your lordship how we propose

arguing? Your lordship will appreciate that what I have argued so far has been a general outline of the case. In addition, my lord, I propose, as soon as I have finished that, to argue the probabilities of the new conspiracy, as we call it - - then after that, my lord, my learned friend Mr. Kentridge will address your lordships on political method, the language of political struggles, then after that I will address your lordships on what we call the main policy documents, namely the conferences, resolutions, pro. ramme of Action, Freedom Charter, Africans' Claims and so on. Then the Defiance Campaign and matters of that nature; then, my lord, it may be convenient at that stage for the Crown possibly to address your lordships. All I want to say, my lord, is that we could find a convenient stopping place by tomorrow afternoon at all events.

RUMPFF J: Or even if it's more convenient a little later.

MR. MAISELS: Yes, my lord.

RUMPFF J: Very well, Mr. de Vos, then we won't call upon the Crown to answer before Wednesday, and it may even be a little later, depending on the position.

MR. DE VOS: As your lordship pleases.

MR. MAISELS: We will try, my lord, to finish a convenient part of our argument by tomorrow so that the Crown can make its reply.

RUMPFF J: Yes.

MR. MAISELS: Now, my lord, may I just for a moment revert before continuing with my general opening on the African National Congress, to a question that was raised on Friday morning by his lordship Mr. Justice Bekker

particularly in regard to the question of how one proves policy as a matter of evidence, and my lord, I had perhaps failed to make it clear - as I should have - the way in which the question of inferential evidence of policy fits in with our main submission on the policy of an organisation.

My lord, we have already submitted to your lordship that policy means one of three things. Firstly, the objects set forth in a Constitution; secondly, a decision consistent with the Constitution and duly adopted and I stress the words, my lord, 'duly adopted' by the policy making body established by the Constitution; or thirdly, my lord a unanimous decision of all the members.

Now one of these three things the Crown must prove.

RUMPFF J: Will you just repeat them please.

MR. MAISELS: Yes, my lord; firstly, the objects set forth in a constitution; secondly, a decision consistent with the constitution, and . . .

RUMPFF J: A decision by whom?

MR. MAISELS: A decision of conference, my lord, the National Conference. And, my lord, I stress the words 'National Conference', consistent with the Constitution and duly adopted by the policy making body established by the Constitution. That's the National Conference, my lord. And thirdly, my lord, a unanimous decision of the members.

RUMPFF J: May I just ask you this question. In regard to the second one, why do you limit it to a decision consistent with the Constitution?

MR. MAISELS: Your lordship means that one could visualise a situation where the National Conference had adopted something which would virtually amount to a change

in the Constitution?

RUMPFF J: Yes. In terms of the Constitution.

MR. MAISELS: Oh, yes, my lord, I'm sorry. A National Conference has powerto alter and therefore it's really a decision of the duly constituted body of the Conference. I say the duly constituted body, I mean the law making body of that Association, my lord, and I was about to submit, my lord, that one of these three things the Crown must prove and it can do so, my lord, either by direct evidence, but, of course, as with any other fact it may do so by circumstantial evidence.

BEKKER J: Is there yet perhaps not a fourth way: if it's shown that all members of the political organisation are aware, or were aware of a consistent course of conduct over years, and nothing is said and nothing is done?

MR. MAISELS: That's by theagreement, my lord, but your lordship will appreciate that that's not the case here. I was about to make it quite clear that the third category does not enter this case at all.

RUMPFF J: Whatever the scope of the third category may be?

MR. MAISELS: Yes, my lord.

RUMPFF J: Let us put it at its highest here which may not have been proved at all. Let's assume that the Constitution says, "Non-violent struggle"; let's assume that at the beginning of a certain year the lead ers, and all the leaders consistently throughout the year on the platforms all over the country preached a contrary suggestion - - all the newspapers used by the organisation and published by the organisation advanced that policy - -

then a National Conference takes place, nothing is said - - the same thing then follows for another year and a further year. Now, assume for argument sake that the argument was then advanced, "Well, actually the leaders missed a small district somewhere in the Eastern Free State" and there there are still members who never heard of it. . . . then I take it a Court might come to the conclusion that the policy of that particular organisation changed, although a few members may not have heard of it, but on the facts - on those facts which I've set out one can safely say that the policy has been changed - by course of conduct.

MR. MAISELS: Rip van Winkel, or whatever it was. The course of conductof the association changed the policy, but that is in effect, my lord, substantial or virtual unanimity.

Now, my lord, dealing with these three categories very briefly then, since the Constitution itself is before the Court the question of circumstantial evidence doesn't arise in this matter, and my lord, the third matter which has just been debated, with submission, need not be considered because the Crown has conceded in this case - to put it at its lowest, the Crown's concession - that the rank and file at least were not party to the alleged conspiracy.

But, my lord. . . .

RUMPFF J: There was a remark to that effect. Where was it made?

MR. MAISELS: It was made by my learned friend Mr. Trengove, my lord, in answer to a question which his lordship Mr. Justice Bekker put, and your lordship will remember it arose also specifically in regard to an examinatio

on the evidence of what we call the ... .omnibus sites, the man in the street, . . .

KENNEDY J: The ten or eleven witnesses that you called....

MR. MAISELS: That's right, my lord, and the evidence wasn't challenged.

RUMPFF J: Yes, I was merely concerned about the statement by Mr. Trengove. You haven't got the reference to that?

MR. MAISELS: My lord, we'll find the reference for your lordship and give it to your lordship later to-day. Now, my lord, the Crown might, however, as your lordship put it, rely on circumstantial evidence of the fact that a resolution in written terms had been passed by a National Conference of the African National Conference; and as your lordship put it such evidence could conceivably emerge from for example the statements of leaders. For instance, if, my lord, a certain subject - by way of testing it - had never been mentioned at African National Congress meetings up to the date of a particular National Conference, while after that date one found a certain attitude on that subject taken up consistently by the leaders, at all A.N.C. meetings, one might be able to infer, my lord, in those circumstances that a resolution on that subject was passed at that Conference; subject, always, of course, to direct evidence to the contrary, but that's the sort of way in which one might be able to infer it, but, of course, my lord, the Crown really hasn't attempted in our submission to approach the circumstantial evidence in this case from that point of view. The Crown, my lord, in our submission

has attempted to draw certain inferences which we say are really vague from a mass of material but has never been able to submit that this material suggests that a particular resolution was taken by a particular Conference on a particular occasion, let alone a particular date. It is only, my lord, in our submission, if that submission could be made by the Crown that the Crown can rely on circumstantial evidence. In other words, my lord, we do not concede that policy can be made by anything less in the result - anything less in the result than a National Conference resolution. The Crown's evidence must be directed towards proof of the existence of such a resolution, in terms which will support the Crown's case. The Crown, my lord, can rely on any kind of evidence it likes, but it must be to that end, my lord, and to no other. Therefore, my lord, any circumstantial evidence upon which the Crown relies must in our submission, my lord, be tested by asking a question - - does this tend to prove - does this tend to prove that a policy decision in terms of the alleged conspiracy was adopted by the National Conference of the African National Conference. My lord, I submit that that is not putting the matter unfairly to the Crown. And it is with that question in mind, my lord, that we shall in due course examine the evidence in this case.

Now I revert to the argument that I was addressing to your lordships on Friday, and I had dealt very briefly with the allegation of the Crown of the International Communist inspired Liberatory Movement and itwas suggested to your lordship that that, which was once the kernel of the Crown case, had collapsed ignominiously.

And it was submitted, my lord, that this collapse left the Crown with the task of making something out of a hotch potch - propaganda statements, and a variety of situations in other countries.

And my lord, by making a careful selection of these statements which suited it, as it was entitled to do, of course, the Crown have contrived to suggest that the theme running through the so called foreign policy statements is a theme of approval of violent revolution. We submit, my lords, that that is not the position at all. The theme running through the documents, and in our submission the view that can safely be attributed to the African National Congress, is approval of independence for Colonial countries, and opposition to any measures taken to delay such independence. We shall show your lordships that that is the theme which goes back at least as far as Africans' Claims in 1943. In cases, my lord, where actual fighting is in progress the African National Congress expresses sympathy with one side; such sympathy in our submission cannot be taken, as the Crown takes it, to imply the intention to use similar methods in South Africa. The Crown suggests, my lord, that the A.N.C. criticism, for example, of violent methods used by the British Government in Kenya is a good example because it's often been used. The Crown suggests, my lord, that this implies the view that similar methods should be used by the South African Government. Some such suggestion, my lord, may be present in a few documents, but these take the matter in our submission no further, my lord, than what admittedly existed, namely a fear that among A.N.C. members that the Government might react, or might act violently.

MR. MAISELS

I then pass, my lord, to a brief consideration in outline to indicate to your lordships what the argument is on the documents used under the heading of "Propaganda for a new State", and we will submit to your lordships that all that really emerges from this is that the African National Congress had a dislike - a strong dislike if one likes to call it that - a dislike which sometimes went to the extent of hate, for the present Government and for previous governments, and because - - not 'and' but because of the discriminatory laws, and my lord the Crown wishes to draw farreaching conclusions from the language in which some A.N.C. propagandists saw fit to express this dislike.

My lords, our submission will be that all this is pure speculation on the part of the Crown. The question 'How did the African National Congress hope to get rid of such a government as they describe', which is a question frequently posed, receives in our submission, my lord, a clear answer from the evidence. In our submission they hope to get rid of it by the means set out in the Programme of Action, and the Crown cannot get away from this, my lord, by building elaborate theories on isolated phrases occurring in propaganda from time to time.

With regard to documents, with regard to publications such as 'New Age', 'Liberation', 'Fighting Talk', we shall submit firatly, my lord, that the Crown has not shown the journals to be so connected with the African National Congress that what they say necessarily reflects A.N.C. policy, but secondly, my lord, and equally importantly, if I may submit it in that way, the Crown has been able to find only a few passages among the hundreds of editions of these publications which have any

relevance at all to the question of violence. A few passages in articles, and these passages, my lord, do not even show that the journals which published them had a policy of violent revolution; still less that the African National Congress had.

BEKKER J: Could it be said that it was the policy of the African National Congress to encourage its members to read these newspapers?

MR. MAISELS: I think, my lord, the word 'policy', if I may suggest . . .

BEKKER J: Policy in the sense that it was decided at National Conference, that volunteers and the members of the African National Congress are encouraged to read 'Inyameso" and all these newspapers.

MR. MAISELS: My lord, I don't thinkm with respect, it's a question of policy because I don't think one finds resolutions to that effect.

BEKKER J: If there was one. Put it on the basis, if there was a resolution . . .

MR. MAISELS: I speak subject to correction, my lord, but I think it was a Transvaal resolution to that effect. I don't recall . . .

BEKKER J: Orlando National Conference. It may have been that one,

MR. MAISELS: Yes, that's the Transvaal one, my lord.

BEKKER J: Then it could be said, if there was a National Conference resolution that people should - that people are encouraged to read these newspapers, then the policy of the A.N.C. could be said that people should read

these newspapers.

MR. MAISELS: That is all, my lord.

BEKKER J: Yes; but now arising out of that, can one draw any inference?

MR. MAISELS: No, my lord, with respect not. May I put it this way? Let's take the United Party for example, or the Liberal Party. That Party is a good example. "All our members should read 'Contact'" which as your lordship knows is a paper said to be edited by Mr. Duncan. Mr. Duncanwrites a lot of articles in that paper; not only Mr. Duncan but a lot of people write articles for that paper. All that they are telling their members to do is to read that paper; that's all - nothing else, my lord.

BEKKER J: Couldn't one then say, as to the next step: inasmuch as it is the policy of the African National Congress to tell its Members to read particular newspapers, that therefore it is the policy of the African National Congress to try and place that type of propaganda before the members?

MR. MAISELS: No, my lord.

BEKKER J: What's wrong with that?

MR. MAISELS: Your lordship has left out various other steps in reasoning, with respect.

BEKKER J: A short cut I take is this; if it's policy to encourage its members to read that, you'd like your members to read it.

MR. MAISELS: I agree, my lord, because there are things in there which you want your members to know.

BEKKER J: Yes.

MR. MAISELS: But the real question is, what are the things you want your members to know? Do you

want your members to know the things that they publish about your own organisation.

BEKKER J: Whatever appears in these newspapers they'd like their members to read, whatever.

MR. MAISELS: Well, my lord, may I suggest that that would be a gloss on the resolution. Well, my lord, assuming that were so, what happens then? Nothing.

BEKKER J: Well, then the Crown comes in and says "Well, why do you want your members to read these papers"?

MR. MAISELS: Then you get the answer, my lord; that's the point I made. We get them to read it because they give us some sympathetic coverage; they give us the coverage which we don't get in the daily newspapers - - that evidence was given. The same as the Liberal Party and (Contact', my lord. The same as any newspaper - - the same as any political party . . ..

BEKKER J: Well, the Crown says 'No'; the Crown says 'Take the reference to Kenya' - I cannot remember the particular one about British soldiers pouring boiling water over the breasts of women . . . The Crown says "That is what the A.N.C. would like its members to read." And the Crown says "Why?" and the Crown says "Because it wants to create hatred for the whites."

MR. MAISELS: No, my lord, with respect, not. That, of course, would at least pre-suppose a censorship in advance of what went out; there must at least then be some evidence to that effect, my lord. Let's take the example - - your lordships remember the controversy between Ruth First and Prof. Price. What did the A.N.C. want its people to read? What Prof. Price had written or what Ruth First had written? What both had written.

Your lordship sees you can draw no inference. They didn't say "Don't read Price, read Ruth First", and the Crown argues the matter as though they said "Read Ruth First and not Price."

Now, my lord, I want to pass now to another source of policy; that's actual activities, and the Crown has sought to infer a policy which it relies on from activities during the period in question, and these activities my lord, consisted of what are called four campaigns; the Western Areas Removal Campaign, the Bantu Education Campaign, the Pass Laws Campaign and the Congress of the People Campaign. Those are the four main campaigns. The subject of Freedom Volunteers, my lord, will also be dealt with under this head.

Now, my lord, on the Western Areas, the Crown case originally appeared to be that the African National Congress incited persons to commit acts of violence in the Western Areas. This case, my lord, has had to be abandoned for lack of evidence to support it . . .

RUMPFF J: You mean the first allegation was in the Indictment or in the Particulars, 'violent resistance'? To advocate violent resistance?

MR. MAISELS: Yes, my lord. Not to commit actual violence themselves. And the Crown, my lord, has now fallen back upon what we submit is the somewhat improbable notion that the plan was really this: the plan was really to provoke the police to massacre the inhabitants, or some of the inhabitants of the Western Areas, and the object of this, my lord, is sometimes said by the Crown to be to test the preparedness of the people, and sometimes to create martyrs, out of whose death propaganda could be made.

Now, my lord, such a scheme in our submission is in the highest degree improbable, and in any case, my lord, if that were the scheme it wouldn't amount to any offence cognisable in Roman Dutch Law. The nearest we've been able to find, my lord, in an English Law where it might be called some form of attempted suicide. But that's what this case really amounts to. . . .

RUMPFF J: I take it the Western Areas will be dealt with in detail.

MR. MAISELS: Oh, yes, my lord, and it will be dealt with very fully indeed; it forms a full separate chapter in our argument.

Now, my lord, the fact - - and I propose indicating to your lordship briefly the heads of argument on Western Areas. The fact, my lord, that the Crown has had to fall back upon theories of this nature we will submit really disposes of this part of the case, but we shall examine the evidence on the Western Areas Campaign in considerable detail. And our submissions will be firstly, my lord, that the opposition to the removal scheme arose out of genuinely felt grievances. Secondly, that the policy was to refuse to move voluntarily in order to demonstrate the popular feeling against the scheme, and also to organise a protest 'Stay at Home' strike. Thirdly, that there was no plan of violent resistance. Fourthly, that there was in fact no violence, and fifthly, that the worst accusation which can be made against the A.N.C. in this campaign is that their speakers were sometimes hotheaded, and that the decisions taken by the various bodies sometimes lacked precision. The Crown suggests, my lord, that the African National Congress' attitude in this campaign was reckless. It is

vert difficult, my lords, to know exactly what this accusation means, since the Crown has been very careful not to commit itself on the question whether there was objectively an existing danger of violence in the Western Areas, or only an A.N.C. belief that such a danger existed. Be this as it may, my lord, the evidence is that the A.N.C. was not reckless. The evidence we will submit shows that it endeavoured to take precautions against the risks of violence which it foresaw, and there is in our submission, my lord, no doubt that such precautions were taken and the question of their adequacy is not in issue. They were, however, whatever precautions they were - they were apparently successful, and no violence took place, and that being so, my lord, it is somewhat idle in our submission for the Crown to talk now of recklessness. The Western Areas Campaign, my lord, is one of the points - - and we shall comment particularly on the absence of direct evidence in the Crown case.

My lord, if there was any evil plan on the part of the A.N.C. in regard to the Western Areas it must have been communicated not to hundreds but to thousands; they presumably knew of this plan, on the Crown assumption, and they presumably disapproved of it, because we know that they didn't carry out the so called evil plan. Why, my lord, is there no evidence of the communication of theevil plan to anybody?

As for the Bantu Education campaign and the Anti-Pass campaign, the Crown has been able to make very little of these. It is not argued by the Crown that these campaigns were intended to involve actual violence against the State. The Crown refers to them merely as examples of

of the sort of unconstitutional action which would be taken in terms of the Programme of Action. We are quite content, my lord, to regard them as such examples, although in fact the action taken in regard to the Anti-Pass Campaign was perfectly constitutional and lawful. In our submission, my lord, these campaigns are in fact examples of the way in which non-violent resistance - -if one uses that term - - was intended to work.

The subject, my lord, of Freedom Volunteers is another one on which, if I may say so, without disrespect to the Crown - the narrow dramatic allegations with which the Crown began this case have suffered a remarkable attenuation. The Volunteers began, my lords, as a band of assasins. They appear now to be a group who had, in order to while away the time before the violent revolution took place, to be taught to grow vegetables lest they become bored. . .

BEKKER J: Where is that?

MR. MAISELS: Your lordship will remember that Dr. Naicker's Code of Discipline for the volunteers suggested that; we will deal with that in detail later, my lord. "Keep up your interests - keep up the interests of this band of assasins by growing vegetables - - and you keep up their interests, my lord, lest they become bored, while waiting for the mysterious Armageddon, because that's what it is, which looms so dreadfully in the background of the Crown case. We contend that the evidence on the volunteers is very simply indeed, my lord.

The documents handed in by the Crown, and the evidence for the Defence point in this connection to the same conclusion; the volunteers, my lord, in our submission

were simply the most active Congress members who were to act as propagandists and organisers. Insofar as anything else may be hinted at in a few speeches these cannot be taken as a reflection of A.N.C. policy.

In conclusion, my lord, your lordships will be invited to consider the probabilities on the case as a whole. On the one hand, my lord, there is the scheme of things as testified to by the Defence witnesses. This shows, my lord, that the A.N.C. was committed to a difficult and a delicate task, but a perfectly rational one. They wanted certain reforms; they do not hope to get them by nere supplication. Violence they neither desire, nor equally important, my lord, do they think that it holds out any hope of success. Therefore, my lord, they embark upon a middle course. It may be that they are over optimistic about the prospects held out by this course; that is very difficult to judge, but in any case it is the only reasonable course open to them.

Now what's the other side, my lord? What does the Crown say? Your lordships will find that on the other hand there is what we call a Wagnarian twilight through which the Crown invites us to peer. This, my lord, involves pointless massacres, planless violence, illdefined action by illdefines masses, and all this, my lord, is supposed to have been agreed upon by an organisation as cumbersome as the A.N.C. without a word of deliberations by them ever having leaked out, and we shall submit to your lordships that this is so improbable that the Court will hesitate long before accepting the evidence of a witness who had testified directly that it had happened. Your lordships have had direct testimony of this improbable fact. To

infer such a thing from the material which has been presented in this case, my lord, we say is quite out of the question, and I propose now examining, on the probabilities, the Crown case as we now understand it, and as we understand it, - I gave your lordship the reference on the first day when I addressed your lordship last week - Vol. 92, page 19300 to Vol.93, page 19302. The plan alleged to have been agreed upon by the A.N.C. was as follows: My lord, I hope I'm putting it correctly:

Firstly, obtain support for the struggle inter alia, by preaching non-violence. That's the start. Thereby, my lord, when you do that you presumably recruit people who believe in non-violence, but at the same time as you do that you condition the population for violent overthrow. That's the first step.

Step 2: you organise campaigns against laws in such a way that the State may use violence to suppress them.

Step 3: if the State does use violent you possibly encourage retaliation, but in any event you present the victim, as heores and martyrs, and thus you further inflame the feelings of the masses.

Step 4: Step 4 may go in with the first three. You recruit volunteers; you tell them to avoid provocation and refrain from violence. You promise them non-violent duties, yet at the same time you condition - - I use that word, my lord, because that's the word used by the Crown - - you condition them for violence.

Now this, as far as the Crown's plan got into practice, but it had further steps for the future. That's step No.5: When the people are - - and I use this word in

inverted commas, my lord, 'ready' - when they are ready, you organise a general strike or a stay at home.

Step 6: If the Crown does not then make concessions and tries to suppress the strike, or stay at home by violence . . .

BEKKER J: The State you mean? You said the Crown.

MR. MAISELS: The State, my lord, I'm sorry. If the State does not then make concessions and try to suppress the strike, or stay at home, by violence - which, my lord, is probable but not certain, of course, you then use the volunteers and/or - - I use it this time - - and/or the masses to retaliate and launch a final onslaught on the State, or possibly you rely on the likelihood that the masses will sell out. How this is to be done, my lord, is apparently not known. Shall we test it in this way, my lord? Thus when Resha speaks speaks in Sophiatown and says "We shall not move", his act is an act of preparation for the overthrow of the State in the sense that firstly, he hopes that his audience will be moved to some unspecified form of action which will secondly, cause the State to use some unspecified form of violence against them, in order that thirdly, in future Resha can make propaganda out of the State's action. So that fourthly, the masses will eventually be prepared for a general strike, and fifthly, be prepared to launch a violent insurrection, if - if, my lord - if the State tries to suppress the general strike by violent action.

All this, my lord, says the Crown was agreed upon by the A.N.C, and all this, says the Crown, was known to and agreed upon by all the accused not later than February

1954. That's the date when they were supposed to have been in the conspiracy.

Now, my lords, let's examine this. There is not a document . . .

RUMPFF J: Is that according to the Further Particulars?

MR. MAISELS: Yes, my lord, that all the accused knew of the conspiracy by February, 1954. Now, my lord, there is not a document, there is not a speech, there is not a passage in the Defence evidence in which any such plan is set forth; not one, my lord. There is no direct evidence, either that it was ever agreed upon, nor is there any evidence that this was ever communicated to any of the accused or co-conspirators. The whole idea in our submission is really a theory evolved by the Crown, and the Crown invites your lordships to find beyond reasonable doubt that this is the only theory that fits the facts. The Crown, of course, must satisfy your lordships that the proved facts are inconsistent, not only with the Defence version of what the accused intended, but also with everyother reasonable possibility, and of course, my lords, they must satisfy your lordships on the second limb that all the proved facts are consistent with the Crown theory.

BEKKER J: On the probabilities, what do you say is to be conveyed by the resolution of the Executive Committee saying that 'This is going to be the test, this is going to be the Waterloo of Apartheid'; what did they have in mind?

MR. MAISELS: That they were going to see whether they could get away with a policy of non-violence, my lord, and defeat the Government - - that's all; the

Waterloo of Apartheid, my lord, doesn't mean a battle of apartheid.

BEKKER J: No, no, a Waterloo . .

MR. MAISELS: In ametaphorical sense, my lord.

BEKKER J: What is it they had in mind, when the National Executive said 'This is going to be the Waterloo of Apartheid'? And 'It's going to be the test'.

MR. MAISELS: Your lordships will remember - - I'm not dealing now with Prof. Matthews' evidence which is rather an exaggerated view - -

BEKKER J: Yes.

MR. MAISELS: What they said was this, my lord: 'Here is the Government trying to move these people from this area, in pursuance of its Apartheid policy," because it's clear, theevidence establishes it, my lord, that the moving of these people from this particular part was not in pursuance of a scheme of slum clearing; it was in pursuance of the Government's Apartheid policy, and my lord, I'm not talking of the rights or wrongs of it. They said "Very well, we are going to see if we can show a passive resistance, a strong passive resistance and do nothing - we won't move - we'll organise public opinion and get everybody on our side; we won't move - - the Government realises that to get us to move it might have to use force".

RUMPFF J: At the time when that resolution was adopted, did they know that a handful, comparatively speaking, of people would be moved on the first occasion?

MR. MAISELS: No, my lord, I don't think so. I think, my lord, that that was in the very early stages . .

RUMPFF J: In May, 1954.

MR. MAISELS: Yes, and the actual first removal

took place in 1955, the beginning of 1955. It was a general sort of statement - the sort of thing that one gets in any political .....(?) and my lord, if they had succeeded - if the Government had said 'These people really don't want to move, and this is their genuine desire, we will - because there is a general force of public opinion - - -" and your lordship will remember that there was - there were a number of outside bodies not connected with the A.N.C. - the Johannesburg Municipality - - there were various people who were opposed to this on principle. Now, my lords, if the Government had not pursued its policy of removing them because of this welter of opposition, that indeed would have been a major victory . . ..

KENNEDY J: Mr. Maisels, you say that in spite of the wording this was not - this campaign was not one of an irresistable force meeting with an immovable object because in fact the objects met . . .

MR. MAISELS: Exactly, my lord.

BEKKER J: As I understand the Crown case, the Crown, in order to construe what meaning is to be attached to the words 'The Waterloo of Apartheid,'and this is going to be a test case' - suggested that the Court must look at what happened thereafter. That supplies a clue, says the Crown, to what the A.N.C. had in mind, and the Crown says in order to see what did transpire they said "Look at the speeches, look at the type of speeches made, and bear in mind 'We shall not move' - we are not going to move." And then the Crown refers to A.162, and the evidence of Luthuli and says that as far as that campaign was concerned the A.N.C. was determined that the people should not move.

MR. MAISELS: Within the limits of its policy, my lord.

BEKKER J: Yes, well, within the limits of its policy, but I'm putting to you the Crown case. The Crown says 'In that setting, the Waterloo of Apartheid and making this a test case, brings about the inference that what they had in mind was violence - if necessary there was going to be violence'.

MR. MAISELS: My lord, we counter that by the direct evidence and we will address your lordships very fully on the Western Areas campaign.

My lords, this is the very point upon which I submitted to your lordships earlier - the point on which one would have expected direct evidence, my lord. They did not resist violently. Why didn't they?

BEKKER J: Well, the Crown says the Government anticipated that . . . .

MR. MAISELS: Your lordship mesns by coming in beforehand?

BEKKER J: Yes, at an earlier date. That is what the Crown says.

MR. MAISELS: My lord, we had direct evidence of a woman who gave evidence and said she went to the meetings and heard a number of speeches; she was a householder; she was one of the people affected.

BEKKER J: She couldn't have been present at the beerhall and the speech, which is common cause . . .

MR. MAISELS My lord, the beerhall language speech is one speech; that was in 1956.

BEKKER J: Was it?

MR. MAISELS: Yes, my lord.

RUMPFF J: Isn't there a document which reflects the view of either the local body of the Transvaal suggesting that the actions of the A.N.C. had compelled the Government to anticipate because the position was so dangerous?

MR. MAISELS: I've got my own ideas about that, my lord. I suggest to your lordship that one must look at that curgrano salus, but at all events that will be dealt with very fully on the whole of the Western Areas campaign. All those documents, all those speeches will be dealt with.

But, my lords, I was dealing generally with this theory of conspiracy. I merely gave that as an example- the Western Areas, because it'sa general theory; the evidence of what happened in the Western Areas supports us. I'm leaving that aside because we might have hoped for something else . . I don't think, my lords, - the passage I gave your lordships last week - that the Western Areas was intended to be the final revolution. But, my lords, your lordship Mr. Justice Bekker invited my learned friend in Vol. 89 page 18700 to deal with the probabilities of the suggestion he was making - - I'd just remind your lordship of that passage. He was dealing with a document - - I think it's B.25, my lord -- one of the documents, I think it's B.25 - it doesn't really matter which one - - but what my learned friend was saying at page 18699 - - now, my lords, it's quite clear from this document that the African National Congress fully realised the consequences of political strike action; strike action as a political weapon. They knew at the outset that that type of action could, and probably would involve the country, would involve them in a violent clash with the State; that if masses were used against the

State it could turn into a war, into a rebellion; it could turn the country into a bloodbath, but that did not deter them. My lords, if you embark upon a campaign which has certain consequences, probable consequences, or likely consequences, then you intend those consequences in law and if those consequences which you foresee and intend, if they are the methods by which you want to achieve your object you must accept responsibility for them.

My lords, that is what the Authorities that I quoted at the outset said; that you cannot deny and say that the consequences of these actions, if they lead to violence, you didn't intend them. My lords, ordinarily in cases of this nature - Treason - the Courts have accepted as a test even the objective approach. If a person should know the Court is satisfied that he should have known that those were going to be the consequences, and he could be held responsible for them, but, my lords, in this case it's not even a question of should or shouldn't know - - they knew, they preached it to their people; they told them that that would probably be the result; they said 'Do not let that deter you'. Then my learned friend quotes: 'Let courage arise with danger, be prepared to make the supreme sacrifice. All through history people have been prepared to shed blood and make the supreme sacrifice;" that was their approach, my lord; they were deliberately provoking violence, violent action, and deliberately involving the masses in what could be a violent conflict with the State.

My lords, my learned friend goes on - - "Then, my lords, another aspect of the Programme of Action....." and your lordship Mr. Justice Bekker said to him: "You're

going to deal with the probabilities, are you not, Mr. Trengove?", and then Mr. Trengove said 'Yes', but he never dealt with the probabilities on the Crown's argument on conspiracy as put.

Therefore, my lord, we invite your lordships to consider the matter this way. Is the Crown theory inherently probable? No argument was addressed to your lordships on that by the Crown. Is it inherently probable? And secondly, my lords, does the Crown theory constitute a sufficiently precise agreement to overthrow the State by violence which is still the conspiracy pleading, my lord? And we submit, my lord, that there are certain gross improbabilities in the theory; some of them - we don't pretend to be exhaustive in our argument. We say firstly, my lord, it is improbable that an organisation like the African National Congress could achieve agreement on so elaborate or speculative a plan without a word of its discussions leaking out.

My lord, let us compare the years taken to formulate the Programme of Action, Your lordship will remember the evidence of Prof. Matthews, Vol.85, pages 17884 to 7, reading from line - - Prof. Matthews had been giving evidence about the dissolution of the Natives Representative Council - - that was in 1946, my lord - - the adjourment of the Native Representative Council - - it adjourned in 1946 following on a deadlock, that had arisen out of the refusal by the Government to let the members go to the Rand and see what had happened in 1946 - in the 1946 Riots. And the question is, "Now following that deadlock" - - line 24, my lords - "Did the African National Congress call an emergency conference?-- (A) Yes." Dr. Xuma who was President

of the A.N.C. called an emergency conference which was held in Bloemfontein in October of that year to consider the position that had arisen as a result of this deadlock between the Government and the Natives Representative Council".

("Q) Now what was the feeling expressed at that conference about the role of the N.R.C?-- (A) The feeling that was expressed at this particular conference was that it seemed to the members, the members of the conference, that they could no longer look to the N.R.C - that is the Native Representative Council as a body which might bring them results, and that instead they should look to the building up of the African National Congress into a stronger body than it was at that time."

("Q) And during the next year or so was there consideration at the National Conferences of this question?-- Yes. This question was considered at the conference in 1946, and also at the conference in 1947".

("Q) Were suggestions made then that the African members should resign from the Native Representative Council?-- Yes."

("Q) Was that rejected at that time?-- Yes, the A.N.C. did not support the idea of resignation at that time because there were still certain negotiations going on between the Government and the Native Representative Council".

("Q) Now in May 1947 did you as a member of the Native Representative Council meet anybody in the Government?-- Yes, in 1947, May, General Smuts who was then the Prime Minister invited a number of members of the Native Representative Council to come to Cape Town to discuss with him new proposals for improving the functions of the N.R.C."

I was one of those who were invited to that conference."
("Q) Did the Government ever do anything to put into effect the new proposals?-- No, before the new proposalswere put into effect there was a general election in the country and a change of government in 1948".
("Q) Now as the National African Congress saw it in 1948 what was the attitude of the new Government towards the political advancement of the Africans?-- (A) The African National Congress, as they saw it, the coming into power of the new government in 1948 with its new policy of apartheid, meant that Africans would lose even the meagre political rights which they had at that time."
("Q) In 1948 the African National Congress held its annual conference at Bloemfontein?-- That is correct; I was present at that conference in 1948."
("Q) What was decided on at that conference?-- At that conference it was decided that a new programme of action, as it is called, should be drawn up to meet the new conditions, and that this programme of action should be considered during 1949 by the different provinces and would be finally adopted at the 1949 conference."
("Q) Was the formulation of a new programme of action discussed during 1949?-- It was discussed during 1949 in the different provinces."
("Q) And taking your own province now, the Cape Province, did it have much consideration?-- Yes, in my own province in the Cape this question of a new programme of action was taken very seriously; both by the branches and also by the Provincial Conference; so that at the end of the year when we went to Bloemfontein for the annual conference we went with certain definite proposals."

(") Had you also discussed the Cape Executive?-- Yes."
("Q) So you took specific proposals from your province to the National Conference in 1949?-- Yes."
("Q) And other provinces?-- Other provinces also came along with suggestions as to what should be included in the programme of action."
("Q) And in the Cape during 1949, as part of this discussion, was there discussion of the various political methods which were open to you?-- Yes, there were discussions for inclusion in the programme of action."
("Q) And then at the annual conference in 1949 was a drafting committee appointed?-- Yes; at that conference Dr. Xuma who was still the President at that time, referred the various drafts of suggestions to a special committee which was appointed."
("Q) Who was the chairman of that committee?-- I was the chairman."
("Q) Did your committee then produce the drsft programme of action?-- Yes."
("Q) And was that adopted by the 1949 conference?-- Yes, that is so." "I think I might say here that the programme of action didn't just deal with political methods and so on, but it also dealt with other aspects of what was called the 'building up of the African people'.

Now, my lord, the point I make in regard to that is that here your lordship finds an important step - adopting the programme of action, different methods of pressure - - this was discussed over a period of time at national conferences. There is evidence on it, there are documents. Your lordship will remember the time it took to agree on a new Constitution. Your lordship will remember

the two conferences needed to deal with the Freedom Charter. Your lordships will remember the chaos into which the Bantu Education boycott plan resolved. Your lordships will remember the endless talks about the 'M' plan. When a new Constitution was proposed to be drawn up, my lord, the Cape made accusations against the Transvaal. Memoranda and counter memoranda were fired off, one to the other. Luthuli and Matthews threatened to resign if certain principles were adopted. When thw Freedom Charter was adopted Natal had reservations - - so did Luthuli. When the National Conference took a resolution on school boycotts the National Executive Council countermanded it and the Transvaal defied the A.N.C. Vundhla, in turn, defied the Transvaal. He was expelled. All these controversies my lords, are reflected not only in official documents but in the numerous private letters and memoranda which were seized by the police, yet, my lords, this elaborate long range scheme this long range plan which the Crown speaks of, and which it makes its case now - which was designed to lead step by step from the initial preachings and practice of non-violence to the complicated chain reactionof the ultimate revolution - - that, my lord, went smoothly to a secret conference. Not only, my lord, of the A.N.C, but of the other four or five organisations, and was unanimously accepted by everyone.

This, my lord, alone caused no inter-provincial disputes; this, my lord, alone satisfied both Communists and Africanists; this alone, my lord, caused no break aways from the A.N.C. This alone was not used as a stick to beat the A.N.C. by disgruntled members. My

lord, the policy of non-violence, your lordship will recall, aroused the ire of an Orlando Africanist Group. I refer your lordships to Vol. 59, page 11767 to 70, an article that appeared in the "Africanist" - Vol. 1, No.3, May 1955, issued by the Orlando A.N.C.Y.L. Your lordships will remember, page 11767,"the Congress of Democrats I said is there to apply the brakes to Congress. Read the statements by Patrick Duncan during the Defiance Campaign. The Congress of Democrats will ally itself to the Congress so long as she binds herself to a policy of non-violence." What does that mean? It means passivism, making doormats of us. Non-violence is an expensive commodity for the Africans in South Africa What's the use of calling on the people of Sophiatown to resist the removal non-violently? How is this possible? Is it not a contradiction in terms? One either resists violently or submits unwillingly, and the Congress of Democrats know this very well. A Liberatory Movement should stop at nothing to achieve its independence, and since white domination is maintained by a form of arms, a force of arms, it's only by superior force of arms that it can be overthrown."

That was a criticism, my lords, of the A.N.C. That was a criticism of the A.N.C. policy of non-violence.

RUMPFF J: Mr. Maisels, if you put the Crown case as you have done, isn't the Crown case that -apart now from the Indictment - isn't the Crown case that the parties concerned had agreed to take a certain course of action; that is the agreement - that's all. Isn't the case, as put by you, subject to what . . . . . .(?) isn't the case that the Crown suggests that it has proved that all the parties to that agreement knew, or ought to

have known - that if that course of action is carried on to completion, violence would or might result.

MR. MAISELS: That's the case, my lord, yes.

RUMPFF J: Now, in other words the agreement is not specifically 'Look, we agree that this will happen'. The agreement is 'We enter upon a certain course of action - take unconstitutional action against the Government". Now says the Crown "If that is proved, the agreement, and if it is proved that ever' party to the agreement knew that certain results would follow if the action was completed, then the Crown says, they are guilty of an offence - - if that is an offence."

MR. MAISELS: Yes, my lord.

RUMPFF J: One gets the question of the Indictment, whether this is covered by the Indictment; one gets the question "If that is so, if it was proved by the Crown that there was an agreement to proceed on a certain course of action, and that the parties who agreed on that knew that a certain result would follow, and finally that that result which the Crown says was within the contemplation of the parties would follow, constitutes the offence with which they are charged." Now if that is so, then the agreement itself - - if that is so, then one need not consider, on this part of the Crown's case, the proposition that the agreement was an agreement as such - - to contemplate certain results; only that the parties knew.

MR. MAISELS: Well, then, my lord - - yes, your lordship means in this part of the argument I should really confine myself to say that there is no evidence to show a knowledge of the results, or a contemplation of the results.

RUMPFF J: Well, let's put it this way; on this basis of the Crown's case, the Crown doesn't allege that the parties agreed in terms, that therw would result violence.

MR. MAISELS: But, my lord, that's the only thing that makes the conspiracy.

BEKKER J: Yes, they say the natural probable result of that will be violence.

MR. MAISELS: Yes, my lord. It would be an implied term, my lord, of conspiracy? Would that be unfair to the Crown, my lord? And I propose testing it on that basis. I propose testing it on that very basis as I deal with the matter, my lord. I'm now, my lord, dealing with the facts, that this plan - - my lord, with the implication which it has - - that's a fair way of putting it, with the implications which it has is nowhere to be found anywhere. One would expect a discussion on it; this is the very sort of thing, my lord, if your lordship pleases, when one gets a situation that the plan is a plan of unconstitutional action; then one would expect a discussion of the implications of this - what's going to happen to the people whom you are going to recruit? What are you going to do? At what stage?

RUMPFF J: Of course the evidence might be that "We don't care" what's going to happen.

MR. MAISELS: Your lordship means on the other basis, that well, we're just reckless - - if it doesn't come off well, it's just too bad.

RUMPFF J: It's immaterial, it's immaterial to us what's going to happen because this is our only course - the only course we can take. We have no alternative . . and that is what happens then . . .

MR. MAISELS: Then, if your lordship pleases, it's not an intended consequence.

RUMPFF J: I know that this involves legal argument on every one of these points.

MR. MAISELS: Oh, yes, my lord.

RUMPFF J: But I'm merely putting it, this point, to clarify the position in regard to the terms, the actual terms of the agreement.

MR. MAISELS: My lord . . .

RUMPFF J: I don't think, on the way the Crown has put it, the Crown can contend that it was a specific term of the agreement; they could only argue that it was an implied term . . . .

MR. MAISELS: Something that would necessarily follow from the course of conduct. Too, of course, the knowledge of the people, the contracting parties. In other words, my lord, when Dr.Conco, or Prof. Matthews, or anybody else who was a party - - my lord, it was necessary to give business efficacy to it; they must have understood it that way. If anybody had come into the conference and said - when this was being discussed - "Well, of course, what will happen in such and such an event", then the answer would be "Go away, you stupid fellow, this of course must be the consequence." That's the way it's got to be approached, my lord, and I'm quite happy to meet the Crown case on that basis, quite happy to do so, my lord, and I propose in this very argument which I am now addressing to your lordships, to deal separately with that aspect of the matter. My lord, at the moment what I'm concerned to show is that even if, as your lordship puts it, that the Crown is not suggesting that there was a specific agreement with the various

steps which I have suggested as part of the plot, but merely that those are the implied terms of the plot - one would expect to find somewhere somebody saying "But look here, this isn't the way to do it", or somebody being discontended, or somebody resigning, because, my lord, it's all very well talking about implied terms, and it's quite often that the reason why you imply the term is because it's so plain that nobody ever talks about it - - I understand that - - but when one talks, my lord, of an implied term in a conspiracy of this nature, then, my lord, it's quite fantastic to suppose there were no such discussions.

RUMPFF J: Couldn't the Crown argue perhaps that the witness for the Defence called on policy - - I suppose you can't say that, but Mr. Luthuli was asked about - - he was cross examined about the expectation - - and I remember there is some part, some portion where he said, "Well, did you expect us then to go out of action?"

MR. MAISELS: Quite correct, my lord, and that we will deal with -- the possibilities of the sort of thing that might happen, because your lordship will appreciate when this argument is developed in greater detail when we deal with the Programme of Action - - because that is where the various things lead to, my lord - - your lordship will appreciate that when taking the case of the general strike which is the highest level of political action that was discussed - - one assumes a political strike, and one assumes, and one has to assume, for the basis of this argument, that the Government is the brutal Fascist Government; that's true; not that the accused believe it, but that that is true - one must assume that - -

for the argument to have any validity - - then one proceeds my lord, with this situation - - there is the general strike and that as a natural and probable consequence of that general strike this Government will use violence, or a Government will use violence to overthrow, to break the strike; to drive the workers back to work at the point of a gun. That's what one must assume. Now, my lord, of course that carries with it so many different positions. May I just examplify, my lord: In the first place, it presupposes that the method of breaking the strike by violence is - if not the only method, the most probable method of doing so - - it presupposes - - one would have thought that that method of strike breaking had gone out in modern times; but it presupposes other things, my lord, it presupposes that the strikers will resist. Why is it any more probable that those strikers will resist than that they won't resist and will simply go back to work?

RUMPFF J: In regard to Mr. Luthuli, when he says: "Yes, we know the Government is hard, we hoped - we based our hope on the innate goodness of man, but we know that the Government is hard, it is true that if there is to be a general strike one day - if we fail in our efforts up to then and we have to go through to that stage there may be violence. . . .

MR. MAISELS: On the part of the Government.

RUMPFF J: On the part of the Government - - doesn't he go further than that and say there may be some isolated cases. . . . .

MR. MAISELS: One cannot exclude the possibility.

RUMPFF J: One cannot exclude the possibility...

MR. MAISELS: One cannot exclude the possibility of some people acting violently: we do all that we can, to stop it . . .

RUMPFF J: Mr. Luthuli, when he gave evidence, that evidence, was he speaking on behalf of the whole African National Congress . . .

MR. MAISELS: Let's assume that, my lord, for the moment; I'll accept that, my lord. I'll show your lordship the evidence in detail on all those matters; it will be dealt with, but, my lords, let us assume that. He went on in the passage which your lordship referred to and said "We don't intend that, we don't want it, we don't expect it; we cannot entirely exclude the possibility of some people reacting violently."

Now, my lord, take an example of a political meeting. Take an example of a political meeting. The A.N.C. calls a meeting, or any political party. And they know when there is a political meeting that some people do come up and do try to break up the meeting. It would be going very, very far indeed, my lord, to say that they intend that that meeting should be broken up so that there should be retaliation by the people at the meeting, and still less, my lord, can it be said that they agreed to that as some form of implied term.... Everybody knows it's a possibility, my lord, experience has taught us . . .

RUMPFF J: Your submission here is that although it may have been in the contemplation of the majority of the people - the possibility of that - - it was a matter which was not to be regarded as an implied term of the agreement.

MR. MAISELS: That is so, my lord; of the conspiracy.

RUMPFF J: Not intended. . .

MR. MAISELS: Not an intended result, and, my lord, not a part of the sort of thing that was in contemplation in the sense of a means of achieving an end. Your lordships bear in mind that we are all talking about achieving an aim; the aim is to get their disabilities removed. My lord, I will develop this matter to your lordships and show the various contingencies . . . .

RUMPFF J: Would it matter in law if it was within the contemplation, but not intended?

MR. MAISELS: No, no, my lord, if it is within the contemplation of the parties in the sense that they were going about knowing that this is the sort of thing that was likely to happen - that it must happen in fact . . . your lordship will remember I referred your lordship to a passage in Vol.1 of Gardiner and Lansdowne - - oh, the Crown have taken the book - - a matter of general experience, my lord, when you fire a gun - - but when you have to speculate on what is the likely course of a political plan, we find it extremely difficult to see the application of this principle at all. Extremely difficult, my lord. One's not dealing with negligence, my lord, one's not dealing with a plan of two people to go and rob - one carrying a gun. One is dealing with quite a different set of circumstances..

I'll revert, if your lordship pleases, to the position of the general strike. The Government, however brutal or Fascist the A.N.C. may believe it to be -

may adopt other means; it may say, "We will starve these people out; we've got lots of white people in this country who will do the work; it's a good time for them to do it. We will import strike breakers from neighbouring territories, or from the Reserves. We will just starve them out." What happens then? Or the Government may say, "We stopped the Defiance Campaign by passing legislation, we might do that too". Or the Government might say "Well, we'll arrest the ring leaders and throw them into gaol and that'll be the end of the strike; they'll have nobody to lead them". "We'll declare a state of emergency". They can do anything they like, my lord.

RUMPFF J: It's a difficult problem; assume that two people come together and talk about a rich uncle of theirs and they say "Well, look, we must make a plan to get money from the old man; he is an uncle of ours, we will first of all going to tell him that we are relations and we need money; we'll go and talk nicely to him. We know that he is a bit of a miser but we'll put up a proper show and he might give us what we want, or part of it. We don't know if we are going to be successful; we know that he's a miser, there is a possibility we may not get anything. Now if we are not successful with this type of thing then we're going to be a bit more severe - -" I cannot think of any possibility at the moment to give you as an example, but . . .

MR. MAISELS: We won't take him to the Rugby with us. He'll have to walk.

RUMPFF J: Well, we are going to boycott him - he cannot go out by himself, and we'll tell him "Old man,

if you don't want to give us what we want then you can sit in your room", and "finally, if he is still morose and he doesn't give in, well, we may have to go a bit further with him; we may have to drag him out of the house and take him for a walk and talk seriously to him - we won't necessarily kill him, but he is going to be manhandled, and we are going to assault him as a matter of fact. That is the course of action we are going to pursue....."

MR. MAISELS: That's an agreement to assault.

RUMPFF J: Well, I'm putting it on that basis - it's a long term basis.

MR. MAISELS: But it's an agreement, my lord.

TUMPFF J: Yes, an agreement that "We will...."

MR. MAISELS: My lord, may I put it this way; the agreement is "We want to get money out of the old man by fair means or foul. If he doesn't give it to us by fair means then we will use foul means".

RUMPFF J: I'm putting a lot of alternatives in between to make it contingent in the sense that if he gives in "We won't go over to the attack"; I'm putting it on that basis. Now in that case, would that be an agreement to commit violence?

MR. MAISELS: Well, it's rather doubtful but, my lord, at all events there would be the initial agreement.

RUMPFF J: Oh, yes, I'm putting it on that basis, the initial agreement. . .

MR. MAISELS: Your lordship is putting no more, with respect, than the agreement of a man who goes into a house, a robber, who says "If you don't hand over

your money peacefully I'm going to hit you over the head."

RUMPFF J: Yes, except that it's a process -- there is a process first of all to try and persuade him. And a number of things may happen.

MR. MAISELS: But, my lord, let us put it this way. If your lordship takes this matter - it would have to be dealt with on a conspiracy basis, the agreement between the two nephews to deal with their uncle in this particular way. I would venture to doubt, my lord, very much indeed whether that would be a comspiracy in law to steal or to rob.

RUMPFF J: Why not? Is it because there are a number of contingencies which may arise,

MR. MAISELS: Yes, my lord, it's too speculative, it's too vague - - it's the sort of Labuschagne thing - - there is no definite plan in it - this, that, or the other - - it's not . . .

RUMPFF J: It's not a fixed agreement, that they will assault.

MR. MAISELS: No, my lord.

TUMPFF J: It's conditional on if this, that or the other happens - if this, or that fails, then . . . .

MR. MAISELS: It's not an agreement to do acts, my lord, and we would submit it's necessary for the Crown case - - of course, the Crown case doesn't go anywhere as far as that, my lord - - -

RUMPFF J: I know, but I'm trying to get some sort of approach on one part of your argument, the contingent part. I know it does not fit the position here, but I wanted some advice on that.

MR.MAISELS: Yes, my lord. Before your lordship adjourns, may I just put the one point. When I was analysing the different ways of strike breaking by the Government, the purpose of that, my lord, was to try and show your lordships that merely because you have these various different acts by the Government which are the necessary step before there is going to be this retaliation, indicates that you cannot consider retailiation as a natural and probable consequence. It disappears immediately, my lord; it would be a misuse of words, my lord, to call it a natural and probable consequence of retaliation under those circumstances, a complete misuse of words.

(COURT ADJOURNED FOR 15 MINUTES)

ON THE COURT RESUMING:

MR. MAISELS: My lords, in discussing the question of natural and probable consequences - of course one always bears in mind the word 'natural' - being nature - what is the sort of thing that happens in nature, as a matter of general experience. Now, my lord, the Crown is in this difficulty. If one applies the subjective test, that is the test of the accused, then your lordship will remember the mass of evidence that the possibility of violence in the ultimate stage we have now reached is regarded - - the question of ultimate violence, the question of violence in the ultimate stage is regarded as a possibility, at most, my lord, by the witnesses who gave evidence, and of course, that may be sporadic. It may not be

insurrection; it may be something that cannot be a particular thing, and that depends for example - that depends for its validity, my lord, the whole of that depends for its validity on the assumption that the State will act as a brutal Fascist State. But, my lord, if one applies the objective test then the Crown is in a hopeless position with respect, because it has to take as its fundamental basis that the State is a brutal and Fascist State. There is no evidence of that. The Crown has not suggested that to be the case, I hope, and if that is so, my lord, then you don't get anywhere near the last step. Then there is no natural and probable consequence of violence at all.

RUMPFF J: What test have you got to apply? Subjective or objective?

MR. MAISELS: There is only one test, my lord, what's agreed.

BEKKER J: On the inferential, on the implied term - - would the test be vis-a-vis the accused, the subjective test - - did he know . . did he contemplate. . .

MR. MAISELS: The implied term, my lord, yes; there is no question, my lord - - then it's part of the agreement, and if there is no direct evidence, and if you want to talk about natural and probable consequences then you must look at it objectively.

BEKKER J: Well, the Crown, I think, suggested that what the accused or some of the leaders did, is that they spread propaganda to the effect that this Government is in fact . . . .

MR. MAISELS: I quite agree, my lord, I quite agree. Then you have to deal with the evidence and then

you must say "Let's take the question whether it's an implied term - by reason of that one implies that there will be violence, as part of the agreement. In other words, it becomes then, my lord, an intended consequence.

My lord, I was, however, at this stage of my argument, dealing with the somewhat different aspect on the probabilities. Your lordship appreciates that it's essential to the Crown case that there must be an initial preaching of non-violence; that's fundamental. You must get your masses in - that's essential. You must tell them "We are a perfectly lawful body, harmless, because (a) - - " and you can only preach non-violence because that's the only way in which you can do it in public and get the masses - - but your lordship appreciates what difficulties that leads the Crown into, on examining probabilities of this plot. Nobody apparently though that the initial preaching of non-violence might only lead to difficulties in the end. Your lordship appreciates the situation. If you train a band of assasins you don't train a band of non-assasins. At what stage do you switch? The Crown has not considered rhat, my lord; they have not addressed an argument to your lordships on it at all.

Nobody doubted, my lord, on the Crown's theory - nobody doubted the wisdom of getting an organisation's loyal followers shot down merely to make martyrs at a stage before the ultimate insurrection . . . nobody spoke a word about that, my lord. A most extraordinary state of affairs, my lord, apart from the wisdom of the policy in any event.

Nobody suggested, my lord, that when you are going to condition people for non-violence that it might

prove impossible to organise the ultimate insurrection. Where is the evidence about it, my lord? My lord, we submit it's improbable that any political party, any political body, would agree upon a plan exhbiting such a strange combination of detail with vagueness. One would expect, my lord, to find some clear indication of the purpose for which violence by the State was desired, if indeed there had been there had been a firm view that it was desired. It's a little odd, my lord, that the plan is clear and specific on the points necessary to secure a conviction; that is ultimate violence against the State and no others. For example, my lord, how were the volunteers to be trained for violence? And how was violence by the State was to be provoked?

My lord, we submit it's improbable that the A.N.C. would on the one hand have a clearly worked out scheme to prevent premature violence by the volunteers and to lure in people who would shrink from a violent policy, and would on the other hand embark on campaigns reckless of the consequences envisaging violence with no hope of victory for their side. It's improbable, my lord.

Did they want to have violence whenever and wherever possible? Did they want to wait till the time was ripe? My lord, with respect, the Crown's effort to have it both ways is not impressive. The Crown's plan requires a balance, a balance of violence and non-violence so delicate and intricate as to be unworkable. Work it out, my lord - imagine the thing in practice. This is the plan said to be agreed on. My lord, may I remind your lordship of some evidence that Professor

Maisels gave at Vol. 85, page 17979. Prof. Matthews said: And his qualifications to speak on this subject are unchallenged, my lord, and unchallengeable. Page 17979, line 9, my lord.

("Q) Now bearing in mind your knowledge and experience of the A.N.C. and of general public political work in this country, and your knowledge of the African people, do you think it's possible that as a practical matter for an organisation like the A.N.C. to preach to the public the policy of non-violence, while it really wants to pursue a policy of non-violence?-- (A) As I said already it seems to me that to adopt an attitude like that would be futile, because if you have a secret policy of violence you would have at some time to tell your followers to whom you've been preaching non-violence over a long period of time - you would have to reveal to them the secret policy, and my own impression would be that they would regard you as somebody who had deceived them all along and your following would fall away." It seems a highly probable approach.

And, my lord, I find the argument of the Crown strange, when this piece of evidence by Prof.Matthews wasn't even challenged in cross examination; he wasn't asked a single question on it. My lord, in fact what political organisation, let alone a loose, disorganised - unorganised body as the A.N.C. was during the period of this Indictment - -

RUMPFF J: What did you say it was?

MR. MAISELS: A disorganised and unorganised, body, my lord.

RUMPFF J: Why do you say that?

MR. MAISELS: Because, my lord, there is constant

evidence of lack of organisation; 'We can't get this, we can't get that, we can't get the other'. They were not a closely knit organisation, my lord, with a Feuhrer at their head dictating -- they were a very loosely knit organisation meeting under great difficulties. What political organisation, my lord, let alone an A.N.C. - - let's take a closely knit organisation; what one could adopt so delicate and impracticable a policy? Non-violence, my lord, may require discipline and organisation. This policy which the Crown suggests is the policy would require an organisation, my lord, of trained social psychologists to work out how to balance Dr. Naicker's non-violent speeches, Luthuli's non-violent speeches, Matthews' non-violent speeches, against the Alexandra Africanists - to produce the right mixture,to bring in volunteers without dampening the enthusiasm of potential insurrections. It doesn't stand up to scrutiny, my lord. My lord, it's improbable if one goes further. If non-violence was merely a lure and discipline merely a check on premature violence - and that's what the Crown says - - not it says that discipline was a check on premature violence - - and they knew they had to wait till the time was ripe - - it's improbable, my lord. If non-violence was a trick, a ruse - a discipline on premature violence - that the importance of non-violence and the African National Congress' faith in it would be so constantly stressed? Dr.Naicker, my lord, might on the Crown theory, pay lip service to non-violence and conceal the ultimate aim of violence, but he and the Congresses could never have issued self discipline for the volunteers, which is con-

ditioning - if anything is conditioning for non-violence - if I am going to use the Crown phrase again - - the effect of which, my lord, it might be difficult, if not impossible to erase. The passage in Prof. Matthews's evidence which I've just read to your lordships makes that point. None of the police witnesses, my lord, who heard non-violence suggested - - there was D/H/Const. Moeller, D/H/Const. Truter - - very experienced police officers - - they never ever suggested, my lord, that this had been put forward in an insincere way, or in an unimpressive fashion, and this, my lord, is borne out by the effect on the man in the street. His evidence wasn't challenged, the evidence of this man or the other eleven witnesses who were called from all over the country. My lord, if what was aimed at was not an organised armed insurrection but a mass reaction to Government strike breaking, this negative indoctrination would be fatal. You couldn't do it.

My lord, the Crown says that a large scale strike wasplanned some time in the future - time unknown but some time - - and the sparking point of State violence and retaliatory mass violence. It is conceivable, my lord, that a government may use force to break a strike. That has been A.N.C. experience. But a mass country wide stay at home would be the form of action which would give least scope for violence. Surely less, for example, my lords, than mass defiance in public places? Much less. And this, my lord, is an improbable plan if violence is desired. If one has faith in violence, my lord, if you have faith in being able to overthrow the Government,

if you have faith in being able to overthrow by force, without arms, why don't you organise an uprising under your own control? My lord, surely that is the position. Why rely on a devious chain reaction by the masses? A devious chain reaction, my lord, which is aided by volunteers who have been taught not merely discipline but non-violence; the thing is absurd, my lord. You wait to be provoked, you let the enemy choose the ground - you don't choose your own ground. What nonsense is this, my lord, if one works it out? Here we are, a band of revolutionaries planning an uprising, and we don't do it; that's one thing we don't do; we tell the people to be non-violent, we don't plan the moment of attack, we don't plan the time when we'll go and blow up the Power Station, commit other acts of sabotage; we don't blow up the Railways, the trains and so on. No, we wait for a possible reaction from the Government in the hope that the people who we have been telling to be non-violent will be violent. I submit, my lord, it's only to be stated to carry its own interpretation.

But, my lord, this theoretical conspiracy, to comply with the pleadings and the law, must constitute an agreement; not a state of mind or a prophesy, but a definite agreement. What is a conspiracy, my lord? And I'm reading from the case of Regina vs. Mulcuhy, 1868, Law Reports, Supreme House of Lords, page 306 at page 317, and it is so defined:

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act. When two agree to carry it into effect the very plot is an act in itself, and the act of

each of the parties, promise against promise, actus contra actus, capable of being enforced if lawful; punishable if for a criminal object, or for the use of criminal means." In other words, my lord, nothing less than an agreement in the full contractual sense.

Labuschagne's case, your lordships will remember, 1941 Transvaal Provincial Division, page 271.

Now, my lord, the Crown here is trying to prove an agreement by inference. Proof of a conspiracy may like any other conclusions be established as a matter of inference from proved facts, but the point, my lord, is not whether you can draw that particular inference although the facts are such that they cannot fairly admit of any other inference. In order, my lord, to draw an inference one must be able to formulate, just as one must be able to formulate any contract on which one relies. A precise analogy, my lord, is the formulation of an implied term. It is a basic principle that before one can ask a Court to imply a contractual term it must be capable of clear and concise formulation. That, my lord, your lordships know the judgment of Mr. Justice Milne in Rapp & Maister vs. Aronowsky reported in 1943 Witwatersrand Local Division Reports, at page 68, and I'll just read the headnote, my lord:

"The term will not be implied by the Court in a contract unless it is .....to give effect to what is clearly the intention of the parties asdisclosed by them in the express terms that they've used and in the surrounding circumstances. The mere fact that if one of the parties or a bystander had suggested it, only an unreasonable person would have disagreed, is not a sufficient

ground for implying the term", and in the judgment his lordship deals with the difficulties of attempting to imply terms where there is no - - where it's not capable of precise formulation.

Now, my lord, what would the position be - pausing there for a moment? The Crown could say "Well, it's only an unreasonable person who would have disagreed, if it was said at the conference of the A.N.C. that when the time comes and the Government uses violence on us we will retaliate." That wouldn't have been sufficient, my lord, to imply theterm.

We say the Crown's theory doesn't meet this test; we say it's too vague, my lord, if I may use the term, to be enforcible. It's impossible to express it in clear and comprehensive terms, as has been demonstrated in the variations in the Crown's submissions. It's conditional, dependent insofaras the use of violence is concerned - - which is the only point with which we are concerned in this case - - on speculative possibilities, and events that may never happen, and are beyond the control of the accused.

My lord, the particular passage if I may just go back for a moment, in Rapp and Maister's case - on the necessity to formulate this term clearly and precisely - is to be found at page 75 where his lordship says this: "Again it follows from the principles which I have tried to extract from the cases, the term sought to be implied must be capable of clear and exact formulation; it must be capable of being formulated substantially in only one way, and once there is difficulty in formulating the term

or a doubt as to how it should be formulated, or as to how far something or other should be extended which has been thought of, it cannot be said that there is a term which the parties had obviously intended to agree upon. Once there is difficulty and doubt as to what the term should be, or how far it should be taken, it's obviously difficult to say that the parties clearly intended ....."

That, my lord, is the situation. It must be accepted, my lord, however insincere my learned friends say the witnesses were in some cases - there were a large body of them who under no circumstances would resort to violence. Under no circumstances, my lords. That evidence is clearly before the Court.

Where would one be able to imply this term of contingent retaliation in the decision of the A.N.C. to embark on its programme of action? It's just impossible, my lords. There is overwhelming evidence to the contrary - which has really not been challenged - to destroy that, my lord.

Apart, my lord, from the improbabilities, we submit to your lordships that the inference which the Crown now asks the Court to draw does not amount to an agreement to overthrow the State by violence, and it appears, my lord, at its highest, we submit, as an agreement to do non-violent things in the hope that if the Government does certain things the masses may react in a certain way, and that the conspirators will in such event do their best to help the process. My lord, is that an unfair formulation of the Crown case? Is that an unfair way of putting it? I repeat it, my lord, the case at its highest appears as an agreement to do non-

violent things, in the hope that one day, if the Government does certain things, the masses may react in a certain way, and that the conspirators will in such event do their best to help the process.

RUMPFF J: Does certain things in answer to the things done. 'In the hope that one day if the Government does certain things in answer . . . . ."

MR. MAISELS: Certainly, my lord, yes. But, my lord, there are other difficulties in the Crown case, and the Crown in our submission leaves too many questions unanswered and which we would submit are unanswerable, my lord. My lord, when was this plan agreed upon? Did the Crown suggest in its opening? When was it agreed upon, my lord? Was it put to any witness? By whom was it agreed upon in the first place, my lord? Which conference? When was each accused brought into it? How was he brought into it? Were any of the volunteers told of their true role? When? How? The conspiracy was in 1954, my lord - - by February, 1954, they were all in it, according to the Crown, so it does not help the Crown to rely on what Resha said in November of 1956, or what Ndimba said in 1955. When were the volunteers informed of their true role? How was it to be kept from other volunteers? Who decided who should be let into the secret? In what way can it be said to be A.N.C. policy? None of those questions are answered, my lord; they are not dealt with by my learned friends. They keep on saying "Look at all the facts and circumstances"; do they ever stop to enquire "If this agreement was made, then how, what, who? How were the intricate parts of the plan worked out?

How were the delicate nuances - when were they to be put on it?" We say, my lord, there are no answers to any of these questions.

The Crown, my lord, may say that it's unreasonable to expect it to give precise dates. I don't want precise dates, my lord, but can the C rown give any coherent account at all of the way in which this conspiracy started? The way in which it grew, and the way in which it maintained secrecy or semi-secrecy? Or was it, my lord, perhaps just like popseed that just growed and growed? What sort of a case is this, my lord? Can the Crown point to any event or landmark as the starting point, or of the joining by any accused as a co-conspirator?

RUMPFF J: Mr. Maisels, in regard to these questions which you've put rhetorically, I come back to what I put to you earlier in the morning. Is the contention of the Crown not that the conspiracy was to take a course of action; that is all. And that the accused are liable because they must either have known or they must be deemed to have known the consequences.... The conspiracy is not an agreement to expect certain consequences - that's not the conspiracy. It can only be an agreement to take a course of action and a knowledge that something may happen.

MR. MAISELS: My lord, may I just read to your lordship a passage from Leibbrandt's case, dealing with an argument as to the purpose of signing the blood oath in that case? His lordship said: "It rests upon a confusion in the terms expressly agreed upon, which may be called the purpose of the agreement, and the unexpressed intention existing in the mind of the signatory. In Markay's case,

Lord Chelmsford refers to this confusion as follows: 'Its too late to argue that the conspiracy may not be an overt act of Treason; there are many authorities to establish that it is a sufficient allegation in an indictment for this offence - all of which are collected in the Judgement of the Lord Chief Justice of the Queens Bench in Ireland on this case. It is a mistake that the conspiracy rests in intention only. It cannot exist without the consent of two or more persons and their agreement is an act in advancement of the intention which each of them has conceived in his mind". Now the intention which has been conceived in the mind must be the violent overthrow. That is the fundamental point."

The judgment proceeds, my lord, "Confounds the secret arrangement of the conspirators among themselves with the secret intention which each must have previously had in his own mind, and which did not issue .....until it displayed itself by mutual concentration."

I doubt, my lord, whether on this one can at all apply reasonable and probable consequences, but, my lord, we have submitted to your lordship, and we shall submit again, when we deal more fully with the Programme of Action, that in fact these are not reasonable andprobable consequences of the case as the Crown puts it.

Now, my lord, we were saying that the Crown cannot point to any evidence as the starting point of this conspiracy; it cannot point to a combination of pieces of evidence which would point irresistibly and exclusively to its improbable conclusion. Take one example, my lord; in terms of the Crown theory an excessively non-violent

document - Naicker's and many others - would constitute a deviation from policy or .....to your unfortunate expression on it. There are innumerable deviations of this kind.

Your lordship will remember when Naicker said for example that non-violence is a complete substitute for armed - - I forget the exact phrase - - for armed violence or something like that - - that's a deviation which is quite inconsistent. In fact . . .

BEKKER J: The Crown has suggested that that is a bluff.

MR. MAISELS: Eye wash, my lord. Who were being bluffed, my lord? That's the difficulty the Crown's got. The very people who were being bluffed are in the Crown's theory the revolutionaries, the masses. You call them to a meeting and you keep on telling them this and he's got to know not by the way you say it, because the police evidence is clear that there is nothing to show that - - they've got to know for some other reason that by non-violence 'read violence'. And then, my lord, to make it quite sure that you are continuing the bluff you circulate the document - - it's just nonsense, my lord; it doesn't hang together. How do you get your irresistible inference?

Indeed, my lord, it could be argued that Resha's speech in November of 1956, if it was a violent speech - is a deviation from policy - telling them to murder. That's not our idea. This is hopeless, my lord. ..... (?) gets into this difficulty because he's got no real agreement and he's trying to suck something out of the air.

But if one looks at a non-violent speech as a deviation, my lord, is it any more improbable to consider an occasional violent outburst as a deviation? The Crown can't have it both ways, my lord, and on this aspect members of the A.N.C. were expelled. There was the man called Vundhla who joined another organisation - now repenting of the error of his ways. Why didn't he come along and tell us about it? Why didn't some informer come and tell us about it, my lord? And finally, my lord, ...

BEKKER J: Well, you posed the question, was a violent outburst not to be considered as a deviation. Doesn't the Crown reply to this and say "Oh, well, take Resha when he had a violent outburst - well, he is a man who knows policy, he is a volunteer in chief, he's a very highly placed executive member." "Because a person in his position suggests this that is a factor you've got to consider in determining what the real policy of the A.N.C. was". That was the line taken by the Crown.

MR. MAISELS: Then that, of course, invites your lordships to ignore speeches made by people who knew the policy - - shall I say just as well as Resha did, - - to the contrary. Your lordships have to say that those speeches must be ignored, but not Resha's. It's impossible, my lords. That's why I made the point, my lord, why should it be any less a deviation of policy when Dr. Naicker, or when Luthuli, or when Matthews speak about non-violence? My lord, there is no escape from the position that has arisen in this case. Let's face it, my lords. We say let's face the situation that your lordship must find for example that Matthews committed perjury - - no escape, my lord.

There is no escape, my lord, on this . . . .

BEKKER J: Or that he didn't know enough about policy.

MR. MAISELS: I'm glad your lordship laughed when your lordship says that because really - - Matthews didn't know policy but Andries Chanile, or the person who wrote "The tin of paint costs 11 lives" - they knew about policy, but not Prof. Matthews. That's what the Crown case is, my lord. But, my lord, they didn't really say he didn't know, because they say he is a co-conspirator, ad, my lord, I would remind your lordships of the fact that Matthews says they just couldn't have this policy without his knowing about it, and I don't recall his being cross examined on that by Mr. Hoexter for the Crown, my lord.

Now, my lord, I made the point when I was arguing a similar point earlier - a point in the Indictment - that this hadn't been put to the Defence witnesses. My lord, it is interesting to see what was put to the second last Defence witness, Yengwa, at page 17638, Vol. 84, line 14, and the only criticism that my learned friend made of Mr. Yengwa's evidence was that he didn't remember in 1960 some words in a lecture that he had given in 1954. That's the only criticism he could make, my lord, of Yengwa's evidence.

("Q) Mr. Yengwa, I want to put it to you, that when you say your policy was non-violent what do you mean; do you mean that you are going to give the white people a chance of choosing either a bloody revolution or to submit to your demands, and if they are not prepared to submit to your

demands the other alternative facing them would be a bloody revolution". My lord, that more or less is the kind of thing one puts to a man who goes to rob. He says "If you don't give me what I want I'm going to kill you". (A) "I just don't know, my lord, how you arrive at that, but as far as I'm concerned I've told you the policy of the African National Congress. We have no dual policy of violence and non-violence; our policy is non-violent."

Now, my lord, if this matter had been investigated for example - - if Prof. Matthews who is an experienced politician, Anthrapologist, and an expert on African thought, he might have taken the unchallenged evidence, my lord, which he gave at page 17979, Vol. 85, to which I have referred -- he might have taken that further, my lord, and in our submission he might convincingly have demolished the theory. Now, my lord, we submit therefore on this part of the evidence that the Crown has failed to deal with the probabilities of the agreement, has failed to put the agreement now alleged to be the agreement, has failed my lord, to establish the conspiracy, either as a matter of probability or as .....evidence.

Now, my lord, before I deal with the major policy document of the A.N.C. my learned friend Mr. Kentridge will deal with the question of political activities and organisation, and also, my lord, with the question of extra-parliamentary activities.

MR KENTRIDGE

MR. KENTRIDGE: My lords, I propose to deal generally now, before my learned leader deals with the Programme of Action, with the general concept of extra-parliamentary activity and the use which the Crown tries to make of that concept in its case.

My lord, in this part of its case the Crown relies heavily on the dictum of Mr. Justice Shreiner in Leibbrandt's case to which reference was made in the argument of my learned friend Mr. Nicholas, that there are two methods of getting constitutional changes effected in South Africa; the constitutional one through the ballot box, and the other the illegal use of force.

Now, my lord, the Crown has accepted that this present case is based on violent overthrow, and on nothing less than the element of violence, but the Crown does appear to have attempted to make use of this dictum of Mr. Justice Shreiner in order to draw some inference from the undoubted reliance on the part of the A.N.C. on extra parliamentary activity. They have appeared to have submitted in effect that because the A.N.C. was embarked on extra-parliamentary activities, therefore there must be some inference pointing towards the use of force, and my lord, I wish to submit now that certainly the dictum referred to of Mr. Justice Shreiner in Leibbrandt's case is no authority for that proposition whatsoever, and that an analysis of it, my lord, an analysis of it, an analysis of that dictum in its place in the case, shows that that was certainly not the meaning of it, and indeed, my lord, we submit that the meaning of what Mr. Justice Shreiner said is really to the contrary. My lord, I have five sub-

missi ons to make on Leibbrandt's case as it affects this question of extra-parliamentary activity, and the first submission I make, my lord, is that what is really stressed is the violent element as being essentially treasonable.

The second point I make, I submit, my lord, is that the Leibbrandt's judgment is concerned with Treason in its ordinary sense of violent and warlike action against the State, i.e. that when in that Judgment force is referred to, it means force in the ordinary physical sense and it doesn't mean some other mode of extra parliamentary pressure.

The third submission I make, my lord, is that the judgment in Leibbrandt's case was not at all concerned with the subject of non-violent extra parliamentary activity and did not purport to make any finding on practical law in connection with such activity.

The fourth submission I make, my lord, is that when in the Leibbrandt judgment Mr. Justice Shreiner spoke about unconstitutional activity he was not with respect using that expression as a particular term of art but really rather as a general synonym for treasonable, and one cannot apply the word 'unconstitutional' as used by the A.N.C. in its various documents as having the same meaning as that in which Mr. Justice Shreiner used the word; and the fifth submissi on I make, my lord, is that the dictum to which I have referred represents a political truism which is completely consistent with the Defence case and with the non-treasonable and non-violent nature of A.N.C. activities, and my lord, I intend to analyse the case briefly in order to show that the above points

are established and also, my lord, to point out how radically the Leibbrandt judgment differs - how the Leibbrandt case differs from the present case, and how unsound it is for the Crown to attempt to draw analogies from the reasoning in that case.

Now, my lord, your lordships recall that in that case there was that oath which had to be signed in blood by the members of the Leibbrandt organisation, and in the circumstances the adherence to that oath was held to be prima facie adherence to a treasonable conspiracy. Now, my lord, we submit that it is clear that that oath was considered in its surrounding circumstances as being prima facie treasonable, and that the major circumstance borne in mind throughout, my lord, was that this conspiracy was entered into in a time of war. That element is expressed time and again, and, my lord, that was a real war with a real enemy.

Now, my lord, when one considers the whole case of Leibbrandt and sees where that dictum falls into place in that case, one sees with respect that the Crown's reliance on it is unfounded. My lord, if one considers the Indictment in Leibbrandt's case, which is to be found on page 1 of the Special Court Judgments, one sees that what was alleged was a conspiracy to overthrow the State in wartime. That is stressed, my lord, in the conspiracy, and furthermore it is stressed that the intention was to carry out the conspiracy by acts of sabotage and arson, not my lord, by campaigns against legislation, not by nere propaganda or speeches but by sabotage and arson; then, my lord, if one looks at the other overt acts one sees that they are

all warlike acts, robbing an Arsenal, derailing troop trains - getting into contact with Germany, the German Government, by radio. And, my lord, if one then having read the Indictment goes on one sees the constant references to the element of force. For example, my lord, on page 3 to 4 it is said that in peace time it may be difficult to ascertain whether any particular form of civil disturbance, or anti-Governmental activity is evidence of hostile intent, for there is no general enemy whose purpose it is to overthrow or subdue the government and the requisite element of force must come from within. The requisite element of force, my lord.

And then, my lord, on pages 4 the learned Judge stated that in wartime it could generally be accepted that acts of sabotage would be treason. One finds that on page 4 my lord.

Then, my lord, if one goes on to page 8, the learned Judge talks of a semi-military organisation, but not simply of a semi-military organisation in the sense that there was discipline, but he speaks of the building up of semi-military organisations in time of War. He says building up of such organisations in time of War may very easily lead to the inference that they are designed as they are obviously likely to do, to weaken the government in its fight against a foreign foe, and he speaks of further inferences which may be drawn if the activities of the organisation were veiled in secrecy. That's the other element, my lord - wartime conspiracy, veiled in secrecy.

And then, my lord, in going on to deal with the oath on page 17 the learned Judge points out that the

evidence of the conspiracy consists in the main of the oath form and such material as may be properly used to interpret it, and when one considers the interpretation one will see that one of the main factors used to interpret it is the fact that this was taking place in Wartime and that the leader of this conspiracy, the moving spirit in it, was a man who had come from Germany during the War in conditions of great secrecy and who was maintaining contact with the German Government to the knowledge of the other conspirators.

My lord, when this oath is analysed one finds for example that - pages 18 to 24 - one finds for instance on page 19, dealing with the fact that the oath was headed 'Nationale Socialistic Rebella', the point that is stressed was that this organisation was not only against the Government but in favour of the system of the enemy; that is the real enemy in time of War.

Then it deals with the part which refers to the freedom and independence of the Afrikaner people and points out that it was a section of the people which already had the vote and citizen rights.

My lord, on page 21 the learned Judge points out that the radical nature of the programme sought may be some guide to the question of how it was intended to obtain it. He says that the language of the oath is the language of revolution which pointed away from the polling booth. Your lordships will bear in mind, reading through the whole judgment, that in that case there was no suggestion before the Court - no evidence at all to show that when people there spoke about the possibilities of their dying they had

any reason to believe that they might be shot by the Government save for engaging in violent activities. There was no question that they ever had in mind that they might hold big peaceful processions which might be dispersed by violence. There was no suggestion raised in that case, my lord, that they might have strikes which might be broken up by violence. Nothing of the sort.

Now, my lord, at pages 21 to 22 in the passage which hasbeen read to your lordships, there is the passage in which the signatories bound themselves to follow No. 1 accused to the death in any direction that he might point, do anything that he told them to do, even though it cost them their lives, and the learned Judge points out that in such an undertaking no man who does not wield the sovereign power in a State may lawfully exact, nor may others lawfully place themselves under such an obligation, and he says when to this usurpation of the prerogatives of sovereign power is added the use of language pointing to an anti-governmental organisation designed to set up the system of the foreign enemy in time of War, the picture of the treasonable conspiracy emerges in tolerably clear colours.

And then, my lords, there is reference to the statement in the oath that a traitor must die and the undertaking to guard secrets with my life, and the learned Judge said that that pointed to violence and illegality.

Now, my lord, one need hardly say that there is no evidence in this case of any oath of that sort which had to be signed in blood in conditions of secrecy. It's true, my lord, in this case, at various meetings, when people were annoyed with the police-apparently they often

spoke of the police in harsh terms, sometimes calling them traitors, but there is no evidence that anyone ever took a solemn oath that traitors must die; no one took a solemn oath to guard the secrets of the A.N.C. with their lives, or anything of that sort, my lord.

Now, my lord, in Leibbrandt's case the Court considered various explanations of the meaning which was given by various witnesses. One explanation for instance, my lord, was that the Leibbrandt organisation was simply waiting for Germany to win, that the conditions in the country might then become chaotic and that Leibbrandt organisation would then take over. It was suggested also that notwithstanding the words of the oath, no violence was intended. That was rejected, because the Court pointed out it's all very well to say - for a witness to say he didn't think any violence was intended, but then he didn't explain what he understood when Leibbrandt showed him explosives and diagrams for time bombs and matters of that sort. Similarly, my lord, some people said they regarded the oath as referring to a physical culture organisation. It waspointed out that there was no evidence that anyone took any part in physical culture or any plans were made for it. Very different from our case where people say they believed the activities would take non-violent forms as were laid down in the Programme of Action, and in fact action of that sort was taken, my lord.

Then, as I pointed out, my lord, if people in the oath there spoke about an expectation of death there was no alternative explanation given ofhow death might come upon them save in violent action.

My lord, in Leibbrandt's case your lordships will find on page 27 the Court found that even if there was an idea of waiting for Germany to win and chaotic conditions to arise, they found that Leibbrandt contemplated the use of explosives to expedite a state of disorder. Furthermore, my lord, they found there was nothing in the organisation to suggest that any preparations were made for being able to take over in a state of disorder; they said it wasn't an organisation of that sort, but furthermore the Court found that if Germany was winning the War and there was some disorder in the State it would in any event be treason for an organisation like Leibbrandt's to try and take over the functions of the State. The Court there found that the oath wasn't symbolic because there was no evidence given as to why it should be taken as symbolic. There was no other evidence to explain the references to sacrifice, and most of all, my lord, as one finds from page 28 there was no reason at all in that case for any belief in the non-violent intentions of Leibbrandt. He had explosives, diagrams for time bombs. He never said, my lord, that his policy was non-violent; there is no evidence in that case of speeches setting forth a non-violent policy. There is nothing like a Programme of Action.

RUMPFF J: Mr. Kentridge, you referred to an alternative where the learned Judge said that if there was disorder and the organisation wasintended to take over the government through that disorder, that would be Treason.

MR. KENTRIDGE: Yes, my lord, it was put in this way, my lord - I think it was on page 27. He says "Even if the idea was present in the minds of the signatories

or some of them that a time will come when there would be disorder in the land - that's owing to a German victory . . .

RUMPFF J: Not as a result of that organisation?

MR. KENTRIDGE: No, my lord. That would not justify their conduct in setting up an organisation to take charge of the Government in such circumstances, or prevent such an organisation from being treasonable, for in times of disorder more even than at other times loyal citizens should rally to the side of the Government and support it in its attempt to restore order. To plan to thrust the Government aside and perform its functions in its place is to plan Treason, for what the witnesses have said was thatif there was disorder the idea was that they would form the police force and the army and they would take over the functions of the State directly.

RUMPFF J: In circumstances which the Government couldn't control.

MR. KENTRIDGE: In circumstances in which there was disorder - apparently some witnesses said their idea was that they would then take over the functions and conclude a peace with Germany . . .. but the point I make, my lord, is that this is very, very far removed from the situation with which we are dealing in this case, because my lord, in Leibbrandt's case, there was no evidence of any ordinary political activity being carried on. It was all secretive and consisted of getting in touch with Germany, getting touch with members of the police, to get them to act as informers - collecting explosives and that sort of thing. Nothing at all like the activity in this case, my lord, and the whole nature of the conspiracy flowed

from the evidence about the first accused in that case, which is dealt with at pages 35 to 48, my lord. It was accepted by the Court that to the knowledge of all the accused, Leibbrandt had served in the German Army, he came during the war in a German submarine to South Africa; he gave a false name when he arrived; he brought foreign money with him and a wireless transmitter with a code, and that he had been sent as a German agent in time of war. He told his colleagues where he had come from; he showed them explosives and time bomb diagrams; he made actual attempts to communicate with Germany; he tried to recruit informers and agents in the Police and Government service. In other words, my lord, it was a conspiracy in the conventional secret sense, and we submit, my lord, that it would be a travesty of the facts in both cases for the Crown to suggest that the oath in that case provides any analogy to membership in the A.N.C.

Now, my lords, on the question of extra parliamentary activity, the importance of it is this; the Leibbrandt's case concerned a wartime conspiracy and sabotage and assistance to the enemy. There was no consideration of any other form of extra parliamentary activity and no occasion for it. My lord, there was no suggestion as far as one can make out, even in argument - let alone evidence - that Leibbrandt's organisation hoped to achieve its ends by strikes or boycotts or passive resistance. The only type of activity proved in evidence is that to which I referred, and my lord, the Special Court therefore at no time had before it any question of the legality or the treasonable nature of extra parliamentary pressure by

people who didn't have the vote.

My lord, the Court in other words wasn't dealing with a suggested intermediate course between, on the one hand, ordinary conventional parliamentary activity, and on the other hand violent insurrection and saying that we reject the legal possibility of such a course. The Court just had no such course before it, and, my lord, we submit that when Mr. Justice Shreiner said there is no intermediate course between constitutional action through the ballot box and treasonable action through the illegal use of force he wasn't saying that a political strike for instance was equivalent to violence. He was simply saying, my lord - he was stating what under our constitution is a political truism in the sense which I have explained, because after all, my lord, if one takes the dictum literally it talks of two forms of activity - the illegal use of force on the one hand, and ordinary activity through the ballot box on the other hand.

Now, my lord, we submit, of course, that looked at broadly the methods in the 1949 Programme in the long run are methods which worked through the ballot box, so leaving this aside for the moment supposing this programme of action method turned out to be a third method, well my lord, the question is a third method which wasn't thought of by Mr. Justice Shreiner in his judgment - the question is why assume then that it falls into the category of force, rather than the category of activity through the ballot box? As I propose to try and show your lordships now, my lord, in fact activities such as the Programme of Action falls into the ballot box . . ..

RUMPFF J: Mr. Kentridge, if you have regard to that particular expression by the learned Judge, you say that what he means there is that disorder should be caused by violence before it can - - before an action taken in times of disorder - to take over the Government. . .

MR. KENTRIDGE: As your lordship pleases.

RUMPFF J: Assume for argument's sake there are two organisations in a country; the one takes the course of action - sets out upon a course of action to embarrass the Government by strikes, and brings complete chaos into the country in this respect - that there is no work done; the police cannot operate, the Railways don't operate, the Government must surrender . . .

MR. KENTRIDGE: Your lordship says the police can't operate . . .

RUMPFF J: Well, having regard to the argument that a stay at home, a National stay at home . . .

MR. KENTRIDGE: Your lordship means for instance the stay at home might be a statutory offence - that there are so many people who commit the offence - - that is correct, my lord, the gaols are not big enough to hold them

RUMPFF J: Yes, crowds mill about the streets - absolute nothing is done . . .

MR. KENTRIDGE: Short of violence, my lord . .

RUMPFF J: Oh, yes, there is no violence. The police can't arrest anybody, or they try and arrest them - - well, there are not enough gaols to put the people in, there are too many who strike. There is no retaliation, there is just chaos.

MR. KENTRIDGE: Yes, my lord.

RUMPFF J: Now I'm putting it merely on a basis - assume that this organisation who organises that, does it with the intention of putting the country into chaos and then to take over the government; you say that's not Treason?

MR. KENTRIDGE: To take over the Government in the physical sense, my lord?

RUMPFF J: In the sense of stepping into the place of the government . . .

MR. KENTRIDGE: Well, my lord, I suppose this may be speculative, but if your lordship means, as apparently the learned Judge here meant, that your organisation would then act as the police force and the army of the State - would simply walk into the Union Buildings and the Police stations - - I would venture to think, my lord, that that is a requisite element of force. You thrust the police aside - one cannot imagine the police will just let you walk into the police station.

RUMPFF J: Assume that that happens; assume the State is in a complete condition of chaos, no violence, nono violence at all, except that the people mill about - there is no production, no trains move - nothing moves - - food becomes scarce, people walk along the streets and look with eager eyes at the food stores, but there is no theft. , and assume the Government is powerless and assume this organisation which organises the strike then issues the statement that the government is incapable of governing this country, "We shall govern the country, our supporters are to understand that the government has gone under. . . .

MR. KENTRIDGE: Well, my lord, in that sort of situation where one says the government is powerless, it's with respect a difficult concept. You are thinking of a situation where the government still has the army. If these people try to take over the army barracks there would still be an army there to resist them.

RUMPFF J: Not at the stage. A call is then made by the leader of the organisation, "We have taken over; the people have taken over; the police must remain in the barracks, the soldiers must remain in their barracks until such time as further orders are given. . .

MR. KENTRIDGE: Well, my lord, that would appear to me to be a use of force. You are coercing the police and the government by force. My lord, it's like the example given in Leibbrandt's case - in Erasmus's case, my lord - - you surround Parliament by a regiment of armed men and you tell the members - - you threaten force, you tell the members of parliament, you pass this act or else - - that is force.

RUMPFF J: I'm putting it on the basis that no threat is made, except that the people have taken over the government.

MR. KENTRIDGE: Well, my lord, that taking over - - you say to the police "You stay in your barracks; ifyou come out of your barracks you just look out"; I suppose that's force, my lord, because if the Army is there and you tell the army that 'You've now got to fight for us', and then the army comes over without actual force - that would I suppose be a mutiny which in itself has an element of force in it. One wonders then would the

organisationwalk into the Union Buildings and just throw out the Cabinet; that would be an element of force, my lord.

RUMPFF J: No, no, the Cabinet Ministers are not there then; they are on their farms or somewhere else.

MR. KENTRIDGE: My lord, it's difficult to deal with this sort of thing. My lord, I've also thought of a speculative possibility. Let's assume that an organisation which doesn't like Parliamentary government at the next General Election makes propaganda towards people, saying that no one should stand for election as a member of Parliament, and on nomination day there are just no nominations at all, and on election day there are no elections. My lord, I don't know what would happen in a case like that. My lord, one can consider in theory that sort of a case .

RUMPFF J: I'm putting this to you on the basis that there is mere disorder, with no violence, and no violence intended . . .

MR. KENTRIDGE: Disorder, mylord, in the sense that there is no control over the Army or the Police any more; there is no one left to give orders . .

RUMPFF J: Disorder in the sense that there is a general strike; that there is no work, there is a limited amount of food available to the non-working millions, and that the police do not actively have to take action against the people . . . that might happen in the case of a national strike . . .

MR. KENTRIDGE: Well, my lord, there have been general strikes.

RUMPFF J: What would you say the position would be in a National strike without violence?

MR. KENTRIDGE: Well, my lord, it's hard to say exactly; there was a general strike in England in 1926 - in a sense things were chaotic, there was a disruption of food supplies, particularly there were fewer supplies; factories had to close down; trains and buses didn't run, but it wasn't the chaos and disorder which your lordship suggests. There was still the army and the police . .

KENNEDY J: The army ran all the services.

MR. KENTRIDGE: The army took over the trains and ran the trains and volunteers supported the Government to run the buses, and although there was in a sense economic chaos there were thousands of out of work strikers who perhaps hung around their factories - - there may have been isolated incidents between the strikers and the police, but none the less there wasn't a situation of complete chaos; there was the government which had police and the army and a civil service and they had to cope with this enormous economic dislocation. They coped with it in a certain way. Now, my lord, if your lordship on the other hand poses a situation where the people who organise that strike are hoping to achieve their aims, not by the Government in power giving in to their demands, but by creating a situation where the police break down, the army breaks down, there is no one to give orders, and their idea is that they will then directly take over themselves - - my lord, I haven't thought out the consequences of my answer but I would be prepared to think that that would be treasonable, because there is a direct taking over of the physical functions of the government.

RUMPFF J: Well, assume that . . .

MR. KENTRIDGE: My lord, if the strikers in England in 1926 had been proved to have a plan of taking over the Government directly - - walking into Whitehall and taking over the Army and the Police, I would have thought that would have been Treason.

RUMPFF J: Assume in similar circumstances the leaders of the organisation responsible for the strike - seeing that the government in a situation like that did not send out the army to do things - - informs the Government "Apparently you don't want to commit violence, you cannot govern; will you surrender to our demands", and the government says yes, "We'll surrender". Would that not be Treason?

MR. KENTRIDGE: I would submit not, my lord. I would submit it wouldn't be treason if the idea was to say "Look, there is economic chaos in this country; everyone is in a terrible state, why don't you make concessions and the workers will go back to work and things will be alright". The Government might well then say 'No' and the answer will be 'Well, then people are just not going to work any more'.

RUMPFF J: Let's assume that there is a very successful Nationwide stay at home, a strike; that millions are affected and that the army is a small army and the police is a small police force, and the situation is that it would be futile for the Government to try and solve this problem by the police or army in any way, and the leaders of such organisation then say, "It is futile, we know it, and you know it's futile, will you please surrender, or accede to our demands," and the Government says "Yes, it's futile, we cannot use the army or the police . . . . ."

MR. KENTRIDGE: You cannot break the strike by force, you can't force 3,000,000 people back to work. Well, then, my lord, we submit it wouldn't be treason. It would be an exercise of non-violent pressure, my lord.

Now, my lord, we are not asking your lordships to put the intramata of the Court's approval on that type of action.

RUMPFF J: No; I'm asking these questions arising out of this short passage which . . . .

MR. KENTRIDGE: Yes, my lord. But, my lord, it's clear in the Leibbrandt judgment that what they had in mind was a direct taking over of the physical functions of the State - ruling with force, my lord, exercising the functions of the police force and the army. My lords, there may be things which are done which are very undesirable - for instance if people decided not to pay taxes; this would also lead to very great difficulties for the State and there would appear to be legislation which might enable that sort of thing to be dealt with at an early stage, but we submit, my lord, that that is not Treason unless there is the requisite element of force, and my lords, we also submit, needless to say, that the fact that one might consider that certain forms of non-violent activity might lead to the most undesirable consequences, wouldn't with respect justify the extension of the concept of High Treason. That would be something for the methods you are to deal with, if indeed it hasn't dealt with it already, ...

My lord, I don't know whether your lordships - whether there is any point in taking a short adjournment or . . . . .

(COURT ADJOURNED FOR 15 MINUTES)

ON THE COURT RESUMING:

MR. KENTRIDGE: My lords, I was going to deal with what I call the political truism contained in the dictum of Mr Justice Shreiner, and to indicate what in our submission it really means. Now, my lord, the basis of it is that under our Constitution the laws are made by Parliament, but an important point to note, my lord, is that with the negligible exceptions of the entrenched clauses our Constitution isn't rigid. To change the Constitution is no more than simply to change the law; by a simple change in the Electoral Act one could bring about very great Constitutional changes in this country.

Now, my lords, when one considers in South Africa how a law can be changed one knows it can be changed by a Government with a majority in Parliament, or the Government itself may be changed by a defeat in Parliament or a defeat at the poll. Now, my lord, one knows that both the Government and Parliament are susceptible to the pressure of public opinion, and furthermore, one knows that the electorate is capable of changing its mind. Now consequently, my lord, one sees that in this country one can bring about a change in the law in three ways - (1) by changing the mind of the Government in power, (2) by changing the mind of the majority of members of Parliament, and (3) by changing the minds of the majority of the electorate, and in fact, in Political activity, my lord, presumably these three things work in a very inter-connected and mixed up sort of way. But the point we stress, my lord, is that when we talk of changing the mind of Parliament

or the electorate, one doesn't necessarily talk in terms of willingness. A Government may reluctantly yield to Parliamentary or public pressure. Members of Parliament may reluctantly yield to pressure and even the electorate, my lord, may reluctantly yield to the pressure of events in the country - economic events, or political events, or propaganda.

My lord, surely the whole basis of our system of democracy is that the electorate will work on a basis of enlightened self interest.

BEKKER J; I think the point was raised with Mr. Trengove. If the programme of action envisaged illegal acts and if illegal acts were embarked upon to create the necessary pressure on the part of the electorate, to change its mind, then Mr. Trengove suggested well, that is tantamount to pointing a gun at people and saying 'You vote this way or else'. The point I want to put to you is this, if a voter is according to the constitution entitled to exercise a vote free from illegal pressure - whatever that pressure may be - including economic pressure - - would that be a legitimate way of exercising pressure on a voter to vote a certain way?

MR. KENTRIDGE: Well, my lord, with respect, whether or not its legitimate maybe a question of Statute law, or even of opinion; we are concerned with submitting that it's not treasonable. My learned friend said these things are tantamount to pointing a gun. We submit that the only thing that is tantamount to pointing a gun is pointing a gun, my lord, because my lord, one can think of the example of the suffragettes in England. They committed illegal acts in order to exercise pressure on the

electorate to extend the vote to them...

RUMPFF J: To extend the vote, yes.

MR. KENTRIDGE: Yes, my lord; that's the point I'm making . . .

RUMPFF J: Could there perhaps be a difference when you commit illegal acts - - I'm assuming that it's done in order to take over the government in this manner.

MR. KENTRIDGE: In the manner your lordship was suggesting before the adjournment?

RUMPFF J: Well, to compel - - yes, taking illegal methods to compel the government to surrender, and to create a new State; that I'm assuming. You see, that's another requisite. In other words, that you have all the elements of Treason except the violence. In that I'm including the change of State radically different from the State we have.

MR. KENTRIDGE: My lord, with great respect, one does'nt know whether there is any element other than violence because after all, my lord, supposing that a body of men, as was alleged in England in the 1790's, assuming that they had undertaken by violence to have the franchise extended to all men in England, that would have been Treason. My lord, your lordship speaks about a new State. Some people would think, and it was the view expressed by some of the Defence witnesses, that if everyone in this country had a vote it would be for substantial purposes a new State. Your lordship mentioned the question of a surrender by the government. That is a phrase we sometimes hear used. If it is surrender in the sense that they undertake to introduce legislation to extend the franchise, that

would not be treasonable, my lord. If what you demand is a surrender in the sense that they've got to walk out of the Union Buildings and let the A.N.C. walk in without any intervening parliamentary process, that I suppose, my lord, might point to treason. But, my lord, if I may return from that to the point raised by his lordship Mr. Justice Bekker, we submit that the test isn't whether the electorate is subjected to illegal pressure, but whether it's subjected to violence or the threat of violence, because, my lord, one knows for instance a form of pressure is put on the electorate perhaps by having processions and demonstrations. A Government, for that matter even a City Council, by legislation can make that form of demonstration illegal; it would then be illegal pressure, but surely, my lord, it wouldn't be suggested that by that simple bit of legislation one turns it into Treason?

My lord, we have submitted right from the outset and with respect it's a submission that has been accepted by your lordship, that the element which makes treason is the element of violence, not an element of illegality.

KENNEDY J: In any event it's the Crown case.

MR. KENTRIDGE: Yes; now, my lord, your lordship asked what the position is if your pressure on the electorate is an illegal one. We have submitted that that cannot be the test. My lord, there are certain forms of strike, stay at homes, which are not illegal by Statute; there are other forms which are illegal by Statute. My lord, surely it couldn't be suggested, we say, that a form of pressure is treason or not treason depending upon whether

My lord, we say it shouldn't enter into it.

BEKKER J: Well, I think the Crown on that point asked what his lordship meant, or sought to convey by the use of force, and then it was debated - - I think Mr. Trengove said that where you exercise illegitimate or illegal pressure in an endeavour to change the mind of the voter that type of force is covered by the dictum appearing in Leibbrandt's case, in that judgment.

MR. KENTRIDGE: In other words, my lord, arguing in effect that the word 'force' or 'violence' may mean some other sort of force.

BEKKER J: Yes.

MR. KENTRIDGE: Well, my lord, as far as this Indictment and the Judgment of this Court is concerned I think it's been accepted that violence is violence, but I am suggesting here that when Mr. Justice Shreiner said 'force' he meant 'force'. My lord, I have submitted that the ways in which one can change the law - by exerting pressure on the electorate and the government. Now, my lord, when Mr. Justice Shreiner said in effect that there are only two ways of changing the law, one by violent revolutionary and the other by one of the three methods I mentioned - - that is, getting the government or parliament or the electorate to change its mind - - that, with respect, is a political truism. One cannot conceive in this country how a law can be changed unless either there is a violent revolution or you have a change of mind in the electorate or parliament in the government of the country. But, my lord, Mr. Justice Shreiner was not dealing with methods of making the government or the electorate change its mind,

that I submit is the point which the Crown overlooked in relying on this dictum, my lord. All Mr. Justice Shreiner was saying was that if Parliament and the electorate are completely by-passed in order to change the law it could only be by revolutionary force, and this what I submit with respect is a political truism. If you completely by-pass Parliament, I take it one must use force in the normal way. My lord, there are these other speculative possibilities we've been into; for instance, if no one stood for Parliament at a general election and there wasjust no government; one doesn't know where that would fit into the dictum at all.

RUMPFF J: It won't happen, because people are too keen to govern.

MR. KENTRIDGE: As your lordship pleases. But his lordship was not dealing with how you persuade the electorate to change its mind; what sort of pressure you bring to bear on it; all he wassaying was that if you by-pass the electorate, if you by-pass parliament, then you must be aiming at force, but he wasn't dealing, and it didn't arise in the case - as I pointed out - - he wasn't dealing with how you can get an electorate to change its mind. What our case deals with, my lord, is how you can get an electorate and parliament to change its mind, not spontaneously but by pressure.

BEKKER J: Without violence.

MR. KENTRIDGE: Without violence, my lord. Now, my lord, as I mentioned earlier in Erasmus' case 1923 Appellate Division at page 82, it indicated that Parliament could be coerced by physical force. In other words you

have parliament remaining but it's surrounded by a body of violent men, and there is a threat - you say "Pass this law or else". That's a form of physical coercion, my lord, and it's . . . .

BEKKER J: If they said to you "You change the Income Tax Act or we won't pay our taxes" . .

MR. KENTRIDGE: Yes, my lord, that's not violence. It's something which the Government can deal with by its system of laws and so forth. My lord, it's interesting to note on page 3 of Leibbrandt's judgment, where having quoted Erasmus' case the learned Judge talks of hostile intent as an intent to overthrow the Government or to coerce it by force. It doesn't merely say "coerce it", as one might have expected in anything other than force - if some sort of pressure was enough, but he says "coerce it by force".

MR. MAISELS: My lord, your lordship wanted a reference earlier this morning. Perhaps I might just give it to your lordship. It was on the question of a statement by my learned friend Mr. Trengove on the basis that it wasn't alleged that all members of the A.N.C. knew about this. Your lordship will find this in Vol.88, at page 18424 to the top of 18425.

RUMPFF J: Thank you.

(COURT ADJOURNED)

COURT RESUMES ON THE 14TH MARCH, 1961.

APPEARANCES AS BEFORE.

MR. KENTRIDGE : My Lords, I was submitting yesterday in connection with the Leibbrandt case that the only form of co-ercion recognised by the law of treason is coercion by force. I referred to the case of Erasmus, and indicated that that was clear from that case. My Lord, I referred to Erasmus' case, 1923 A.D. at page 82, where Sir James Rose-Innes said : "The whole structure of society might be shaken by the violent actions of a body of men whose object was not to alter the Constitution or change the government, but to compel the latter to obey their behests." As Your Lordship remembers, that case was concerned with actual violent action, and at page 89 of the same case, My Lord, in the Judgment of Mr. Justice Coetzee the learned Judge said : "And Boehmer aptly observes that if a person has set on foot rebellion or discovered plans to the enemy it will not avail him to plead that he had no hostile intent for such and similar acts naturally and necessarily manifest a hostile mind and tend to the subversion of the state". He goes on to say : "To levy war against the sovereign amounts to treason and this offence of levying war may be committed even by a few persons who for instance devise or intend to force the King by means of acts of violence to change his counsels or to overawe the Houses of Parliament by violent methods." My Lord, I submit with respect that when one considers it, it is difficult

to consider any other criterion which could really be applied by the Courts. My Lord, a general criterion of what is dangerous to the state would with great respect be a very dangerous one for Courts to apply. It is a matter of opinion and degree what is dangerous to the state. The suffragette movement might have been considered dangerousto the state by some, the Chartist movement in England was no doubt considered by some dangerous to the state. We submit that the law of treason has fixed the dividing line at force, and when one speaks of extra-parliamentary activity, which falls short of force, one is really considering methods of pressure brought to bear on the electorate and parliament and therefore working essentially through the ballot box. And that is why, My Lord, we submit that a non-violent extra-parliamentary activity, aimed at a change of the law, even if that part of the law be called the Constitution, is not treason and is no evidence of an intention to use treasonable means. And I have submitted My Lord, that Leibbrandt's case is no authority for any use of the idea of an extra-parliamentary campaign as being evidence of a treasonable campaign.

My Lord, I would add in this regard, with regard to the Crown's reliance on that dictum of Leibbrandt's case, and its attempt to extend its meaning and ambit, ...

MR. JUSTICE RUMPFF :

Well, actually the matter has not been discussed in this Court before in this country at all. Any case that you approach for some light on the subject

you must approach with the caution that it wasn't discussed in that case. Statements may have been made that indicate a certain trend of thought, but the point wasn't stated or argued.

MR. KENTRIDGE :

My Lord, the point I was going to finish up on, on this aspect of the argument, is that the attitude of our Courts in dealing with vaguely - in dealing with doubtful crimes if I can put it that way, has certainly not been to extend the ambit of the common law. My Lord, one can recall a number of cases. There was the case of Harrison and Dryburgh, 1922 A.D. 320, which dealt with the placaat which made it an offence to scandalise the government, the Appellate Division held that there is no evidence that that placaat has ever been applied in South Africa, and they were not prepared to apply it. There was the case of Roux, 1936 A.D., which has often been quoted, My Lord, on the case of laesae majestatis or laesaw venerationis, that is 1936 A.D. 271, where the Court made it quite clear that they were certainly not going to extend the ambit of that crime to any case which didn't appear to be clearly covered by it in the modern law. And similarly, My Lord, there is an appeal from Rhodesia, I am afraid I havan't the reference but I will give it to Your Lordships, the case of Rex versus Chipo, when the question arose of whether it was a common law offence to institute a malicious prosectuion, and the attitude of the Appellate Division again was that there must be no extension by judicial interpretation

of doubtful crimes. And so I submit, My Lord, that Your Lordships will not take the reference in Leibbrandt's case to force as anything but force in the ordinary sense. My Lord, I did submit that the word "unconstitutional" which was used in the Leibbrandt judgment, wasn't used as an all comprehensive word. That is to say, My Lord, it doesn't mean that anything which one can call unconstitutional is treasonable. My Lord, the word unconstitutional may have a number of meanings. In Dricy's (?) Law of the Constitution, My Lord, I refer to the eighth edition, page 560, there is a note on the various meanings of the word constitutional in various contexts as applied to laws, for instance, and even as applied to law the statement unconstitutional law has various meanings. My Lord, a number of different meanings of the word were canvassed in a long discussion with Professor Murray in Volume 32 of the record. It is not necessary forme, My Lord, to go right through them. As far as we are concerned we can sum it up with a passage on page 6359, where it is put : "It doesn't follow that what is unconstitutional always involves the use of force and violence?" and Professor Murray says "No.". From our point of view, My Lord, that is really all we need to say, that when our clients may have used the phrase "unconstitutional" with reference to their own activity, it did not mean that they were embarking on force and violence, and the use of the word "unconstitutional" by Mr. Justice Schreiner in the Leibbrandt case can certainly, we submit, not be taken as a suggestion that anything which you can call

unconstitutional is therefore violent and treasonable. The learned Judge, with respect, was apparently simply using "unconstitutional" as a synonymn for treasonable. My Lord, it was clearly a very different use from the use which one finds in the documents, for instance, produced by the African National Congress. For instance, My Lord, if one looks at the edition of Mayibuye, that is the Natal A.N.C. journal, No. G. 812, which is in Volume 50, at page 9981, one sees that the statement, "We of the African National Congress have adopted unconstituional methods because we have discovered the methods of begging have proved a failure and we have no other way". And My Lord, it is perfectly clear if one reads that in its context that all thatis meant by unconstitutional there, is unconstitutional in contrast to methods of supplication, that is to say militant methods such as the Defiance Campaign and stay at homes.

Now My Lord, I have therefore submitted that there is nothing in that dictum in Leibbrandt's case or in the case itself which assists the Crown in making any inference from the mere fact of extra-parliamentary activity. And My Lord, I now propose to leave Leibbrandt's case, but before leaving it, My Lord, there are a few additional references to that case which I would like to give to complete the references which I have given, so that there won't be any need to return to it. My Lord, on the matter which was discussed yesterday on what the Court there had in mind when it spoke about the idea of Leibbrandt's organisation taking over the functions of government, there was a further reference

on page 87 which I also have given, which says that the idea that No. 1 Accused wanted to build up an unofficial police force to preserve law and order in anticipation of times of disturbance was certainly never entertained by No. 1 Accused, and it does appear that what was in mind was an unofficial police force. Now My Lord, there are certain further references which I find in Leibbrandt's case which I ought to have given Your Lordships when the question of the two witness rule was argued. I informed my learned friend Mr. Trengove that there are these additional page references, My Lord, and he has arranged for a note to be taken of it, and I have undertaken to give him the page references which I give Your Lordships so that there will be no delay in argument.

My Lord, amongst the references which I either didn't give Your Lordships or didn't give Your Lordships in sufficient detail, were the references on page 7, which indicate that overt acts of sabotage in wartime will be held to be treasonable acts in themselves. On the same page there is a reference which I think I did not give to Your Lordships about communicating with the enemy in time of war. There the learned Judge said that a communication even with the enemy government itself might be explained consistently with innocence, for instance it might take the form of an enquiry with regard to a relative in an enemy country, which presumably wouldn't be an act of treason. Now My Lord, the Appellate Division does however appear to have considered that prima facie an act of communicating with the enemy in wartime would be an overt act in

itself. That appears in 1944 A.D., at the top of page 287. The matter arose My Lord with regard to another statutory provision, Section 302 of the Code, which provided that you can't lead evidence of an overt act which isn't pleaded, unless it is relevant to prove another overt act. And an objection was taken because evidence was led by two witnesses that Leibbrandt has served in the German Army. Now that wasn't an overt act charged, but the Court held that that sort of evidence could be admitted if it was relevant to prove any part of the overt act, and the Court held that it might be relevant to prove that the radio transmissions which took place were directed to the German government.

Now My Lord, the Appellate Division said at the reference I have given, that the paragraphs relating to transmissions to Germany were allegations of overt acts. Now My Lord, I should point out however, that in any event the Special Court found that those transmissions were not merely made with hostile intent, but were carried out by members of No. 1 Accused's organisation and was part of his policy of getting into communication with Germany - that is on page 60, My Lord. My Lord, one should point out that it was only against Leibbrandt that there was apparently a finding that more than one overt act had been committed. In the case of the other Accused, it was only the conspiracy or they were found not guilty. In the case of Leibbrandt he was apparently found guilty of the conspiracy and of two transmissions to Germany. My Lord, if Your Lordship looks at page 88 of the Judgment

in Leibbrandt's case, Your Lordship will see that in Leibbrandt's case there were no specific findings on the overt act, the Court having outlines the evidence said this was a treasonable adventure from start to finish and No. 1 is found guilty of treason. But as appears from the Appellate Division Judgment at the foot of page 271, it does appear from the findings that he was found guilty of conspiracy and two overt acts, in addition. My Lord, one doesn't find in the Judgment in Leibbrandt's case any particular discussion in his own case of the application of the two witness rule. The reason - it appears not to have been argued in his case in either Court, and the reason appears to be, My Lord, that there was a mass, not only of circumstantial evidence, but of direct evidence of his adherence to a treasonable conspiracy. My Lord it appears to have been proved not twice over, but several times over if one examines the record. For example at pages 58 to 59 the Court refers to the evidence of at least four witnesses as to No. 1 Accused getting people to sign the Oath which was held to be prima facie evidence of a treasonable conspiracy, and also these four witnesses deposed to the fact that he came from Germany in order to put up this anti-governmental organisation in wartime. Your Lordship will find, My Lord, at pages 78 to 82 there are a number of witnesses who depose to his possession of explosives and his intention of using violence, at pages 82 to 85, one finds evidence of documents which indicate violence on his part. Some of those, incidentally, My Lord, aren't set out in full

in the Special Court Judgment, one finds some of them set out in the Appellate Division Judgment. So it does appear, My Lords, that there was so much direct evidence, so many direct witnesses of his adherence to a treasnnable conspiracy, that there was no doubt at all about the two witness rule in his case. But in any event, My Lord, Your Lordships will see that nonetheless in dealing with the other overt acts of transmitting to Germany, there was this finding - there were findings not merely that they were done with hostile intent, but that they were in pursuance of his particular purpose, although as I say, My Lords, these other overt acts weren't the sort of overt acts that were overt acts only because of the sonspiracy. But in any event, My Lord, I would like to refer Your Lordship to a number of pages which indicate that they were specific findings about the radio transmissions and what the contents were, at pages 69 to 72 there is a discussion of the purpose of the broadcasts. Page 86 there is a discussion of the purpose of the whole conspiracy; page 93 again the purpose of the transmission; pages 97 to 98 references to evilence of the use of a German code and the contents of the broadcast, namely showing that it wasn't a mere innocent enquiry about a relative or anything like that. Pages 127 and 128, specific findings that a certain man was recruited purely because of his knowledge of the Morse code, evidence is accepted of this attempted transmit to Germany for the purpose of the conspiracy, and page 130 again evidence accepted of discussions of No. 1 Accused with regard to transmissions to Germany as

part of the plan of his conspiracy. In other words, My Lord, I simply sum this up to show that in the case of Leibbrandt No. 1 Accused himself, there is nothing at all to suggest, needless to say, that it is enough to have the single proof of the conspiracy plus one colourless overt act. The second and third overt acts were not colourless, and there seem to have been three or four witnesses of the conspiracy quite apart from circumstantial evidence.

My Lord, I should have given two other references in the case which show the Special Court's understanding of the two witness rule. On page 157 the Court in connection with one of the Accused who was acquitted, said "If it were not for the protection afforded to Accused persons on treason charges by the proviso of Section 284, which requires double proof of the offence...". And on page 167 it says with regard to No. 6 : "The Crown case breaks down because it has failed to furnish two complete sets of proof." My Lords, that concludes what I have to say about the Leibbrandt case.

My Lord, I pass now to the general question of extra-parliamentary activity as it was considered and discussed by the A.N.C. and the Accused in this case. Now My Lord, this case is about extra-parliamentary political activity, carried on in the main by people who have no vote. Now My Lord, if the Crown were correct in drawing any adverse inference with regard to treason from this sort of activity, it might have far reaching political and social consequences, but we submit that

on the indictment it is clear that that doesn't arise. The Crown was not suggesting that extra-parliamentary activity in itself now is treasonable. The real Crown argument as it develops with regard to extra-parliamentary activity, does appear to be a suggestion on the part of the Crown that the Accused in this case did not have a genuine belief in the efficacy of extra-parliamentary methods and did not really believe that those methods would succeed without the ultimate use of violence. My Lord, there are certain portions of the Crown argument or examination where there appears to be a suggestion that extra-parliamentary methods are actually inefficacious. But I think that if one examines the Crown argument, the argument is really that whether they are objectively speaking efficacious or not, the Accused didn't have a genuine belief in them, and it is on that basis that I propose to deal with it, My Lord. We respectfully submit that that would be the only issue raised before the Court. Whether the Court may believe that in South Africa any particular method of extra-parliamentary non-violent action would be effective, the real question is whether the Court can reject the evidence that the Accused and the A.N.C. Believed in the efficacy thereof. My Lord, I put it that way, because it is clear we submit that there is no onus on the Accused to prove a reasonable bona fide belief on their part in the efficacy of extra-parliamentary action, still less any belief amounting to a feeling that they could guarantee success. We submit that insofar as this point is

relative, the Crown would have to prove affirmatively that there was no actual belief in the efficacy of extra-parliamentary methods.

Now My Lords, the Crown's reasoning appears to be as follows ...

MR. JUSTICE BEKKER :

That is in relation to the objects to be achieved?

MR. KENTRIDGE :

As Your Lordship pleases. That, My Lord, as was stated in Leibbrandt's case, is undoubtedly a factor which the Court can take into account.

MR. JUSTICE BEKKER :

What I have in mind is this, taking the Freedom Charter for instance. The Crown suggested that inasmuch to the knowledge of some or all of the accused the Freedom Charter - or the demands could not be achieved unless the political and economic setup of the country is smashed. That being the position, that the political setup has got to be smashed, and the economic setup has got to be smashed, how could they do it by way of extra-parliamentary and constitutional means says the Crown?

MR. KENTRIDGE :

How could they have believed in it. My Lord, one could say with regard to this word "smash", it is really smash to the extent that it is required by the Freedom Charter. It would mean universal franchise...

MR. JUSTICE BEKKER :

I have in mind that article written by Mandela. He says it is impossible to achieve the demands of the Freedom Charter, unless the economic structure and the political structure is smashed.

MR. KENTRIDGE :

Yes, My Lord, but My Lord, if one reads the article and bears in mind the evidence, it means smashed to the extent required by the Freedom Charter, that is universal franchise, nationalisation of gold mines and redivision of land. That is regarded as a complete - that would be a tremendous upheaval in the political and economic structure.

MR. JUSTICE BEKKER :

Well, it would involve I suppose the setting aside of the present economic and political structure?

MR. KENTRIDGE :

Well, it would mean extensive measures of nationalisation in the first place. It would mean an extension of the franchise to an extent never before contemplated in this country...

MR. JUSTICE BEKKER :

Yes, I think it is in that setting that I think the Crown advanced this argument.

MR. KENTRIDGE :

That is so, My Lord, that is their argument, that these changes, they say are so drastic, so far reaching that the Accused couldn't really believe they would have got them by non-violent means. They

realised that the White electorate would be very, very reluctant ...

MR. JUSTICE BEKKER :

Wouldn't do it at all.

MR. KENTRIDGE :

A Wouldn't do it at all willingly, yes, My Lord, I think that is the argument. Of course My Lord, this is quite apart from matters of detail such as that the Freedom Charter was adopted by the A.N.C. in 1956, and that everyone was alleged to be in the conspiracy by the beginning of 1954, but I do it on the basis, My Lord, that that is the Crown case, that these are the most drastic changes. And that, My Lord, is really the reasoning in the Crown's action. They say the Accused realised that they couldn't achieve this by any spontaneous change of heart on the part of the electorate. Furthermore, the Crown says the Accused realised that there would be tremendous opposition to such changes from the existing political parties, and furthermore they say that the Accused regarded the Government of this country not as a government likely to make concessions easily, but as a tyrannical government, indeed a brutal government.

Now, My Lords, it is because of that that the Crown says the Accused couldn't have hoped to succeed non-violently. Now My Lord, that we say is a glaring non sequitur. What does follow from that view, the view that these were drastic changes, that the electorate wouldn't comply with them willingly, that the government wouldn't willingly make concessions,

what does follow from that is that you can't rely simply on mere persuasion of the electorate or the government, one can't rely on any idea of change of heart. But My Lord, if one believes that the concessions won't come easily, that they are far reaching, that the While electorate is prima facie unwilling to grant them, that the government won't grant them, and is a brutal government, My Lord, it follows that one doesn't expect the concessions voluntarily, and one doesn't expect an easy struggle.

MR. JUSTICE RUMPFF :

Is it correct to say that certain individuals published material which indicate that they thought that it might not be efficacious, that the method advanced might not be efficacious, until a final struggle at the end would take place.

MR. KENTRIDGE :

My Lord, I submit that there is nothing at all to show that anyone believed that these extra-parliamentary methods such as strikes or defiance would be ineffective. There is a lot of material to show that it would be ineffective to rely on the ordinary political parties or mere methods of propaganda directed to the White electorate. But My Lord, supposing one believes that one has a tough, brutal government and an electorate which is at present most unwilling and likely to continue to be unwilling voluntarily to make the concessions which are demanded in the Freedom Charter. My Lord, one asks, what follows from that. Can one say that because of that one

believes that a nation wide general strike cannot succeed? My Lord, one asks why one can't believe that the tyrannical government which won't succomb to mere persuasion, will succomb to economic pressure. My Lord, one may believe a government is brutal, and it is ready to use force, even eager to use force, and yet one may believe that although it may shoot down a mob without compunction, that although it may disperse processions brutally without compunction, that although it may not hesitate to use machine guns, yet one may believe that even such a government would not be able to go into a million or two million households and break up a stay at home by force.

MR. JUSTICE BEKKER :

Well, it was suggested yesterday that one way of breaking a strike is say righto, you go on strike, we are sending the police and the army to do the essential services, ...

MR. KENTRIDGE :

Quite, that is what may happen. That is so, My Lord.

MR. JUSTICE BEKKER :

How could the demands of the Freedom Charter be achieved if the belief was well, if we go on strike, the government will simply take over the running of the essential services. So that won't help us.

MR. KENTRIDGE :

No, My Lord - well, it may be if that happened, it would fail as it did in England in 1926,

but it is a matter of degree. Supposing on the other hand, that the government found well, it hasn't got enough soldiers and police to run the railways and the mines, coal mines for power, the gold mines for exports, the railways, the ports - My Lord, one is there in the realms of speculation. But the sole point I make here, is that it goes very far to say that the Accused, because they believed that this was a brutal government and an unwilling electorate, couldn't have believed in the efficacy of economic pressure. My Lord, one may even believe that this is an unfriendly electorate from the point of view of the Accused, apathetic to their needs, unfriendly to them, perhaps unwilling to give up privileges, but nonetheless, My Lord, it doesn't follow from that that such an electorate would tolerate the shooting of thousands of peaceful strikers, even if the government wanted to.

MR. JUSTICE BEKKER :

Well, on what basis would you approach Sejake's speech?

MR. KENTIRDGE :

Well, My Lord, Sejake framed his speech himself. Sejake's speech, My Lord - he gives an example of how he himself clashed with the police in a particular strike. But even if one extends it beyond his speech, and one says yes, if we go on, we may have to meet the army ...

MR. JUSTICE BEKKER :

"If the struggle assumes countrywide proportions..."

MR. KENTRIDGE :

I take it what he may have had in mind was that supposing you do go on a country wide strike, the government may call out the army, if necessary to try and force people back to work. But the question is, My Lord, would such action by the government succeed? My Lord, it is all very well saying in the 1946 miners' strike, if it happened as some witnesses believed, they had a strike on a few mines and there are police who go into the compounds and force people back to work. But even if that is tried, and it is expected to be tried in a country wide strike, the question is, would it succeed? Is there any reason in other words, My Lord, for the Court accepting that the Accused did not believe that a nation wide strike would succeed against the brutal government, but that some form of insurrection would. And My Lord, this brings one to a major fallacy in the Crown argument. The Crown argument implies that if the Accused didn't believe in the efficacy of non-violence, they must have believed in the efficacy of the violent insurrection in South Africa. Now My Lord, there was no evidence why they should have believed this would succeed. Far less any evidence of any preparation for such an insurrection.

MR. JUSTICE BEKKER :

Excepting that the references to struggles in other countries, there they say people struggle and struggle, but in the end people succeed. Now could it not be suggested that they did have a belief based on what happened in other countries, that

in the end their struggle must succeed?

MR. KENTRIDGE :

My Lord, they did believe that their struggle must succeed, or they said so anyway - they may have been keeping up their spirits - but they did say - that is the belief which they stated. Now My Lord, that matter was really dealt with in that speech of Professor Matthews in 1952, opening the Defiance Campaign, in which he said quite frankly that they know there have been examples in other countries where people who seem to be unarmed may have succeeded, but nonetheless he says that in South Africa the A.N.C. had rejected that idea. Quite apart from the morality, it was an unarmed people, and they did not think that they could or should ...

MR. JUSTICE BEKKER :

Is that the speech which was circulated?

MR. KENTRIDGE :

Yes, it was circulated. Now My Lord, my learned leader will deal with that speech in detail. My Lord, it is quite true that there - My Lord, it is in Volume 86, page 180 27. My Lord, it is perfectly true of course that the accused in giving examples of struggles in other countries referred to countries like Malaya and Indo-China as well as countries like Ghana and India, where struggles had succeeded. Now My Lord, there were many, many references to struggles in places like Ghana and India which were accepted as non-violent, Nigeria. It was put to some witnesses that after all conditions

in India and Ghana are not exactly the same as they are in South Africa, and the answer was given that no, conditions aren't exactly the same. But My Lord, it has never been suggested that conditions in Malaya or Indo-China are exactly the same as in South Africa, far from it. And My Lord, in due course we will show Your Lordship numerous references from people like Professor Matthews downwards, in which it is said that our power is the power of our labour. Now My Lord, we are dealing with what the Accused might reasonably have believed or honestly believed, one can ask, is an insurrection by a virtually unarmed people againstthe tyrannical government more likelyto succeed than massive economic pressure. Our reply, My Lord, is no, that there is no reason to believe that, and there is no evidence of any such belief. The stress all the time was on the question of organisation and unity. Consequently, My Lord, we say if people - if the idea put forward that one has a nation wide stay at home, perhaps combined with boycotts or other forms of pressure, is there any reason for finding that that couldn't have been believed in, but the efficacy or some unorganised or partly organised retaliation by unarmed people would succeed. We submit, My Lord, there is no evidence of any belief in that, and My Lord, nothing at all to show such a belief. No sign of any preparation for an insurrection.

MR. JUSTICE RUMPFF :

What is the evidence on the contrary, apart from the evidence in Court, about ...

MR. KENTRIDGE :

"bout belief in the efficacy of ...

MR. JUSTICE RUMPFF :

If one were to approach inter alia, the problem from the point of view that one must make inferences, and to make inferences you look at the objects, the methods stated and what was said.

MR. KENTRIDGE :

My Lord, I have referred to Professor Matthews's speech. Another very striking example of a top level document is the Plan of Campaign for the Defiance Campaign which was put in in full in the evidence of Cachalia, in which it is stated specifically that the supreme weapon of the non-White people is their labour power and the threat of the withdrawal of their labour, and that is the ultimate weapon which is there for their use. Then My Lord, in the case of Our Chief Speaks, A.J.L. 45, one finds similar references. My Lord, particularly in the Eastern Districts, speeches there - one finds numerous references to economic pressure. Even in thatspeech of Sejake to which Your Lordship refers, one finds references to the force of labour power - not physical power, labour power, My Lord. My Lord, we have a long list of references to this point, which were to have been dealt with later, but if necessary I will get them during the adjournment and read them out to Your Lordships.

MR. JUSTICE RUMPFF :

No, if they are going to be dealt with,

it is quite unnecessary to do it now.

MR. KENTRIDGE :

My Lord, we intend to give Your Lordship from the positive point of view numerous references in which a positive belief in the force of industrial action is expressed.

My Lord, Your Lordship will bear in mind, as far as we can recall, that the Crown not only led no evidence to show that there were good reasons for believing in violence, but in its argument, My Lord, it does not seem to have directed any attention to the question of the probability of people in South Africa believing in the efficacy of a violent insurrection as distinct from labour power, and one sees, My Lord - we will show it to Your Lordships, time and again the stress is, the government is dependent on us, on our labour. That is the source of our power. And My Lord, that being so, the fact that you have a tyrannical group - a tyrannical, brutal government, if that is your belief, it doesn't contradict this in any way. It is not at all inconsistent with it. You have a government which says it will make no concessions, an unwilling electorate, but My Lord, if one says what would happen for instance if the railway workers stopped work, or what would happen if domestic servants said they didn't want to work, the idea of excluding them, that the electorate would say to the government, you have got to do something. My Lord, it seems impossible to exclude it.

MR. JUSTICE RUMPFF :

I can understand that perfectly - well you will come to the argument. On this very point that you make, obviously it is quite possibl to say look, we are up against a hard tyrannical government. We will have to make sacrifices, for instance a document or a speech may say that, even in different terms. You say well, we will have to fight this government - I am using that word on purpose - we will have to fight it, we will be shot at, in the end they will have to give in because they are dependent on our labour. In the end we will force them by the sheer weight of our policy of non-violence and strike and boycott. They will have to succomb for economic reason, whatever the harm may do us. Now that would be a clear cut speech to indicate what the end was that would be envisaged, that we would suffer in the meantime, we will getshot at, we will be put in gaol, but in the end we will force them by our non-violent policy, by our strikes and boycotts to succomb. Do you follow what I mean?

MR. KENTRIDGE :

Yes, My Lord.

MR. JUSTICE RUMPFF :

In the simple way that I have put it, it is an indication that sacrifice, fight, violence, is anticipated, is realised and envisaged, and it is stated, we will have to face that, but in the end, the final end will be ours, we will be victorious because of our policy, that we will submit (?) them into accepting our objects. Then there is no doubt

about that.

MR. KENTRIDGE :

My Lord, of course we will submit that that ...

MR. JUSTICE RUMPFF :

That is the effect, yes.

MR. KENTRIDGE :

My Lord, there is no doubt, and that is the point with which I propose to deal with, that these matters one way or another, are certainly not stated by these political speakers as clearly as they might have been. If one looks at it with hindsight, one can say now here was a case - here was a position where you could have made it clearer, and possibly if they were better speakers or better politicians, they might have made it clearer. Or if they had in mind the doubts which the Crown has expressed on their policy, they might have made it clearer.

MR. JUSTICE RUMPFF :

But wouldn't it have been very simple? Isn't the Crown case this, rightly or wrongly, that here you are preparing masses, they have a grievance, perhaps they are entitled to have a grievance, you know that, you are preparing them for action against the government in a certain way. Now in them you install more and more the feeling of - I won't say hatred, but dissatisfaction. You tell them what they haven't got and what they should have. Psychologically you condition them against the government, by telling them that this government is not going to give it on

a platter what you want, you must face hardship. Now if you do that, you are creating an instrument. And instrument, a very delicate instrument, a dangerous instrument, as far as the state is concerned. I am now approaching it from the state point of view. It is dangerous, this instrument with which you are dealing. If you accentuate in the minds of the people that you are preparing, the dissatisfaction, hardness, the tyrannical nature of the government, and you don't at the same time stress, always stress that the end is not a violent end which you envisage, in the process there may be violence by the government, but the end is not a violent end, then you are preparing a machine that may in the end - or that you yourself may use in the end for other purposes, if the state doesn't succomb, because it will be ready to do so, even if it hasn't got weapons.

MR. KENTRIDGE :

I follow that, My Lord. My Lord ...

MR. JUSTICE RUMPFF :

I take it that is the Crown's argument.

MR. KENTRIDGE :

My Lord, may I say briefly two things about that. Insofar as it is the Crown case that one is creating a dangerous instrument, it seems to come perilously close to an argument that you are committing treason by negligence, perhaps, My Lord. But apart from that ..

MR. JUSTICE RUMPFF :

I am really on the point of the evidence.

Let us forget whether this is treason or not. I am really on the evidence you see, that the Crown will say, what we put before the Courtis to show - I admit that I haven't put thousands of speeches, what I have put before the Court, the documents and the speeches, and they have a certain slant.

MR. KENTRIDGE :

My Lord, may I deal with it briefly in this way. Assuming that that is the evidence, the position would still be firstly that on that basis nothing is said about what happens at the end. It is not said that it is going to be a violent end, and the methods used throughout the period we deal with and according to all our evidence, are in fact non-violent methods. So even if that stood alone, My Lord, the matter would certainly be in doubt. But secondly, My Lord, we submit that notwithstanding the fact that it might not have been as clear as one would like or as well put as one would like, one has in meeting after meeting, document after document, this stress on non-violence. Now My Lord, it may be that Your Lordships may feel, looking at it from an ideal point of view, that if one has this sort of policy, the idea of non-violence should be stressed not merely at most meetings, but in every single one. It may be. But we will submit, My Lord, that quite apart from the question whether the Crown evidence as Your Lordship has put it, could lead to a definite conclusion, there is ample evidence of a constant stress on non-violence.

So that even if there are not many cases before the Court where it is specifically said the end is going to be a non-violent end, there is an enormous mass of evidence which shows that people were told ours is a non-violent struggle - a non-violent campaign, and that being the case, My Lord, there is no particular reason why people should have expected a violent end, indeed, thecontrary.

My Lord, apart from the major documents which the Court may have in mind, we propose to go even on the evidence given in this Court, and show Your Lordships literally dozens of occasions where at meetings of various sorts, various speakers referred to non-violence, major documents and minor documents, evidence of detectives who said that time and again at meetings they heard non-violence stressed, time and again. And My Lords, consequently we submit that firstly it was made reasonably sufficiently clear that what was in mind was a non-violent campaign, but in any event, My Lord, even if nothing were said, it may be dangerous, but if nothing were said My Lord about a violent end, I submit My Lord, it would be going too far to deduce that a violent end was intended. We submit, My Lord, that in fact you have policy documents laying down non-violent methods, you have policy documents laying down principles of violence (sic), it was announced time and time again, and consequently, My Lord, even if one finds that the way things are going to work out in the end isn't as clearly formulated as perhaps we could formulate the various possibilities in

discussion here, My Lord, there is certainly nothing which points to the expectation and intention of a violent end rather than a non-violent one.

My Lord, one must bear in mind that in this case the evidence is that there has been in fact practical experience of various non-violent methods. My Lord, first of all one has had stay at homes - not nation wide ones or possibly if nation wide, only for nominal periods, one has had the Defiance Campaign, one has had economic boycotts, one has had - My Lord, one must ask how extra-parliamentary means work. My Lord, one has the example of passive defiance as in the Defiance Campaign, it might excite respect owing to the suffering that is being borne, it may involve submission to force, and the ideas that the exercise of force on a non-violent crowd might cause revulsion of feelings against - in the electorate. Your Lordship will recall in the evidence and in documents a great deal of discussion about whether the Defiance Campaign was successful or not, that is a good edample, My Lord, of the way one gets into the realms of speculation when one tries to follow the Crown argument that people couldn't have believed in the efficacy of this form of struggle. Witnesses have said that although the Defiance Campaign didn't succeed in repealing the laws it set out to repeal, it was not a failure, that it did produce an effect. Now My Lord, with great respect, no Court could hold that that was a wrong view or an unjustified view. It is certainly a matter of political opinion. One could

never say that when the Accused say that the Defiance Campaign did have a postive effect in this country that they are wrong. One may individually have one's own view of just how great a success it was, but My Lord, a Court of law with great respect on the evidence before it, that is before this Court, could never find that those people are insincere in saying that they believed that the Defiance Campaign within ? with its certain limits had an effect.

MR. JUSTICE RUMPFF :

Well, I think the evidence on that broadly can be said to be that it was a failure on the one hand, but a success on the other hand, because for - it calls for a different type of method on the one hand, that it awoke the conscience of a certain number of Whites in this country, to that extent it was a success.

MR. KENTRIDGE :

Yes, My Lord, and afterall, one must bear in mind that certain witnesses have said, that seems to be common sense, that in talking of say a stay at home, no one can guarantee that one of them is going to work. Of course it may fail. Then perhaps we have to go on to another, perhaps combine it with a boycott, perhaps combine it with another form of the passive resistance campaign. My Lord, take the question of economic boycott of key businesses, People in the Eastern Cape have applied it, admittedly in a local and limited way, but there is nothing in that experience which in their experience

which can force this Court to say positively that these people couldn't have believed in the efficacy of economic boycott. My Lord, these forms of pressure, particularly a withdrawal of labour - My Lord, one must bear in mind that a withdrawal of labour has for years been recognised in the economic sphere as a legitimate form of pressure applied by workers. My Lord, these forms may have drastic results...

MR. JUSTICE BEKKER :

Does not the fact that there might be an expectation that the government might have to resort to force, indicate the efficacy of this form of campaign?

MR. KENTRIDGE:

Well, My Lord, yes, it may indeed do that, particularly if you feel that you may be able to do it in such a way that even if the government tries to use force, the electorate in the long run won't stand for it. My Lord, I think it would be a very drastic thing to take the view that the electorate in this country would stand for an unlimited use of force against people, strikers, who stay at home. That is really the way it was put by Professor Matthews, and other witnesses, My Lord. He said, there have been governments in other countries which wouldn't make concessions, he recall the time he heard Churchill himself say that Britain would never give up India. But he said it does happen.

MR. JUSTICE BEKKER :

I am rather on the question of belief. If I believe that what I am going to do will have the

result of compelling the government to step in by force, then can it be said that I have no belief in the real efficacy of my actions?

MR. KENTRIDGE :

I see Your Lordship's point. Yet, My Lord, with great respect, I would accept that, yes. That would probably suggest a belief in the efficacy rather than otherwise. At any rate, My Lord, it certainly doesn't show a non-belief in the efficacy.

MR. JUSTICE RUMPFF :

It depends on an efficacy to achieve what? You certainly believe in the efficacy of the method to get out the police, but would it be a belief in the efficacy to acquire what you really want?

MR. KENTRIDGE :

Well, I suppose My Lord, it might, because I suppose one would believe that however harsh a view one takes of the government, that it is only going to do these things if it feels that the only alternative is to make concessions, or to change its policy.

MR. JUSTICE RUMPFF :

Might not the reply to that be - it raises the very point, you don't believe in the efficacy of your methods, you know that the police will come out, and eventually you know that the army will come out, and you know eventually there will be a lot of violence.

MR. KENTRIDGE :

That would be a possibility, but the other way of looking at it is you say yes, the government

realises that if we don't go to work, it will have to change its policy. The people of this country just won't stand for a policy that keeps millions of people away from work. Consequently the government is going to try to smash us by force, but if we stand together, and we are prepared to face that hardship, the government will have to give in, they can't go shooting us all down, they can't shoot down every striker and drive them back to work at the point of a gun.

Now My Lord, I must perhaps apologise for taking up Your Lordship's time with speculative arguments on this question. But with great respect, My Lord, all these various possibilities that one is considering shows how speculative is the Crown argument about what must have been foreseen. Their argument that the Accused couldn't have believed in the efficacy of this. My Lord, if for some reason or other we had to prove to the Court positvely that these non-violent methods could succeed and must succeed, I have no doubt we would fail. There is not the material before the Court to make such a finding. But when the Crown asks Your Lordship to believe that the Accused couldn't have believed in the efficacy of these methods, with so many possibilities. Or when the Crown asks Your Lordship to believe that the Accused in adopting a Programme of Action which contemplated strike action, must have intended violence, must be taken to have known that violence will result, My Lord, this very debate with great respect, shows how unfounded such a submission is on the part of the Crown. My Lord, one

realises that if we don't go to work, it will have to change its policy. The people of this country just won't stand for a policy that keeps millions of people away from work. Consequently the government is going to try to smash us by force, but if we stand together, and we are prepared to face that hardship, the government will have to give in, they can't go shooting us all down, they can't shoot down every striker and drive them back to work at the point of a gun.

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be effective, and that there is no reason why the Accused in saying they believed they were effective, should be disbelieved.

My Lord, one must bear in mind that even in the case of ordinary industrial strikes by trade unions, there have been times when the police have been called out against the strikers. There have been times when strikes...

MR. JUSTICE BEKKER :

Well, that rather depends on for what reason.

MR. KENTRIDGE :

Well, My Lord, for various reasons.

MR. JUSTICE BEKKER :

There may be riots...

MR. KENTRIDGE :

Sometimes to break the strikes. My Lord, I think I recollect some years ago Your Lordship Mr. Justice Bekker was sitting with the former Judge President in the Transvaal Provincial Division in an Appeal on an illegal strike under the Industrial Concilliation Act, I think the case of Regina versus King, where the evidence if I recall was that it was an ordinary strike of about sixty or seventy workers in a factory, the employer called in the police, and within twenty minutes police with sten guns were on the spot. Nothing happened, My Lord, but it is the sort of thing that happens even in an ordinary strike.c The question of course was whether it was an unlawful strike, there was no question of violence, but that was the evidence.

It does happen. If something had gone wrong, there might have been a little - the police might have used force, one doesn't know. But the point is, My Lord, no one could say that the strike weapon is ineffective or isn't a genuine weapon because people ought to know that sometimes the police might be called in and something might happen.

MR. JUSTICE BEKKER :

It occurs to me, when the "murder, murder" speech was made, wasn't there some mention about the factories, the weaponis in your hands, we must go on strike?

MR. KENTRIDGE :

Yes, there was, My Lord. In the West Street meeting that was said by one of the speakers also, My Lord. My Lord, we have had so much evidence and such a long time ago some of it was, that one can't recall all the examples, but we have tried to connect, and we will give Your Lordship a long list of these examples where the belief in the efficacy of the labour power of the masses is expressed. And My Lord, looking at this country as it is, knowing the parts played by non-White labour in our economy, it would be with respect, My Lord, a very rash man who would say that that couldn't be a genuine belief. My Lord, I submit again, that even if Your Lordships personally may believe that a certain political method may fail, it is not the test.

MR. JUSTICE BEKKER :

As far as the other organisations mentioned

in this case, other than the African National Congress, are concerned, there is no evidence as to the method in the sense that we have got the Programme of Action in the case of the African National Congress.

MR. KENTRIDGE :

There is no such specific document, but Your Lordships will recall that the Indian Congress was a party to that joint document on the Defiance Campaign, which specifically stated the efficacy of strike action. But My Lord, in the case of the other organisations, I know of no document in which they specifically set out what they are doing, but of course, My Lord, there is no document concerned with them in which any sort of violent action is undertaken either.

And My Lord, in portions of the Crown argument, the Crown proceeded as though the question was, is there any evidence to show that this or that organisation was setting out on a non-violent campaign. The question of course really is whether there is any evidence to convince this Court that they were setting out on a violent campaign. If any organisation leaves its methods in doubt, My Lord, the Crown . . . . . , not the Defence, with respect.

My Lord, on the general question of extra-parliamentary, non-violent methods, there was some cross-examination of Professor Murray, to which I would like to give Your Lordships the references without reading the whole passage, which is some forty or fifty pages long. It appears, My Lord, in Volume 32. It starts really at page 6311, at the top. The

cross-examination starts off on these lines. It was put to Professor Murray that there have been many situations in which the inhabitants of a country, even the majority, have been unrepresented politically and excluded from direct political power, and the witness agrees.

"For example England before 1832, and India before 1847? --- Yes".

"The Transvaal and the Free State in the interval between the end of the Anglo-Boer War and the granting of responsible government? --- Yes".

Now it is agreed there that in those situations there were available form of exercising political pressure, although the people concerned didn't have the vote, and that they had methods other than violent revolution open to them. On page 6312, the Professor agrees that strikes may be effective political weapons, for example with reference to the General Strike in England in 1926, and the Gold Coast strike which led to the appointment of Dr. Nkrumah at the head of the government. At page 6314, there is a discussion about how economic pressure might work. It is put

"Economic self interest may lead those in power, either the government or the electorate, to pursue a policy which they would not voluntarily have chosen, or it may shock and shame them into recognition of the importance of citizens of their own country who have no vote", and there is an acknowledgment by Professor Murray on the effect of White public opinion of the Alexandra Bus boycott. And there is discussion with

Professor Murray on the concept which I have mentioned of a form of enlightened self interest, that is to say people, a particular section of society may be - the demand may be that they give up certain economic privileges, they may not want to. Economic pressure by the forces of labour show them that in the long run their own economic interest would be better served even by these sacrifices which they are called upon to make.

MR. JUSTICE BEKKER :

What do you say to the submission of the Crown, in the Programme of Action the various methods of campaigning are set out, industrial action, strike action, boycott, defiance, and the Crown on the concluding sentence "And such other means as may be found expedient". Now the Crown has suggested that what was really hidden under that cloak was violence.

MR. KENTRIDGE :

Well, my Lord, they did suggest that in one of the early cross-examinations, I don't remember off hand - oh, yes, it was Dr. Conco or Mr. Luthuli, but later when Mandela was cross-examined by my learned friend Mr. Hoexter, he was asked about that, and my learned friend Mr. Hoexter made it quite clear to him that when he said that he - it didn't mean something violent, he said well, he wasn't saying that it did. And My Lord, in particular Professor Matthews, who was one of the draftsmen was directly asked about that. When we deal with the Programme of Action and how it

came into being Your Lordship will have the reference. But My Lord, Professor Matthews was directly asked about that in chief. He said clearly that it certainly didn't mean violence, it meant similar methods which they might not perhaps have been able to think of specifically, and on that he was unchallenged, My Lord.

MR. JUSTICE BEKKER :

I don't think Africans Claims sets out in so many words non-violent struggle?

MR. KENTRIDGE :

No, My Lord.

MR. JUSTICE BEKKER :

Nor does the Programme of Action, but there is the 1952 speech of Professor Matthews. In that speech, does he refer to the Programme of Action?

MR. KENTRIDGE :

Well, My Lord, he refers to the fact - I don't know whether he uses the words Programme of Action, he refers to the fact of course that after years of other methods in 1949 the African National Congress felt that it had to go over to more direct methods. So My Lord, there is no doubt that there is a direct linking up with the change that came about in 1949. My Lord, the particular reference - My Lord, I have got the reference to the first mention of this in the cross-examination of Dr. Conco, volume 55, page 10986, and he was asked :

"What do the words mean 'and such other means as may bring about the accomplishment and realisation of our aspirations'", and he indicates that it means the same

sort of thing. And then my learned friend Mr. Trengove at the foot of the page puts it to him :
"I don't want to say that you are wrong, Dr. Conco, in giving that explanation, but this document doesn't specifically exclude the possibility of violence", and he says, "the paragraph before makes the policy clear of non-violence. That policy of non-violence was taken for granted when that document was drawn up", and it is left at that by the cross-examiner, My Lord. n My Lord, in the evidence of Professor Matthews, who was one of the draftsmen, it was completely cleared up and he was never challenged on that.

My Lord, returning to the evidence of Professor Murray, if one goes forward to pages 6321 to 6322, it is put to Professor Murray :
"If for one reason or another there is no Bantustan in South Africa, presumably it follows that the Black man will eventually have to be given full political rights? --- Yes."
"In fact this is so stated by the governing party in South Africa? --- Yes".
"With the possibility or perhaps probability of a Black majority in parliament? --- Yes".
And then it is put : "It would be a bold man, Professor, who having regard to what has happened in the rest of Africa, would say whether this would happen in our lifetime or not, would it not? --- Yes".
"And it would be a bold man who says that this couldn't happen entirely by peaceful means? --- Yes".

Now of course that is Professor Murray's

opinion, but nonetheless that being so, My Lord, once again we say it is very difficult to see how the Crown can say that the Accused alone had no belief in the efficacy of these methods. My Lord, this matter is discussed in the following pages, how passive resistance works, how Gandhism works. My Lord, one can go forward to page 6332, a question of public opinion in South Africa, the Professor agrees that White public opinion in South Africa, even though it may be apathetic at times to the non-White people, isn't insensitive. People in South Africa are not immune to the feelings aroused by the sight of voluntary suffering. And then at page 6333, the question of what might happen if people refused to move under the Group Areas Act, and everyone had to be removed bodily from his home, and he agrees that the government may be forced then to take notice of criticisms. There is a discussion then of how passive resistance works. It makes the task of governing difficult, it makes life uncomfortable for those in control. There is a discussion of what would happen if Africans refused to carry passes. The Professor agrees that if the government - that the government might be forced by extra-parliamentary means to give way, much as they dislike it, and the Professor agrees. They might be forced to adopt another policy. In the discussion on the document from Natal, in which someone suggested that people shouldn't pay taxes or shouldn't send their children to school, the professor agreed that no one could say that if that was done it may not be effective. There is a discussion at pages 6335/6 of

what might happen if domestic servants didn't work. The Professor says at page 6336, that that situation might of course lead to the use of force either by the government or by the sympathisers of the domestic servants, or it could lead to two or three possibilities of the use of force. Then it is put :

"But not necessarily force on the side of the people who don't go to work", and all the Professor says to that is "There may be use of force on that side too, it is an open question".

"But you can visualise it without force, can't you? --- It could happen without force".

It is certainly no natural and probable consequence of force according to this particular political scientist, My Lord, and no political scientist has said in this Court that a country wide stay at home in South Africa must lead to the use of force on the part of the masses. One would imagine, My Lord, that if that were a natural and probable consequence, a political scientist might have been found who would state that. Then My Lord, there is an interesting discussion on page 6339 of the word "extra-parliamentary" or the phrase "extra-parliamentary activity".

MR. JUSTICE BEKKER :

Do you dispute that the action envisaged or some of the actions that might be taken under the Programme of Action, might in fact be contrary to law, the law of the land.

MR. KENTRIDGE :

Yes. It could be, My Lord, for instance ...

MR. JUSTICE BEKKER :

The Defiance campaign, for instance.

MR. KENTRIDGE :

The Defiance Campaign was contrary to the law. It was not merely the acts of defiance itself, but it was found to constitute a contravention of the Suppression of Communism Act, which has a specific definition of communism, which is more or less on the lines that any project for bringing about political or economic changes by means involving contraventions of the law, is statutory communism, and the Defiance Campaign was held to be an offence under that law. Similarly, My Lord, one could visualise for instance if one considers the Bantu Education Campaign - in fact it didn't constitute an offence, because schooling under the Bantu Education Act is not compulsory, but if you had compulsory schooling and there was a campaign...

MR. JUSTICE BEKKER :

What I had in mind, Mr. Kentridge, is whether Luthuli was wrong when he said in his evidence that he visualised illegal acts in carrying out the Programme of Action, whether he was overstating the case ...

MR. KENTRIDGE :

My Lord, insofar as he had in mind the Defiance Campaign, I think he was not overstating it.

MR. JUSTICE BEKKER :

It is common cause that some of the actions contemplated under the Programme of Action involved illegality.

MR. KENTRIDGE :

As Your Lordship pleases. But My Lord, it would appear - it could involve illegality, it might. In the Defiance Campaign it did. But My Lord, in fact as far as the Western Areas Campaign, the Bantu Education Campaign and the Anti-Pass campaign is concerned, in fact they did not - without begging the question of treason of course, My Lord - but in themselves they didn't involve any contravention of laws, it so happened.

MR. JUSTICE KENNEDY :

Anyway, that will be dealt with later in some detail.

Mr. Kentridge ;

There will be argument on each of those campaigns, My Lord.

MR. JUSTICE KENNEDY :

It springs to my mind that there may have been some illegality, I don't know. Under the anti-pass campaign, if there was burning of passes.

MR. KENTRIDGE :

My Lord, I think the position there is that under the Co-Ordination of Documents Acts as it was called, the case of women, although passes were issued, it wasn't compulsory until a certain date, which was only gazetted long after the indictment period. Furthermore, I think in parts it still haven't been gazetted, My Lord. My Lord, as far as burning passes were concerned, that at the time wasn't an offence only a later amendment of the Act made it an offence.

At all events, My Lord, Professor Murray discusses the word "extra-parliamentary" which had been used both by the cross-examiner and by himself in various meanings. He said, page 6339, "The word extra-parliamentary really had two meanings", and it is put to him :

"Quite, but ~~neither~~ ??? is violence, even the illegal meaning? --- Some may lead to violence, but it is not essentially violent, it need not lead to violence eventually".

Now My Lord, Professor Murray goes on to deal with other examples at page 6343, he deals with suffragettes, for example, the fact that suffragettes in England had an extra-parliamentary campaign, to get votes. And then My Lord, at page 6346 there is a discussion about whether strikes constitute extra-parliamentary action, and the Professor says strikes are a difficult situation, I think strikes may be allowed, it depends on the conditions under which they arise.

And My Lord, that discussion with Professor Murray about extra-parliamentary action and unconstitutional action goes on, I have referred to his statement about unconstitutional action, that it may be completely non-violent.

Now, My Lord, the point of this evidence of Professor Murray is once again simply that the possibility of extra-parliamentary non-violent action and of what may happen, are very wide, they are very open, certainly no one can say as a matter of fact that they must lead to violence, or must be taken to

lead to violence, or must be so understood.

My Lords, there is one further point, however, which I ought to mention with regard to the possibility of violence, even by the state.

COURT ADJOURNS.

COURT RESUMES.

MR. DE VOS :

My Lord, may I be allowed to raise the point that I raised yesterday morning with the Court as far as the further legal argument of the Crown is concerned. My Lord, yesterday Your Lordship indicated that the Crown would be called upon not before Wednesday morning to argue the points concerned. Now it has evolved from a perusal of the record that possibly a bit more research will be required for certain additional points, and could the Court grant the Crown the further indulgence of perhapsnot calling upon the Crown before Thursday morning.

MR.JUSTICE RUMPFF :

We don't want to call on the Crown before you are ready to argue. We would like you to be ready fully, so that if you think that you will not be ready until Thursday morning, then you can start your argument on Thursday.

MR. DE VOS :

As Your Lordship pleases. The Crown will be ready on Thursday morning, and if that is the position, the Crown ...

MR. JUSTICE RUMPFF :

I realise it may take some time to get a copy of the record, I know.

MR. DE VOS :

That is so, My Lord.

MR. KENTRIDGE :

My Lord, I was turning to the question of the possibility of extra-parliamentary action leading to forcible action by the state in order to suppress it, and examples were given. For example, a crowd of thousands may peacefully gather in a square, but refuse to disperse. And to disperse them, force may be used, even firearms. Defence witnesses, particularly Mr. Luthuli, conceded that in such a case the use of force might be lawful, strictly speaking, it might be justified in law, justified from the state's point of view, although the people who demonstrate might feel that it is not the way to handle such a situation. Mr. Luthuli, however did make one concession to cross-examining Counsel, which with submission would appear to be unfounded. At page 11961, he conceded to Crown Counsel that if there were a stay at home, the government might be legally justified in driving the strikers, those who stay at home, back to work. Now My Lord, as a matter of law, with respect, that submission would appear to be unfounded. Because although Defence witnesses have said that at times

particularly in 1946, they believe that the state has done that, there would appear My Lord, to be no provision in our law which would make it lawful for the state to force people back to work, as a matter of compulsion. My Lord, again that is a matter to be considered insofar as Your Lordships have been pressed with this idea, that violence would be the natural and probable consequence of a nation wide stay at home, for instance. My Lord, if violent action on the part of the state, that is to say actually attempting by force to guide peopple back to work is in fact not provided for by the law, that would be yet an additional factor against any finding that a consequence of violent retaliation to state violence could be a natural and probable consequence of a stay at home. Even though the Accused may believe that in circumstances the government has used violence for that purpose, the idea of unlawful government action on a wide scale is hardly one that Your Lordships objectively could take into account as a natural and probable consequence.

Now My Lord, we have argued that these methods of extra-parliamentary action, can work and were believed to be able to work without violence, and it doesn't help the Crown to say My Lord that these methods are coercive or constitute an ultimatum, or would endanger the safety and stability of the state. As my learned friend Mr. Nicholas argued, the only type of danger to the safety and stability of the state with which this Court is concerned, is a danger arising from the use of violence against the state. I repeat, My Lord,

that doesn't mean necessarily that the actionsundertaken or contemplated for the future by the Accused because they are not treason, can necessarily be embarked upon with impunity. I have already said, My Lord, that the Defiance Campaign was an offence under the Suppression of Communism Act. Other actions, other political actions which might be taken in the future in terms of the Programme of Action, if they involve breaches of the law, might similarly be stopped and be punishable under the Suppression of Communism Act. My Lord, a strike which affects essential services is a serious offence under the provisions of the Riotous Assemblies Act. My Lord, one may refer to paragraph 12(i) of the Riotous Assemblies Act of 1914, and the same paragraph of the new Act, Act 17 of 1956. In certain essential services any strike is a criminal offence. And My Lord, we also have Act No. 8 of 1953, the Criminal Law Amendment Act, which provides for specific penalties for acts - unlawful acts committed by way of protest, political protest. And consequently, My Lord, we are not arguing that these extra-parliamentary activities may not in some circumstances be unlawful. We are not asking the Court to hold that they are lawful and legitimate. We are simply arguing, My Lord, that they are not treason, which appears to be accepted, and we are arguing that there is no prima facie ground for rejecting as proved the Crown submission that the Accused could not have believed in their efficacy.

My Lord, my learned friend Mr. Trengove, in his argument used a particular phrase. He

said that these methods put the onus of solving the situation on the government. Now My Lord, there is no doubt that in a sense that is true. The A.N.C. intends to use non-violent measures which put economic pressure on the government and the electorate. The onus is placed on the government to solve the situation, as the onus is on any government to solve a dangerous economic situation. The efficacy of the method depends on creating a situation to which the best solution isn't violence, but political concession. For example, My Lord, a stay at home may be met by force, it may be met by troops going into thousands of homes. But this is not a practical method of solving such a problem. It is not likely to be popular in the long run with the electorate. There may be another solution, to starve out the strikers. But another solution may be to negotiate and to make concessions. So it helps the Crown not at all to say that these methods put the onus of solving the situation on the government. That is the whole point of it. The onus is on the government, those who stay at home don't use violence. If the government wants to use violence, the onus of doing so is on the government. The idea is that an alternative solution will be forced on the government by the force of public opinion reinforced by economic pressure.

Now My Lord, there are times when it does appear that the Crown has argued as though the use of methods which lead to forcible repression by the state, are treasonable. For example, My Lord, in the Crown's file in Professor Matthews, at pages 4 to 6,

one will find submissions that really seem to go no further against him than that he was in favour of action which he knew might lead to violence on the part of the state, - on the part of the state. My Lords, that of course is not treason. Now consequently, My Lord - My Lord, the way it is put in that file of Professor Matthews, it is under Unconstitutional and Illegal Action, page 4. "Although he said that they have chosen non-violence as the basis of their method of struggle, it is clear that Professor Matthews fully appreciated and knew that the use of illegal methods was likely to result in clashes between the masses and the forces of state, and he foresaw the likelihood of violence as a consequence of such clashes", and then over the next two pages, they proceed to quote evidence which shows that he realised that the state might use violence. Now needless to say, My Lord, that is just not good enough in order to prove treason.

MR. JUSTICE BEKKER :

Mr. Kentridge, I think Mr. Trengove in support of their submission that the Accused did not believe in the efficacy of this manner of campaigning, based some argument on the absence on the part of the leaders to explain to the masses that what they had in mind was open negotiations with the government. He said Luthuli, in reply to the question, why they didn't inform the masses that negotiations were the real aim, said well that is a matter in the mind of the leadership, they don't tell the people that. From which Mr. Trengove suggested that if they had any belief in the

efficacy of this type of campaign, then surely they would have told their people.

MR. KENTRIDGE :

My Lord, we say to that, that throughout, all the statements of leaders express a belief in the efficacy of their methods. They say we can win, we will win. All that there is really in the point made by the Crown, is that it is very seldom that one finds a statement saying in so many words, of course what is going to come out of this is that the government is going to open negotiations. My Lord, it is not very often found in that form, although we shall show Your Lordship that there are speeches, documents, in which people speak in terms of negotiation, coming to a round table. But, My Lord, our submission is this, that you have political leaders, that they have their methods and their aims, they prosecute their methods and their aims, they tell their followers you must follow us, and follow our methods, it will be a hard struggle, but in the long run we will win. My Lord, I submit it is somewhat unrealistic to expect them to say, and the way we are going to win is at a certain stage the government is going to open negotiations. My Lord, if one works through methods of political and economic pressure and says that one hopes to succeed in the end, My Lord, what does that mean, one asks, other than that one expects the other side to yield to that pressure by making concessions or opening negotiations. My Lord, there were so many ways in which it could happen. It could happen that the government would open negotiations

directly, or it could happen that if the government doesn't open negotiations, it might be replaced by the electorate. And My Lord, the way the Crown puts it is an extremely theoretical matter. The witnesses have explained that they understood their campaigns were non-violent, they had the Programme of Action, they didn't have frequent theoretical discussions about exactly how it would work in the long run. And we submit, My Lords, this isn't surprising. Political parties have got their aims andtheir methods which they apply in their ordinary work. My Lord, ifone looks at what is said by political parties, one doesn't normally find that they make forecasts that in particular circumstances the government will open negotiations. My Lord, this is again a matter of istorical speculation, but one had say asked a South African political leader in say 1904 before there was self government in the Free State and the Transvaal, if one asked a leader like General Hertzog how he expected to achieve self government, one wouldhave been very surprised if one would have got a specific answer, well, at a certain stage we expect the British Government to open negotiations. He would have had his policies and his political campaigns, and he would have pursued them, one would imagine. One wouldn't have drawn any inference of violence if one found that he didn't tell his followers, now, don't worry, at a certain stage the British Government will make concessions or open negotiations.

MR. JUSTICE RUMPFF :

I agree with you fully, except that

the position is slightly different here. When you have the fact that people are warned that they will have to suffer, that they may be shot, bloodshed, they may have to go to gaol. That is the difference to the position of general Hertzog in 1904. If he had made the same statements, and had told the people in the Free State, we are going to fight for self government, we will be shot at, we will go to gaol.

MR. LENTRIDGE:

My Lord, if he had said to his followers for example, this is a most brutal British Government, and even though we are non-violent they are still going to shoot some of us and put us in prison or beat us up, but nonetheless, carry on, we will win in the end. I submit, My Lord, that one wouldn't draw an inference of violence. Possibly one has a better analogy in the case of Gandhi and Nehru. They pursued long passive resistance campaigns. In India too, apparently, according to some of the evidence, even though they were non violent, violence was sometimes used against them. Well, My Lord, there is not full evidence on it in this Court, but if one reads Nehru's autobiography or the accounts of Gandhi's life, his passive resistance campaigns both in South Africa or in India, one finds followers were exhorted to follow them, to follow their methods. One doesn't find, as far as one knows, My Lord, that they said what is going to happen in the end is that the British Government will open negotiations, or if it doesn't another government will replace it which will open negotiations. My Lord, that sort of

thing is presumably taken for granted. In the future political changes occur. People make concessions, they open negotiation. It would be very wrong to draw an inference if in Nehru's speeches if one had found no express reference to negotiations. I submit, My Lord, my learned friend Mr. Trengove's submission derives from a failure to understand how political parties work. My Lords, one may have a party which for years, thirty or forty years, in some countries, who work for a republic, without saying particularly how in the end we expect to get it, how it is going to come about in the end. You work for your aim, you employ your ordinary political methods, and you work towards your aim. And My Lord, all that the argument my learned friend Mr. Trengove amounts to, is really a political criticism of the A.N.C. He is saying in effect that if you were better politicians, you would have more frequently - you would have thought more clearly about the last stages, and discussed in fact how these negotiations would come about, or whether it would be concession or negotiation or a change of government. Well, it may be, My Lord, that that is another way of running a political organisation, and the Crown might be right, it might be a better way. My Lord, one can't draw inferences that there is something being concealed. Political utterances, particularly with regard to the future, are never very remarkable for their clarity or accuracy, My Lord. The Crown is criticising the A.N.C. because it simply said to its people our methods are non-violent, follow us, you will have to face

sacrifice and hardship, but we won't be provoked, we will just go on and we will win in the end. The criticism is that Chief Luthuli wasn't always - and Professor Matthews were always saying how it is going to happen at the end, that at a certain stage the government will open negotiations, for if they don't the electorate will make them or replace them. It is quite true, My Lord, that may be a matter of analysis, it may have been implied or assumed. It may even be possible that it was never fully articulated and worked out. It may be that they were vague about these things, and didn't discuss them as fully as they ought to have. That is a political criticism, My Lord, it is not a ground for drawing an inference that there was a hidden policy of violence. My Lord, if we look back now with hindsight at various speeches or statements made not only by the A.N.C. but perhaps by other political organisations, one can say well if so and so had spoken more clearly, there wouldn't have been a misunderstanding. My Lord, we know that there are political misunderstandings all the time. Political leaders make speeches and they are criticised afterwards, and they say well, I really meant so and so. Sometimes they do, perhaps, and sometimes they don't. It is very easy to say afterwards you could have stated it far more clearly. You don't draw an inference of treason or some hidden policy against a politician because he doesn't state his policy as clearly as his opponents think that he might have. We have had examples in this country, only - not only in recent months, but throughout our

political history. A man makes a statement perhaps in wild or extravagant terms, or in vague terms, and his opponents attach a bad meaning to it. He explains afterwards that he didn't mean that at all. One can always say why didn't you say it more clearly, My Lord. One doesn't attach an inference of treason to it. Certainly, My Lords, if one bears in mind the question of onus, the Crown has got to show that any idea that there would be a non-violent victory through negotiation or concession or a change in the government under pressure, that that was rejected by the Accused. There is no such evidence of that at all.

MR. JUSTICE BEKKER :

Well, in this regard, there is a passage in the evidence of Luthuli on which the Crown relied, I think it is to the effect that in 1955-1956, the climate in the country was of such a nature that they did not expect concessions at that stage.

MR. KENTRIDGE :

Yes, I think it was put to him at - that in 1955 the government appeared to be even harder than it had been in previous years.

MR. JUSTICE BEKKER :

Yes, well now, that the Crown relies on to show in what view the organisation regarded the government and posed the question, what use is it to expect this government to make any concession.

MR. KENTRIDGE :

As Your Lordship pleases. If the Crown case had been that the A.N.C. was aiming definitely

to get its aims achieved in 1955 or 1956, if that were so we would concede that that was a good point made by the Crown. But all that Mr. Luthuli was saying, My Lord, was that in 1955 the government seemed to be harder than ever., The conclusion they drew was that they just had to go on with their struggle. My Lord, after all - may I put it this way, My Lord. Supposing in 1955 not merely Mr. Luthuli gave his statement here in Court, but supposing that the A.N.C. had actually sat down in National Conference and had decided, well, we haven't done very well over the last two years, the government seems harder than ever, we have got a bit of White support but not very much, then My Lord, what ought they to have done on the Crown's theory? Have given up their methods entirely? What could they do, My Lords, except go on struggling in their own way? What were the alternatives before them? Suddenly to turn to violence? Why should they have done that? After all, My Lord, the idea was that this conspiracy started at the end of 1952, and at the latest - and that every one was in it by the beginning of 1954, and so if Mr. Luthuli and the A.N.C. did see in 1955 that the government was harder than ever, one asks what inference can be drawn. Merely then because they didn't give up, because they didn't throw up their hands in dispair andsay we are going to close up shop, we are going to give up entirely, how can one infer from thatbthat they decided therefore they must go over to violence, and that their methods wouldn't work? One draws the inference, if they really thought that,

that they must have foreseen a long and difficult struggle. After all, My Lord, one must - may one not apply that to any opposition party? One may ask, put a United Party leader in the witness box, and say to him well now in 1960 the electorate seemed to be more against you than ever, you seem to have no hope of winning, you have lost three elctions in a row and there is no sign of a swing towards you. Well, My Lord, what are the alternatives before that United Party man? He may just go on struggling in his present way, however long and hard it may be, or he may give up entirely. Or I suppose there is a theoretical possibility he might decide that we can't win by parliamentary means, we must go over either to extra-parliamentary means or to violence. But why, one asks, My Lord, draw the last inference? One can say to anyone, the government was stronger than ever in 1955, the electorate was more solidly behind it than ever, how could you hope to get a political change by your old methods? The answer is that political organisations go on. They never expected this to be a short struggle. They didn't expect to win within five years, My Lord, that hasn't been the slogan. My Lord, there have been political parties in this country which have gone on for forty years in order to go into power. And they may have setbacks, and things may be tough and difficult for them, but one doesn't infer from that that they don't have belief in the efficacy of their methods. Objectively speaking if one looks at an opposition parliamentary party today, one may say you have got no hope. One can imagine,

My Lord, with great respect to my learned friend Mr. Trengove, my learned friend cross-examining a leader of the Liberal Party, saying to him you have got no membersof parliament, you have got no support, you lose your deposits, you can't honestly believe you can win by parliamentary means. And what is the answer to that, My Lord? The answer is, firstly, it is going to be a long and difficult struggle and we are unpopular, but we must go on. Alternatively we may conclude that his optimism is completely unfounded, he is going to fail in the end. But one doesn't draw the conclusion, well, you must be plotting something else. How can you believe you will win. Everything that my learned friend Mr. Trengove said could have been said to any leader of an unpopular political party, who wasn't making any political progress in the ordinary way, My Lord. And we submit that is all it amounts to. It is absolutely clear the A.N.C. decided it wouldn't win by mere supplication, it decided on extra-parliamentary methods, non-violent methods, My Lord, they were difficult, they were going to take a long time, they were going to involve hardship. And My Lord, there is nothing more to it than that. It is quite true that they couldn't guarantee success. But what happens, My Lord, if they can't succeed? Either they give up entirely, or they still struggle along optimistically, because there is nothing else that they can do. And the final possibility is that they might decide to change their methods, and that, My Lord, isn't the inference one draws from the fact that they realised that

they have got a hard long struggle against them and that success isn't certain.

My Lord, that was in fact a question which my learned friend often posed. What were you going to do, he said, if the White people did not give in? Well, My Lord, what can any political party say? What are you going to do if they didn't give in? And the answers in fact were given. They amounted really to this. Well, we are going to go on trying. If we don't succeed, well, it may be that we will be pushed aside by other organisations with different policies. Of course that is possible. My Lord, what if one had asked for instance General Hertzog in 1912 when he formed his new party, what are you going to do if you don't succeed at the polls?, What could he have said, My Lords? He could have said I will go on trying or I will be thrust aside or I will have failed. If you cross-examined him to show that he had a small majority - a small party and very little hope of getting a bigger one, the Crown in this case would have asked the Court to draw the inference that he was going to use violence. I submit, My Lord, that it is a most unsound inference that the Crown asks Your Lordships to draw.

MR. JUSTICE RUMPFF :

Of course, in isolation the Crown's argument couldn't possibly stand. I take it the Crown's case is that one must judge the position, having regard to what was said and written. That in a constitutional party that sort of argument is obvious...

MR. KENTRIDGE :

But My Lord, I am trying to show that it applies just as well to an unconstitutional extra-parliamentary party if what you are trying to find is whether they have gone over to a policy of violence.

MR. JUSTICE RUMPFF :

What they expect may happen in future. I am just, for argument's sake, looking - having regard to your argument, looking at this particular issue of Liberation, a document which the people are advised to read. This is the Constitutional Fallacy article. Now you have the position there, you see, you have a certain policy, and you say we all know it is non-violent, and we know that there will be stiff opposition. If it - it is not necessary to say how the end will be, why? Because we base ourselves on non-violence. Again, then, a member is told to read a certain magazine, and he reads this. "The claim advanced in some quarters that there must be a guarantee that any campaign embarked upon can be carried out peacefully is to be rejected out of hand". Now that is the opinion of the writer.

MR. KENTRIDGE :

But My Lord, as Your Lordship will see in the context, what the writer has in mind is that even non-violent campaigns lead to the use of violence against the people who run the campaign.

MR. JUSTICE RUMPFF :

And then it goes on, "Such a form of insurance is unknown in politics. In any case, every demonstration of the non-European people that has ended

in bloodshed, has so ended as a result of vicious state action". One must look at the whole xontext. But I take it that is only how the Crown could argue. You must look at other features.

MR. KENTRIDGE :

That is so, and the Crown does say that, and what the Crown can find is this view not expressed by Ruth First, whose opinions, My Lord, we shall submit with respect, aren't of great value in finding A.N.C. policy, but A.N.C. leaders themselves do say, in and out of the witness box, we can't expect to carry this on without the expectationthat some of our followers will suffer hardship and even by killed by state action. But the question is, whether because of that one can draw the inference that they say therefore we must go over to violence ourselves. My Lord, it is a non sequitur, we submit. Because after all, My Lord, we are dealing now with this argument of the Crown on what they really could have believed. It is quite true that the Crown does point to an article by Ruth First w ich appear d in Liberation, which was a journal which A.N.C. members were encouraged to read. But, whether or not - whatever inference one draws about A.N.C. policy from that, the point is, My Lord, that one can't infer simply because a struggle is going to be long and hard and that it will involve your own followers being killed, and b cause you don't make progress immediately, you can't infer that therefore you didn't believe in it and were going to go over to something else.

My Lord, there is another attitude taken up by the Crown in cross-examination particularly on this question. The Crown kept saying, they kept putting it that surely you must have expected your own followers or the masses might use some violence Well, My Lord, the answer given was that no, they didn't. You can't guarantee it, possibly, you can't guarantee that some individuals may not use violence. But you do your best to obviate the possibility by preaching non-violence. My Lord, it may be that the Crown is correct that the A.N.C. people were over optimistic about their powers, but as Professor Matthews asked, why is the Crown hypothesis on this preferable to his own. After all, My Lord, there was nothing in the experience of the A.N.C. from 1949 to show that their hope and belief that they could keep their followers non-violent, was over optimistic. There was no case the Crown could point to in the various actions taken from 1949 onwards where the followers of the A.N.C. had resorted to violence, where they hadn't stuck to non-violence.

MR. JUSTICE RUMPFF :

What do you say to the reference to Witzieshoek in that one document, is it unwarranted? Do you remember, it was argued that the A.N.C. claimed ...

MR. KENTRIDGE :

Yes, but My Lord, it is not clear from those documents what happened at Witzieshoek, whether the violence was on the part of the police or on the part of people who demonstrated or what part the A.N.C.

played in it. There are two documents. One claims some credit for it, and the other criticises the A.N.C. for not having taken up the matter sufficiently. But My Lord, the Crown led no evidence on that. It wasn't suggested whatever happened at Witzieshoek - it wasn't put for instance to people who had been in the A.N.C. in 1949, like Professor Matthews, or Mandela or Yengwa, it wasn't put to them what happened at Witzieshoek showed that you can't expect your followers to remain non-violent, didn't that teach you a lesson. Nothing like that was put at all. There were one or two references in documents which spoke of a clash...

MR. JUSTICE RUMPFF :

On the evidence, what have we got that we could attribute to the A.N.C. fully? Not the A.N.C. only, necessarily, but in conjunction with other organisations. The Defiance Campaign? Western Areas?

MR. KENTRIDGE :

There was a stay at home in 1950 of which Mandela and Resha gave evidence. Then there is the Defiance Campaign of 1952/3, ...

MR. JUSTICE RUMPFF :

The stay at home in 1950, was there a reference to some form of violence where the buses came?

MR. KENTRIDGE :

My Lord, there was a reference to the fact that people were shot by the police. Resha and Mandela said it was unjustified. In cross-examination of Resha, something was put to Resha in cross-examination about what had happened at bus stops, that Africans at

busstops had used violence, they had thrown stones. He denied that.

MR. JUSTICE RUMPFF :

When the buses dropped the passangers, not so?

MR. KENTRIDGE :

Yes. Then the second stay at home on June 26th 1950 was apparently completely non-violent either way. There was the 1952 Defiance Campaign, which was not suggested to have resulted in any violence. There was the Western Areas Campaign, there was the Bantu Education Campaign, there was the Pass Campaign ...

MR. JUSTICE BEKKER :

Well, in the further particulars the Crown says that it does not allege...

MR. KENTRIDGE :

Yes, My Lord. And in fact, My Lord, to take that further, that is so. Not only does the Crown not rely on it, but in cross-examining Defence witnesses, and suggesting to them or asking them whether they didn't foresee that their followers or the masses would go over to violence and couldn't be non-violent, there was never any suggestion put to any witness that there was some A.N.C. campaign which should have taught them a lesson. All that the Crown relied on, merely in that connection, a document which my learned leader will deal with in due course, was that Transvaal lecture on Political Organisation in which it was mentioned that in 1922 the strikers had gone over to violence, although whether that was by way of retaliation

or not doesn't appear. Now My Lord, what the Defence witnesses have said was that we are having our campaigns, we anticipate there may be a strong reaction from the government, it is possible, even a strong possibility, a possibility that the government will even use violence, even a strong possibility some witnesses think, but, they say, we believe that our people would remain non-violent. Obviously they say you can't guarantee it. But they say we believe that our people would remain non-violent. Now My Lord, other observers with a different political outlook may think it was an unrealistic view. But there is certainly no evidence to show that those witnesses and the A.N.C. in general couldn't have believed it. My Lord, the Crown thesis we submit is based entirely on political speculation. And My Lord, we may even venture to suggest that there may be in it some element, perhaps of unconstitutional - some element of perhaps unconscious political prejudice. They have the feeling that these people can't carry on a campaign without people resorting to violence. Because, My Lord, there is really no evidence to support the Crown attitude on that. All that they were ever able to get from - to put to Defence witnesses, and my learned leader will deal with those passages in detail - they were able to put to them, there was a possibility that your people might use some violence, you can't exclude that entirely. The answer was, well, I suppose we can't exclude that entirely, but our propaganda was against that, we believed people would follow us, we had no