A

IN DIE HOOGGEREGSHOF VAN SUID-AFRIA

(TRANSVAALSE PROVINSIALE AFDELING)

SAAKNOMMER: CC 482/85

PRETORIA

1988-09-02

DIE STAAT teen : PATRICK MABUYA BALEKA EN 21 ANDER

VOOR: SY EDELE REGTER VAN DIJKHORST en ASSESSOR : MNR. W.F. KRUGEL

NAMENS DIE STAAT: ADV. P.B. JACOBS
ADV. P. FICK
ADV. H. SMITH

NAMENS DIE VERDEDIGING: ADV. A. CHASKALSON
ADV. G. BIZOS
ADV. K. TIP
ADV. Z.M. YACOOB
ADV. G.J. MARCUS

TOLK: MNR. B.S.N. SKOSANA

KLAGTE: (SIEN AKTE VAN BESKULDIGING)

PLEIT: AL DIE BESKULDIGDES: ONSKULDIG

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KONTRAKTEURS : LUBBE OPNAMES

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VOLUME 453

(Bladsye 26 827 tot 26 870 )

THE COURT RESUMES ON 2 SEPTEMBER 1988

COURT: I am sorry we are starting a bit late, Mr Bizos. You can debit the account again with a further ten minutes.

MR BIZOS: As your lordship pleases. I myself had to rush here. I was only here at about 3 minutes to 10h00 in view of the pleasant weather conditions. The investigating officer has kindly consented to an alternation, temporary alteration to the bail of Mr Ramakgula, accused no.9.

COURT: I will read this into the record. In accordance with paragraph 2 of the conditions of bail accused no.9, Tebello Ephraim Ramakgula, is granted permission to visit Johannes Ramakgula at no.8567 Letsoalo Street, Tsakane, on 3 and 4 September 1988 to attend a ritual ceremony, subject to the following conditions:

1. He reports at the Tsakane police station on 3 September 1988 between 18h00 and 20h00 and between 06h00 and 09h00 the morning of 4 September 1988.
2. He will report at the Jeppe police station as usual on the morning of 3 September 1988 and the evening of 4 September 1988.
3. During his visit he limits his movements to house no.8567 Letsoale Street, Tsakane, and the Tsakane police station.
4. All other conditions of bail stand and are strictly to be adhered to.

MR BIZOS: As your lordship pleases. There are three matters which I want to revert back to. Your lordship asked yesterday at what stage IC.8 joined the march after the incident at Motuane's house. The effect of the evidence is that he walked one block, he did not cross the street he says, the way he described it. He did not cross a street. He walked

one block parallel to the tarred road, turned right and came onto the tarred road. Your lordship will find that at the following places. Volume 22, page 1 092 line 30 to page 1 094 line 29 and in volume 23, page 1 099 line 3 to 5 and 1 099 line 9 to page 1 101 line 10. Then the other m'lord, we did trace what the Rev Mahlatsi said about the singing, that the learned assessor asked about.

ASSESSOR: Yes, was there something about it?

MR BIZOS: There was, m'lord, quite right with respect. He did say that songs about Mandela and Tambo were sung - or (10 just Mandela I am reminded. I give your lordship..

COURT: Mandela and Tambo or only Mandela?

MR BIZOS: Only Mandela, m'lord, but I will give your lordship the references and make a submission in regard to that because he speaks about songs both at the meeting of the 26th and on the march. Firstly in volume 41 page 1 935 line 12 to 30 and again at volume 43, 2 057 line 30 to page 2 058 line 1; and again in volume 43, page 2 089 line 15 to 20. Now if your lordship reads those two passages together your lordship will see that this man really says he does not know (20 what songs - he says he is not a Zulu speaker, he did not understand these songs but perhaps the gravest criticism in this regard in his evidence entirely in relation to songs is that he categorically denies that "Siyaya eHoutkop" was ever sung on the march, so that we submit with respect that no reliance can be placed and above all it was not put to any of the witnesses for the defence nor to any of the accused so that with respect I think that the correct finding of fact or the finding of fact there should be that the theme song of the march was "Siyaya eHoutkop". (30

There / ..

There is just one other aspect that I want to say in relation to yesterday's argument and that is this. Let us assume for the sake of argument that Miss Phosisi did see another march. Now that of course does not help the state at all, it may even make it much worse because the onus is on it to show your lordship how the violence broke out in the Vaal and it has set its colours on the march that it was the march that started off from Small Farms. If in fact there was another march of a thousand people from some place which your lordship has not been told about, it has failed to prove what was really happening. If it could a thousand people marching so near to Motuane's house and there is no evidence about it, how can any reliance be placed on such evidence as there is that people on the march from Small Farms had anything to do with it? And there is the suggestion that the state tried to make, that the placard that finished up on the late Motuane's body must have been from this march. Once there was a march of a thousand a block away, quite inconsistent with the state's, Masenya's evidence - well, quite inconsistent with the purpose for which Masenya's evidence was led. So either way the state does not derive any profit from that evidence.

I now want to proceed with the march up to the point of dispersal and we say that in keeping with the state's case that it was the mob that was responsible for a wide range of killing and destruction on 3 September 1984 and thereafter. It is alleged in 77 11 that after the arson and murder at the house of the late councillor Caesar Motuane the mob at the scene screamed that they were now finished with Caesar Motuane and must now go on to the other councillors. The

only / ..

only state evidence on this comes from the witness IC.8. Even his evidence is in conflict with the allegation being to the effect that after the events at Motuane's house the group then went away and went on with the march and back to the main road still with the intention to proceed to Houtkop. That is a fair summary of his evidence in volume 17, page 791, lines 12 to 22. It is the state's case that the accused are to be held culpable for the trail of violence in the Vaal triangle, hence it was pleaded in paragraph 77.15, a long catalogue of violence including murder, arson, looting, malicious injury to property, setting up of road blocks and attacks on members of the police. The device through which the state has alleged to attribute all this to the accused is through the notion of the mob that they have pleaded, in the singular m'lord. With the exception of a reference to accused no.5 in relation to the killing of councillor Dipoko in 77.15. None of the accused is referred to specifically in relation to any of these events. I need to remind your lordship that no evidence at all was led in relation to this allegation, this particularly grave allegation against accused no.5 in respect of which no explanation has been furnished. It is as strange an allegation as the one that accused no.3 ha started the trouble at the meeting of the 29th at Bophelong. The basis for the culpability of the accused in respect of hostilities of the mob is therefore pleaded to be that this mob was thoroughly incited by the activities including the accused named in 77.7 and 77.9 who had played a leading role in inciting and leading the massas to become a mob, and to commit acts of revolt, riots and violence and so forth. If your lordship has a look at

77.15(i)/..

77.15(i).

COURT: Yes, I remember that.

MR BIZOS: As your lordship pleases. Coupled with this approach by the state is the allegation deliberately repeated in paragraph 77.12, 77.15 and the further particulars, paragraph 41.3 on 111 and the activists who were performing this function of the incitement withdrew once the masses had been thoroughly incited; so that the incitement alleged for the rioting and violence was that this mob was so incited. That is the case that the accused have come to plead, to face. (10 The notion of activists withdrawing after having performed their work of inciting the massas is not an inconsequential one we would submit. It clearly suggests a dimension of deliberate, calculating and ruthless political incitement as to be expected from a group of conspirators who cold-bloodedly pursue an objective which is not necessarily disclosed to the more ingenious people whose emotions they arouse and exploit for their own ends. That is the state case m'lord. The extent to which the pleadings represent an essay and not fact is reflected in the use of the phrase m'lord: the (20 majority of the activits withdrew, in paragraph 77.12 and 15. In the further particulars, paragraph 41.11.2, the activists who withdrew are specified as being Dorcas Raditsela, Esau Raditsela, Edith Letlhake and accused no.17. That is the case that we have to meet, so that they did this cold-blooded incitement for the violence. These people, the only ones previously referred to in relation to the march as being activists in control are Esau Raditsela and accused no.17, which on any basis can never constitute a majority of the activists who had incited and led the mob. The state was (30

requested/..

requested to specify the precise moment when these activists withdrew as alleged and not unexpectedly stated that this was after the events set out in 77.11, that is after the arson and murder at the house of Motuane, where the mob screamed that they were now going to other councillors. Your lordship will find that in paragraph 41.11.3 of the further particulars, page 113.

Once again, m'lord, once again the state evidence before the court directly contradicts this allegation. The witness Rina Mokoena testifies about having seen Raditsela in zone 11 with a young man of 19 or 20 years old who had been shot. (10 I may say that this wounded person was clearly not the child who had been shot at Motuane's house and who was referred to in the evidence of Alinah Mohatla. It is not clear when this incident was supposed to have taken place but in any event does not constitute evidence to support the allegation that Esau Raditsela left the home of Motuane after the mob went off on its business and returned home to play cards. Volume 37 171, lines 8 to 31. Rina Mokoena also testifies about having encountered accused no.17 and Edith Letlhake. This evidence clearly relates to the scene after the march had (20 been dispersed by the police and deals with the incident where accused 8 and 17 met with Edith Letlhake and gave assistance to the youngster who had been wounded in the arm. The evidence establishes that this was near Hunter's garage. Rina Mokoena, volume 37, page 1 713 line 1 to page 1 713 line 3 and volume 38 page 1 770 lines 8 to 20. And this of course contradicts the suggestion that accused no.17, this arch activist who incited and then withdrew because if he withdrew after Motuane's he could not have been as part of the march near Hunter's Garage, which is some distance (30

away/..

away. He obviously continued with the march. What I am..

COURT: Yes now, aren't you taking two things together? Rina Mokoena's evidence and no.8's evidence?

MR BIZOS: Yes, well..

COURT: You are complaining that the state throws everything in the same pot and gets a result.

MR BIZOS: No, but this is a permissible stew with respect, because a state witness and a defence witness agree on a point, agree on a point then it is possibly a very sure guide of the correctness of the facts sought to be proved. (10

COURT: Yes?

MR BIZOS: Mokoena's evidence is to be found in volume 37, 1 713 line 1..

COURT: Yes, we have that.

MR BIZOS: I am sorry. In addition, the evidence of the accused makes it clear that they remained with the march until the dispersal as set out. Whilst the march was passing the post office in zone 12 the attention of - perhaps I should make the submission here and not later. That is the case that the accused have to meet, that there was an incitement (20 at Small Farms early in the morning and a incitement immediately after Motuane's. What has happened in this case is that somewhere along the way we..

COURT: Must I delete this post office story now?

MR BIZOS: For the time being, I will to come back to it. I want to make a submission in relation to the pleadings and that is this: the state thought that if it got a concession that councillors were called puppets or sell-outs at meetings or if they were degraded at meetings or if they were called corrupted meetings, that it was proving its case of (30

incitement/..

incitement to violence. Well, nothing can be further from a proper analysis. This logic or lack of it is to be found in the case in the law reports of which I am reminded and that is Waring v Mervis.

ASSESSOR: Wasn't it Frankie v Joel?

MR BIZOS: I beg your pardon?

ASSESSOR: Frankie v Joel?

MR BIZOS: No, it was Mrs.

ASSESSOR: Oh, it was Mrs?

MR BIZOS: Mrs, Mrs Joyce Waring. (10

COURT: Mrs sticks or stands.

MR BIZOS: That is the one, yes. And that is the sort of logic, because the press was highly critical of the late Dr Verwoerd Mrs Waring says it is the press and the opposition politicians and the ungodly clerics that were really responsible for Dr Verwoerd's death because they said so many bad things about it. I merely mention it as an illustration of the sort of logic that is not permissible in a court at any rate. It may have been the sort of talk that Mrs Joyce Waring could indulge in but certainly not a way in which (20 to prove a case.

I now want to come to the post office. I am sorry for the diversion. Whilst the march was passing the post office in zone 12, the attention of accused no.2 was drawn to some youths who were evidently intending to throw stones at the post office. Accused no.2 went to the scene where he supported the efforts of other person called Matsebiso in talking to these youths and stopping their apparently intended attack. Accused no.2 did not see the witness IC.8 on that scene and your lordship will find no.2's evidence in volume 221, (30

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11 701 line 20 to 11 702 line 7. None of the accused saw anything happening at the post office. I want to give your lordship an assurance in that regard; I have the references. your lordship would have remembered it if they had said anything to the contrary; except for no.2 none of the accused and none of the defence witnesses saw anything at the post office. The incident is not referred to in the indictment. I want to make a submission in regard to this, m'lord. Let us assume that your lordship even takes IC.8's version because IC.8 and no.2 claim credit separately as to whose idea it was that the small group of young people that came out of the lane and had nothing to do with the march wanted to throw stones at the post office and they were apparently persuaded that there may be letters addressed to their parents at that post office and they had better not do anything about it. Now it does not matter for the purposes of main argument whether it was no.2 or IC.8 that managed to persuade these youths not to do this thing, but what is significant on either version is that there was no mob violence at this stage. If this march had turned into a mob would the reasoned words of either IC.8 or accused no.2 have been heeded? It is noteworthy that when accused no.7 rejoined the march it was at the post office and he was ahead of the march and had the opportunity to observe that approaching him. He describes the march as peaceful, he saw no-one break away from the march in order to attack the post office. Your lordship will see that in the evidence of accused no.7, 201, 10 521 line 10 to 10 522 line 26. We submit that the general impression that the march which was still proceeding on anyone's account to Houtkop is a far cry from the mob referred to by the state throughout/..

throughout paragraph 77 and it is strengthened by the circumstances of the dispersal itself. An interesting indictor in relation to the preservation of discipline of the marchers during the procession is given by accused no.8. He testified that by the time the march reached Hunter's Garage it had grown from 500 who had begun the march at Small Farms to approximately 3 000. Your lordship raised with him the question that this fact implied that five out of every six persons on the march would not have heard the call for discipline which the defence says was made by Raditsela and (10 others. Accused no.8 replied that the call for proper conduct made at the meeting of the 26th of August was well-known and that in addition the marshalls on the march told people to join what was expected of them. Volume 177, page 9 129 line 8 to page 9 130. I am sorry, I have not got a line. The evidence of accused no.1 is that as the march approached Hunter's Garage a number of police vehicles emerged from the opposite direction. As arranged at the meeting of 2 September 1984, your lordship will recall that was the Sunday morning meeting, accused no.8 nd Esau Raditsela (20 hurried to the front with a view to speaking to the police. However, without any warning or order to disperse the police started firing rubber bullets and tear smoke and people then dispersed. No.8, 171, 8 836 line 10 to 8 838 line 24. At the time the police started firing the people on the march were well-behaved. Afterwards people appeared to be angry and people who were in their homes were also affected by the tear smoke. 171, 8 839, 1; 8 840, 8. The march did not stop when the police were first seen because the police blockade was still some distance away. The march did then move slowly (30

and / ..

and at that stage people were no longer singing. 178, 9 150 line 9 to 9 151, line 19. The marshalls tried to stop the march but before they could complete this task the police began firing. 178, 9 153 lines 12 to 15. It is accused no.8 all the time, m'lord. In the estimation of accused no.8 the march was dispersed at approximately 10h45. After the dispersal accused no.8 met up with accused no.17. They rendered assistance to a youth who had been wounded and then went to their homes in zone 3 and zone 7 respectively. Volume 171, pages 8 840 line 24 to 8 841 line 10. One of the leaders (10 of the march, accused no.9 confirms that when the police was seen the march slowed down and accused no.8 and Raditsela arrived at the front. Before anything could be said to the police a helicopter flew over low and then shots were fired. There was no warning and the march had been peaceful at the time and the singing had stopped. Accused no.9, 180, 8 296, 12 to 9 297, 10. No.7 did not hear any warning uttered by any police officer or anyone else that the march should disperse before he heard shots. 201, 10 523 lines 11 to 15. Accused no.5 states that whilst the march was passing (20 Hunter's Garage it was orderly and not a mob as alleged. Ranks were properly formed and people were still singing. There were no obstructions on the road. 207, 10 829, 29 to 10 830 line 8. That the police then set up a blockade, the march slowed down and the marshalls ran alongside the march saying that the people must just be calm. Some people including accused no. 8 moved up to the front. This is the evidence of accused no.5 volume 207, 10 830, 9 to 10 831, 7. He also confirmes that no warning was given by the police and shots were then fired and people dispersed with the police following up. The (30

police / ..

police would not be able to distinguish from those - I am sorry, I cancel that m'lord. Volume 207, 10 831 line 8 to 10 832 line 6, but the people who were affected by this became angry as testified to by accused no.5, volume 207, 10 834 lines 1 to 2. Accused no.2 also heard no warning that the march should disperse. At that time it was orderly. Marshalls had warned people to stop singing and the pace was decreased. That is the evidence of accused no.2, 221, 11 702 lines 8 to 16. From the account given by accused no.13 it appears also that when the police vehicles were seen, marshalls announced that people in the march were to be quiet because they were people who were going to talk to the police. Immediately after this there was the sound of guns ahead and people started running away. Before the shooting accused no.13 had heard no warning to disperse. Volume 243, 12 975 line 7 to 26 and again at 12 976 lines 25 to 26. The account given generally by the accused is not inconsistent with the description given by the witness iC.8 and there is no suggestion in his evidence that there was any disorder to the march at the stage and certainly no suggestion that the march was presenting a violent encounter. Volume 17, 792, line 28 to 793 line 19. At the stage when it stopped the intention was to proceed towards Houtkop and people were singing "Siyaya eHoutkop". The procession as a whole did not go up to the police; only a few tried to do so. Had the police not been there and in the view of IC.8 the procession would have gone on along the road to Houtkop. The vanguard of the march was approximately 70 metres from the police when tearsmoke was used for the first time. Your lordship will find that in volume 23, 1 102, 9 to 1 104 line 4 and again at 1 106

lines / ..

lines 13 to 18. A number of witnesses called by the defence has testified also aso the circumstances of dispersal and it is submitted that the overall effect of this is to reinforce the details already given. It is therefore, we submit, not necessary to give the content of the evidence but no less than nine witnesses have corroborated this part. I have the names and their references but I do not think with respect in the absence of any evidence to the contrary in your lordship's recollection of the evidence that it is really necessary for me to enumerate the names and the references. They(10 are available should your lordship want them.

A person who was not on the march has also testified and given a description of the dispersal and confirmed that there was no request to disperse and the police chased some people into a house whilst yielding sjamboks and teargas was then thrown into the house. This is the evidence of Radebe in volume 363 page 20 891 lines 12 to 20 892 line 22. We submit that on the evidence it has been established overwhelmingly that the state has failed to make out the case that it pleaded. Its premise in the pleadings is that the march became a (20 mob once the office building of the VTC was destroyed by it as alleged in paragraph 77.9. The march did not then set off on a quest for councillors, but continued on its way to Houtkop. It is submitted also that the evidence establishes that the attack on Motuane was initiated and carried out by a group other than the march. It is submitted also that there is no evidence whatsoever to support the allegations that the mob carried out the other murders and acts of destruction as alleged. What the evidence does show is that the orderly procession was dispersed without warning by the police at (30

Hunter's /..

Hunter's Garage and that the very notion of the mob being on the march transformed by the inciting activists is completely untenable.

We want to submit that there is no clear evidence of exactly what happened. The evidence does show that the attack on Motuane's house started before the march left Small Farms. The attacks were held off by gun shots from the house and there was police intervention. There is no evidence to support the allegation that the persons who committed the murders were part of the Small Farms march, nor is there any evidence to support the allegation that after the murder the mob screamed that they were finished with Caesar and would go on to the other councillors. The persons who finally attacked and killed Motuane and Matebidi are not identified. The furthest the state case goes is that one or more of those persons may have been on the march from Small Farms. They may also have been persons who had been involved in the attack on his property since early in the morning or persons who had joined the march from two different directions, one near the BP Garage, the other near Caesar's place or any such combination of the persons. To say that they were persons who had been on the march is pure speculation. There is also no evidence whatsoever to link accused no.5 or any of the persons who had been at Small Farms with the murders of Dipoko, Chikane or Dhlamini which is the allegation made in the indictment. The murders of Dhlamini, Chikane and Dipoko, I want to give your lordship some details in relation to that. Dhlamini's house was attacked about 07h30. The only direct evidence concerning this event was the evidence given by the neighbour Mahile. He describes a noise group of more than 100

arriving/ ..

arriving. There was some discussion among them as to which was Dhlamini's place, suggesting that there were outsiders. Your lordship will find that in volume 127, page 6 404. I am sorry, but this is the result of late nights and lines were not... The witness did not recognise any of them. Volume 127, page 6 409. This group came armed with stones and bricks. They were determined. When Dhlamini was caught he was stoned. Group left and returned and dragged him away and burned him. The house and vehicle was also set alight. Volume 127, 6 407 to 6 408. After the attack the group (10 left. It is all in volume 127, the same witness, 6 409. Mahile did not notice any teargas firing of rubber bullets birdshot etc by the police. Volume 127, 6 412 to 6 413. The murder had been committed by 09h00. Brig Viljoen received a report at 09h00 about the incident but when he arrived at the house he found that Dhlamini was already dead. He left the house at about 09h25. Brig Viljoen, volume 64, 3 368/9. Warrant Officer Bruyns describes an incident apparently later in the day at Dhlamini's house when a large crowd attacked the police who had gone there to investigate. Although (20 Bruyns says that he received a report at 11h00 that Dhlamini was being attacked, that Dhlamini had by then already been dead for approximately two hours and Brig Viljoen had left the scene approximately 1½ hours before that.

COURT: So are you saying that we should Brig Viljoen and not W/O Bruyns' time here?

MR BIZOS: Because Mahile the next door neighbour is - they correspond and it is quite clear that Mr Bruyns confused an attack on the house with the death of the person who was really in charge of the overall situation, corroborated as (30

he is by the next door neighbour is more likely to have had the story, the version correctly than the other. It seems clear that during the course of the day there were confrontations between residents and the police. That teargas, rubber bullets..(hesitates, discussion in background)

COURT: Yes.

MR BIZOS: I will start again. It seems clear that during the day there were confrontations between residents and the police; that teargas, rubber bullets and from 09h45 some live ammunition was used. Brig Viljoen, vol.64, 3 372/3. That there was widespread destruction of property, arson and violence and that groups formed and dispersed in response to events. Neither Brig Viljoen nor Mahile referred to a large crowd being present at the time of or immediately after Dhlamini's murder and the events described by Bruyns must have been an incident which boiled up approximately two hours after the killing and was unrelated to it we submit.

In any event we submit that there is no evidence to link the killing of Dhlamini to the Small Farms march which is the allegation made in the indictment or to any of the accused. As far as Chikane is concerned the only evidence about this incident was given by Kunene who says that she saw a group of approxinately two hundred young people throwing stones at Chikane; that she heard a shot being fired and she saw people running away; that she saw Chikane bleeding and crawling to his kitchen. He was apparently attacked in the street and there was no damage to his house although later in the day it was set alight. This was some time after Chikane had been removed from his house by ambulance. Volume 129, pages 6 453 to 6 458. There is no evidence identifying any / ..

any members of the group that attacked Chikane and nothing to link that group to the Small Farms march or to the accused or anyone of them.

The murder of Dipoko. The principle witness who describes the mortal attack on Dipoko is IC.25. None of the accused was put on the scene as having been involved in any way with the events by this or other witnesses. She says that at about 09h30 a bakkie unloaded stones outside the Dipoko premises. One of the persons involved was Daniel..

ASSESSOR: 09h30? (10

MR BIZOS: 09h30. A bakkie unloaded stones outside the Dipoko premises. One of the persons involved was Daniël Matauwi. Thereafter he drove past in a kombi with Thomas Nhlapo. These were people who had previous to that date made threats over a loudhailer. Volume 150, 7 492-7, and was said by her to be members of the ratepayers' association. These were later seen by her amongst a large group which stoned the place and injured Dipoko. There is no evidence linking this group to the Small Farms march or to the accused or any one of them.

With the greatest respect to our learned friends we (20 ask your lordship to ignore the generalisations made in the "betoog" from pages 145 to 278 of the "betoog". We are able to give your lordship numerous references..

COURT: Yes, go ahead.

MR BIZOS: We are able to give your lordship numerous references in which the facts according to the record are not correctly set out. I am going to read the record only by way of example. I am going to read to your lordship some of the things that are said in the "betoog" in relation to - I do not know whether your lordship wants this. We have - (30

time / ..

time is very valuable, m'lord.

COURT: I think it is a waste of time. If you indicate from page so and so, paragraph so and so, what is disputed I will put a cross next to it and check it myself.

MR BIZOS: Could I then just by way of example give your lordship the sort of thing attributed for instance to accused no.5 which is not supported at all by the - take as an example accused no.5's position. On page 122 of the "betoog"..

COURT: 122?

MR BIZOS: 122. (10

COURT: But you are referring to pages 145 to 278.

ASSESSOR: 122 is accused no.7.

MR BIZOS: Maybe I wrote the reference down incorrectly. It may be that that is incorrect but it is alleged here, it is stated that accused no.5 attended the meeting of 19 February 1984 as a common cause fact. Sorry that I have the wrong reference, but this is specifically denied..

COURT: Oh, you mean at the top of 122?

MR BIZOS: Let me have a look how this..

COURT: "Die volgende beskuldigdes het die vergadering (20 bygewoon"?

MR BIZOS: "bygewoon", yes.

COURT: Yes, we have that.

MR BIZOS: Yes well, there is no evidence to the contrary that - accused no.5 denies this when this is put to him in cross-examination in volume 209, 11 027 lines 5 to 9. IC.8 admitted that he made a mistake by putting accused no.5 at this meeting and that your lordship will find in the evidence of IC.8, volume 20, page 935 line 1 to 9. He is put at the meeting at volume 19, page 765 line 22. At page 149 of the (30

"betoog" / ..

"betoog" it is said that Raditsela got accused no.5 to speak at both meetings of 26 August. The evidence is to the contrary, Edith Letlhake got him to speak at the afternoon meeting because someone else had fallen out at the last moment. An important fact disturbing the conspiratorial idea, and that it was Raditsela to get him to speak at the morning meeting. Your lordship will find that in volume 61, page 10 797, line 27 to page 10 797 line 6.

COURT: It would be the next page, 798.

MR BIZOS: It would be the next page 797 to 798, yes. (10 It is baldly stated that accused no.5 organised the Vaal youth congress.

COURT: What page?

MR BIZOS: "Betoog", page 150.

COURT: 150?

MR BIZOS: That is how I have got it.

COURT: At the top of the page, yes.

MR BIZOS: Yes, yes. Now of course that is just stated there without any reference at all but the evidence is that the youth, Vaal youth congress was not formed on 26 August 1984 (20 Your lordship will find that in the evidence in volume 208, page 10 912 line 3 to 12. He is supported by the evidence of Mazibuko in volume 339 page 19 342, 28 to 30. Vilakazi, page 347, page 19 844, 13-15. And Tebogo Ponyane - now unfortunately for some reason or other the volume of this witness' evidence we cannot find. I do not know whether - your lordship will remember the young man who gave evidence. Yes, it is a copy that we have, it is here. It is apparently volume 423, page..

COURT: 423? (30

MR BIZOS / ..

MR BIZOS: 423.

ASSESSOR: What was his name again?

MR BIZOS: Ponyane. If my memory serves me correctly this was the young woman who had the silkscreen process..

COURT: Yes, who went to Johannesburg.

MR BIZOS: Who went to Johannesburg, yes. That is volume 423, page 24 774 line 15 and again at line 22 to 25. If your lordship has a look at the "betoog", page 154, the word "allowed" and that only nurses would be "allowed" to perform their services is not a correct way of putting it. There (10 was much discussion about essential services including police officers and others and it was not that they were allowed but rather exempted. I want to give your lordship the references to that. Volume 206, page 10 790 line 10 to 14. Volume 206, 10 808, line 27 to 30. Volume 211, page 11 141 line 23 to page 11 142 line 7. Those are all of accused no.5. Vilakazi in volume 349, 19 963, 11-26. Then that the 3rd was chosen - unfortunately I did not get the page, but that the 3rd was chosen because of the opening of parliament. It is made as an allegation, unfortunately I did not note (20 the page but that is denied. It was put..had your lordship found it?

ASSESSOR: 158 is possibly paragraph 158, sorry.

COURT: Anyway the point has already been made.

MR BIZOS: Yes, I wanted to give your lordship that there was specific evidence both from accused no.10, accused no.5 and accused no.8, that it was chosen because it was the day on which the increased rental was to come into operation, and it happened to be on the Monday.

COURT: It was to come into operation on the 1st. (30

MR BIZOS: On 1 September, that was the notice, the two-paged document, the AAQ - I will give your lordship only one reference to that. It is 11 077, line 21 to 29. On page 209 in relation to accused no.5 it is stated as if it had been proved or accepted that he was on the scene at Caesar Motuane's. Of course this is on page 209, paragraph 14. There is a specific denial from accused no.5 and no.13 in volume 206 page 10 824 line 1 to 5 and in volume 244 page 13 001 line 10 to 14. It is suggested on pages 238 to 239 that his evidence that he came to the march late is false, but his (10 evidence that he did come there appears in volume 206, page 10 815 line 30..

COURT: Just give me the page again?

MR BIZOS: 10 815 line 13 and he was with Mazibuko, volume 206 page 10 817 line 13. Mazibuko was not cross-examined that they were there late.

COURT: Just a minute, are these references to no.5 or to Mazibuko?

MR BIZOS: They are both references to no.5.

COURT: To no.5, but did Mazibuko say they came late? (20

MR BIZOS: I have not the reference unfortunately but I merely, we may have to try and find it if we have time. Of course we will find Mazibuko that they came there late but what I am saying is that once there is enough credible evidence to the contrary; the point that I want to make is that your lordship cannot rely on this and even on those handwritten notes - both versions that were handed to your lordship we are busy formulating an argument in answer to those handwritten notes in the hope to give your lordship with reference to the correct picture and not the picture that is set out in (30

those /..

those notes. My attention has been drawn to the time. I am going on to the next reference.

THE COURT ADJOURNS FOR TEA / THE COURT RESUMES

MR BIZOS: As your lordship pleases. I would ask your lordship to have a look at the "betoog" page 239, the last paragraph and there fairly strong language is used as is elsewhere about a blatant lie having been told by accused no.5 about look at him, he is lying about the damage to the ticket office. Now if your lordship has a look at the record, your lordship will see that the witness was actually asked where the offices of the VTC are and he says that those are far away on the Johannesburg/Vereeniging road, that is what his evidence is at page 206, the page quoted, line - 10 818, ..

COURT: It is a long page.

MR BIZOS: Sorry, at page 10 818 line 26 to 10 819 line 4 and the evidence of Nkopane is the same, accused no.8, in volume 171, page 8 822, 24 to 26. I am giving your lordship these as examples of the reasons that have been advanced as to why the accused should be disbelieved, but I will have to make general submissions in relation to your lordship's approach to the accused's evidence in due course. Then he is accused again of being untruthful on page 240 and that is this, to sum it up, look at it says the state, he has been untruthful, he was hiding the fact and the reason for the untruthfulness is he did not want to say that Raditsela was at the head of the march because he says that he was 500 metres away and he could not say..but the "betoog" goes on to say look at him, when it suits him he can read the placards. Well, if that was supported by the evidence it may have been a point but it is not supported by the evidence because he

says / ..

says that he was 500 metres when he joined and that is when he was asked who was leading the march at that stage and later on after having said that he moved up 50 to 60 metres from the front of the march, it was then that he saw the placards. Your lordship will find that in volume 206, page 10 817 line 22 to 25 and the draughtsman of the argument could have been a little more careful instead of - your lordship will see that I am quoted on the previous page, page 239, as you were marching along 50 or 60 paces, that is what persuaded me to look at the point. I am being selective in the points that we have taken, so that points can be made on an incorrect premise as to what the evidence is but I would urge your lordship with the greatest respect not to be influenced by the bold statements made by the state. On page.. Then they say, why does he say that he was past Hunter's Garage and that he was also past Hunter's Garage and again this question of the distances is missed because assuming the argument proceeds on the basis that he was 500 yards from the front of the garage right through and then how can he possibly say that he passed Hunter's Garage. Of course if the evidence was correctly quoted it would have been a point but it not a point. Then on page 259 in connection with the groups it says in sub-paragraph (3):

> "Onder kruisondervraging verander sy storie drasties and is daar nie meer groepe mense nie maar net dié in een groot groep en 'n paar mense, 'n paar van die groot groep wat hy beskryf."

Now on the very page quoted, line 26 to 27, if your lordship looks at it there is in fact no contradiction. On "betoog" page 259 again it is suggested that he was not speaking

the / ..

the truth when he said about the stopping or non-stopping of the march and we could find nowhere that he was actually questioned about this. He again on "betoog", page 259, he denies that there were people on the street to the stadium near the intersection. He actually specifically says that there were people on the stadium side in volume 211, page 11 159 lines 25 to 27. What he does say on line 28 to 30, that he did not see them later as they approached the intersection. Then in - if your lordship bears with me - unfortunately I did not note the page of the "betoog", that this was on, but I submit that the criticisms levelled against the accused no.5 in relation to the launch of the VCA and the question of the youth organisation, the criticisms are not borne out. In any event we are going to address your lordship in relation to whether or not there was a youth organisation in the Vaal in due course and I will refer to that more specifically.

What I want to turn to now somewhat out of order, I want to move away from the 3rd and make certain submissions to your lordship on two aspects. I have told my learned friends I would do that because we assume that your lordship will ask them to reply on the law andperhaps the sooner we do that the more of an opportunity they will have to check on the submissions that we want to make. So if it pleases your lordship I will deal with two aspects.

The first is the effect of certain of the accused in this case not having given evidence, and secondly I want to refer your lordship to the approach of the accused as a witness. I will start as to whether in the circumstances of this case your lordship can draw any adverse inference against any of the accused that did not give evidence which are Baleka,

accused no.1, accused no.14, accused no.15 - what is Jerry's number? No.14, yes. 15, 17 and 22. I do not think I have left anyone out that your lordship has not seen in the...

COURT: Yes?

MR BIZOS: As your lordship pleases. The facts briefly are that these accused have not given, the five accused have not given - have chosen not to give evidence and of course whether or not an adverse inference can be drawn for a party's failure to testify depends upon the circumstances of each particular case. We submit that it has been repeatedly (10 emphasised that there is no inflexible rule that an adverse inference is due on every occasion, that an available and material witness is not called. I have the list of cases if your lordship want to note them. It is S v Masiya 1962 2 SA 541 (A) at 546D-G; S v Mini 1963 3 SA 188 at 195D-G (A); S v Letsoko & Others 1964 4 SA 768 (A) at 776D; the classic case of Galante v Dickenson 1950 2 SA 460 (A) at 465; Marine and Trade Insurance Company v Van der Schyff 1972 1 SA 26 (A) 40D-E at 49f-H. Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 1 SA 621 (A) at 624B-G. In adopting this (20 what may be called casuistic approach of the courts, the courts have however laid down certain guidelines as to the appropriateness of drawing an adverse inference and in this regard it is pertinent to draw to your lordship's attention that the inference must not be so easily drawn or must be the subject of greater caution in criminal cases than in civil cases. R v Bezuidenhout 1954 3 SA 188 (A) at 197B. The matter is dealt with fully in Lansdowne & Campbell: South African Criminal Law and Procedure, vol. 5, 1982 edition at page 523. Moreover in both criminal and civil cases a (30

prerequisite/..

prerequisite for the drawing of an adverse inference is that the state or the plaintiff must have made out a prima facie case which the accused or the defendant respectively is called upon to answer. That is in S v Xhoza 1982 3 SA 1 019 (A) at 1 043D-E; the Masiya-case already referred to at 546E; the Marine & Trade case already referred to 37G-H. This is does not mean that where the state has made out a prima facie case and the discharge has been refused that an adverse inference automatically follows from the accused's failure to testify. The same goes for civil cases in respect of which absolution was refused at the close of the plaintiff's case. The question is whether any adverse inference is due at all will depend upon the circumstances of the particular case in question. And moreover it is quite possible that where the state has made out a prima facie case and the circumstances warrant the drawing of some adverse influence that the actual inference due is insufficient - of insufficient probative value to tip the scales against the accused beyond reasonable doubt. Your lordship will find that in S v Letsoko. I have already given your lordship the reference at 776G to 777 A.

COURT: What is the volume of Letsoko:

MR BIZOS: 1964 4 SA and Matsepe. I do not remember whether I gave your lordship Matsepe.

ASSESSOR: No.

MR BIZOS: S v Matsepe 1962 4 SA 708 (A) 716D-G, a judgment of his lordship SCHREINER J where his lordship said:

> "Each case is to be dealt with in relation to its own circumstances. Considerations which may have to be taken into account in any particular case are the

strength/..

strength or weakness of the Crown case. The apparent certainty with which the accused could have answered that case if he were innocent and the probability or improbability of accused's failure to testify have been explainable on some hypothesis unrelated to his guilt on a charge in question."

Similar dicta in R v Ismail 1952 1 SA 204 (A) at 210B-C.

Of particular importance in the present matter we submit is the consideration that an adverse inference cannot be drawn if the accused's failure is reasonably explicable on an (10 hypothesis unrelated to the accused's skill and we would ask your lordship to have regard to what was said in R v Voqwane 1965 4 SA 230 in what was Southern Rhodesia 230H. And Masaya..

COURT: I am sorry 230 - 230H?

MR BIZOS: No, that must be wrong.

COURT: It can be on the same page.

MR BIZOS: It cannot be on the same page m'lord. I am almost certain it is the second reference that is wrong but we will just..can I just check it quickly m'lord? I will come back to it, just check the case. And the Masiya case at 546G (20 Oh, there is only one page so it is correct. Apparently the case is with my learned friend Mr Fick already.

But those are really of - the general principles but what I submit with respect is the case to follow in this particular case is S v Theron, a judgment of this division, presided over by TROLLIP J and TRENGOVE J. Of course it is known to your lordship that they both thereafter were members of the court of appeal. This was in the Transvaal.

ASSESSOR: Unreported?

MR BIZOS: No, no reported, I am sorry. 1968 4 SA 61 (T). (30

COURT / ..

COURT: Page?

MR BIZOS: At 63. It was one of those judgments which was signed by both their lordships, a joint judgment, not one which concurred.

COURT: All judgments are signed by two judges, it is a question of who writes it. Both wrote that judgment.

MR BIZOS: Both wrote that judgment, yes. That is what it is really, it is a joint judgment in that sense.

"Generally, in regard to an accused's failure to testify, a useful practical distinction can be drawn between situations in which the state case is:

1. The direct testimony of a witness or witnesses;
2. Circumstantial evidence.

In 1, if the testimony is wholly credible or non-credible no problem arises, for in the former case the accused's failure to contradict the credible evidence must inevitably result in the prima facie case becoming conclusive proof and in the latter case it would be irrelevant. There would then be no prima facie proof and the accused's silence could not make or restore the state's case. It is only when the state's evidence, although amounting to prima facie proof, creates some doubt about its credibility that the accused's silence becomes important and maybe decisive, for his failure to contradict the state's evidence may then resolve the doubt about its credibility in the state's favour."

K1534 And this is really what we submit, m'lord, what I am about to read is really the matter that we are dealing with here.

"Of course, if the accused adduces other evidence to contradict the state's, his silence would then

usually / ..

usually lose much if not all of its importance. Similarly, in 2, if the inference of the accused's guilt or innocence can be drawn with the requisite degree of certainty, the accused's silence is unimportant. It is only of importance if, although there is prima facie proof of his guilt, some doubt exists whether the proof should now be regarded as conclusive, that is that the only reasonable inference from the fact is one of guilt his silence then becomes a factor to be considered along with the other factors and from that totality (10 the court may draw the inference of guilt. The weight to be given to the factor in question depends upon the circumstances.."

and then his lordships refer to Letsoko, Ismail and Masiya.

Now of course with one single exception relating to accused no.17 , that what he was supposed to have said over a fence to someone that he had better join the UDF or something or other, except for that there is no fact in the case which the accused could have traversed which other accused or other witnesses have not done. So that in our respect- (20 ful submission and we will submit in due course when dealing with the liability that even if that is found as a fact it does not carry the case against no.17 any further at all. Your lordship knows that he could not join the UDF but it certainly does not prove any of the matters that...This case has been followed in S v S A Associated Newspapers Ltd and Others 1970 1 SA 469 (WLD) at 476C-H; S v Twala 1979 3 SA 878 (T) at 878C-H. In these circumstances where the accused has adduced other evidence from the point in issue, his own failure to testify is explainable on a hypothesis other (30

than / ..

than guilt. A similar situation obtains in civil cases where a party fails to call an available and material witness but has adduced other evidence on the point in issue. Tshabalala v Southern Insurance Association Ltd 19762 SA 381 at 383B-F. CPD, Cape, the Tshabalala case. Shield Insurance Company Ltd v Theron N.O. 1973 3 SA 515 (A) 517C-F. Your lordship will I submit also find prof Smith's Bewysreg 1982 edition at page 111 of some assistance.

In conclusion we submit that no adverse inference is due where the accused has repeatedly adduced sufficient - (10 has already adduced sufficient evidence on the point in issue is reinforced by consideration of the fact that cases in which adverse inferences have readily been drawn are cases in which there was no evidence adduced by the accused to gainsay the state's case. Indeed, it would appear from the reading of the cases that it is the complete absence of any such evidence which is the reason for the drawing of the adverse inference. S v Nkombani and Others 1963 4 SA 877 (A) at 893F-G. S v Snyman 1968 2 SA 682 (A) at 588G-H, and the erstwhile HIEMSTRA J's book Suid-Afrikaanse Strafproses (20 4de uitgawe on page 333. Moreover when viewed in the light of the evidence adduced on behalf of the various accused in this case we submit that the state case was considerably weakened and as SCHREINER JA has pointed out in the case already quoted, this also a relevant circumstance in determining whether an adverse influence could be drawn or in determining its import. I think that we are correct in summarising in one sentence what this case has been about: was violence advocated at the meetings particularly of the 26th and 3rd. That is the question. That is not a (30

matter / ..

matter which is peculiar within the knowledge of the accused. If it was done, it was done publicly to people varying from a minimum of 700 or 800 to a maximum of 1 500 on the various estimates. This can hardly be a case where only the accused is the person who can really testify. We submit that the reading of the cases show an adverse inference is more readily to be drawn where the issue in question is one about which he can best testify. Now we draw that conclusion from the reading of the following cases: S v Miles 1978 3 SA 407 (NPD) 413E-G; the Theron case in this division already quoted at 63F, S v Saayman - I think we have already had the reference - 1967 4 SA 440 (A) at 442 F; S v Xhoza 1982 3 SA 1 019 (A) at 1 039E-F and S v Roodt 1983 3 SA 382 (TPD) at 388G. A similar position apparently obtains in civil cases. An adverse inference will more readily be drawn where the witness who was not called was better informed on the issues in question than anyone else. The reference to that, Oliphant v Shield Insurance Company 1980 1 903 (CPD) at 907E-G, Minister of Justice v Seametso 1969 3 SA 530 (A) at 535D-G; Your lordship also may find the matter dealt with by Hoffman, 3rd edition: South African Law of Evidence at p 469.

There may well be reasons where counsel for an accused may not call an accused or a party to a case and..

COURT: There is always a reason why he does not call him. It it not a question of there may be reasons, there is always a reason why he does not call him.

MR BIZOS: Yes, well, may I then for the sake of completeness that there may well be reasons why counsel unrelated to his guilt or innocence..

COURT: Yes.

MR BIZOS: That is really the..perhaps I should..Yes, I agree with respect that all human activities motivate it.

COURT: Yes, even that of counsel.

MR BIZOS: Even that of counsel, particularly of counsel at times. I would ask your lordship to compare Magagula v Senator Insurance Company Ltd 1980 1 SA 717 at 722C-F.

COURT: 717 - 1980 1 717?

MR BIZOS: 1980 1 717, 722C-F.

ASSESSOR: Appellate division?

MR BIZOS: No, I have not noted the division, I am sorry. (10 In the present matter we submit that either no adverse inference at all is warranted from these five accused's failture to testify or alternatively that the important of any inference that may be warranted is of no moment. This conclusion we submit is supported by the following considerations, firstly that the accused had already adduced sufficient evidence on the points in question and the conduct of each one of them was explainable on a hypothesis other than his own guilt. Viewed in the light of the evidence given and the analysis which we have submitted and are still to submit to(20 your lordship that the state's case is both contradictory, the case not pleaded and in many respects highly improbable increases the correctness of the submission that no adverse inference can be drawn. None of the points in issue except the one exception that I have mentioned about this talk over the fence - we will deal with it when we deal with the individual accused - which fell peculiarly within accused's own knowledge and finally the courts are generally more hesitant about drawing an adverse inference in criminal cases than in civil cases when counsel may have had an (30

assessment / ..

assessment of the need or otherwise for calling an accused as a witness. Those are the considerations and in relation to accused no.1 we will submit in due course that there was really no case to meet for the reasons submitted at the application for the discharge but even if we were wrong in that the plethora of evidence that there was no violence called for at the meeting of the 19th, because that was really the gravamen of the case against him, there was no reason to call him. AZANYU did not feature anywhere in the state's case and that was the primary matter which was alleged against him. AZANYU was alleged to be a co-conspirator but your lordship heard no evidence about that.

Then the next accused who did not give evidence is accused no.14. The state does not say anything about him.

Accused no.15 is covered by the other witnesses who were members of the zone committee. He only attended one meeting. He was at a meeting of the 26th and on the march. Nobody said that he spoke, he was elected treasurer of the area. Other witnesses have put him on the march. We submit that Mahlatsi cannot even be believed when he says that 9 ran away with him because our case is that he actually accompanied.. that Mahlatsi did not run away but there was nothing further that he could add to the multiple witnesses that gave evidence as to what happened at the zone meeting or at the meeting of the 26th.

As far as Matlole is concerned, evidence was led through the person, the co-accused that knew him best. Mr Mphuthi, accused no.7, to be found in volume 200, page 10 446 where a graphic before and after picture is painted of this man, what has happened to this man in the meantime. I do not

want / ..

want to read it out, I am sure it is not something that can escape one's mind but he does not remember from one day to the next who he had seen. Did I give your lordship the page, 10 446 from line 8 to 10 447 line 9. That from one day to the next and from one week to the next he introduces himself to people and he does not remember. No.7 was not cross-examined on this evidence, and it would have been a matter - he spoke during the period that they were in custody. It was a matter could be easily checked presumably by the state from the wardens and doctors and nurses that he was taken to according to the evidence whilst he was in custody.

Accused no.22. The only issue that was really debated during the application for a discharge in relation to him as to whether there was evidence that he had resigned his position was treasurer in the VCA in January/February when he left for Grahamstown. The uncontradicted evidence, un-challenged evidence of Mr Vilakazi who was on the committee was that he did resign when he went to Rhodes University and that an acting treasurer, Miss Letlhake was appointed. And acting not because they expected accused no.22 to come back and take his place but that they thought it was wrong to appoint a treasurer themselves when the inaugural meeting or the launch had actually...

ASSESSOR: No.18?

MR BIZOS: No, Vilakazi, no.10, I beg your pardon. Unfortu-nately I haven't got a reference but we are going to deal with the individual accused when I will give your lordship the reference to it. So that in our respectful submission no adverse inference can be drawn against that.

The other matter on which we want to make submissions is / ..

is that your lordship's approach to the accused as witnesses - we will time permitting be in a position to answer the criticisms of the state in the "betoog" but generally the classical statement in this regard, almost as well-known as Blom's case is the statement of his lordship GREENBERG J in R v Differt 1937 AS 370 at 373:

> "It is clear that no onus rests on the accused to convince the court of the truth of any explanation that he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable, but beyond any reasonable doubt that it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his acquittal."

A similar statement by DAVIS AJA in R v M 1946 AD 1 023 at 1 027:

> "The court does not have to believe the defence story Still less does it have to believe it in all its details. It is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."

And the weighing up of the respective merits of witnesses for the prosecution and the defence have been discussed as your lordship knows in a number of cases. The one that we consider particularly apposite in this case, is the case of R v Mtembu 1956 4 SA 334 (T) where his lordship DOWLING J stated at 335H to 336B:

> "A magistrate in his reasons for judgment obviously takes the view that if the evidence of a traffic

inspector is accepted then the accused is guilty of driving to the danger of the public. In coming to the conclusion that that evidence is to be accepted he said that the inspector either see the accused drive as he says or he has come to court to commit perjury. That is not the correct approach. The remarks of the late MILNE J in Schultz v Pretoria City Council, a judgment delivered on 8 June 1950 but not reported, are very pertinent to this point. He says:

> "It is the wrong approach in a criminal case to say why should a witness for the prosecution come here and commit perjury. It might equally be asked why does the accused come here to commit perjury. True, an accused is interested in not being convicted but it may be that an inspector has an interest in securing a conviction. It is therefore the wrong approach to say: I ask myself whether this man has come here to commit perjury and I can see no reason why he should have done that. Therefore his evidence must be true and the accused must be convicted. The question is whether the accused's evidence raises a doubt.""

I submit that in a similar vein in the case of R v P 1955 2 SA 561A at 564F:

> "There is no justification for basing a conviction solely on the improbability that an apparently responsible and trustworthy witness who has frequently given what seems to the court to be fair and honest evidence would on this occasion lie."

Also in R van Van Heerden in 1960 2 SA 405T at 409A. We

submit / ..

submit that the judgment in the Kubeka case, S v Kubeka 1982 1 SA 534 (W) of SCHLOMOWITZ AJ at 537F-G is particularly instructive:

> "Whether I subjectively disbelieve him, the accused, is however not a test. I need not even reject the state case in order to acquit him. It is not enough that he contradicts other acceptable evidence, I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the state." (10

The courts have on a number of occasions considered the correct approach to the untruthful evidence of an accused. In S v Mtsweni 1955 1 SA 590 (A). We submit that the headnote accurately reflects the approach and the principles enunciated in the decision:

> "Although the untruthful evidence or denial of an accused is of importance when it comes to the drawing of conclusions and the determination of guilt, caution must be exercised against attaching too much weight thereto. The conclusion that because an accused is (20 untruthful and therefore is probably guilty must especially be guarded against. Untruthful evidence or a false statement does not always justify the most extreme conclusion. The weight to be attached thereto must be related to the circumstances of each case. In considering false testimony by an accused the following matters should inter alia be taken into account; the nature, extent and materiality of the lies and whether they necessarily point to a realisation of guilt. The accused's age, level of development and cultural and (30

social / ..

social background and standing insofar as they might provide an explanation for his lies. Possible reasons why people might turn to lie, example because in a given case a lie might sound more acceptable than the truth. The tendency which might arise in some people to deny the truth are the fear of being held to be involved in a crime or because they fear that an admission of their involvement in an incident or crime, however trivial the involvement may lead to the danger of an inference of participation and guilt out of proportion to the truth."

Those are the principles which we submit your lordship will have in mind in approaching the evidence of the accused. We do not concede that any of the accused told your lordship any deliberate untruths. None have been shown. By way of contrast a considerable number of state witnesses have shown either through their own mouth or through other evidence or on the probabilities that they did not speak the truth, and we would submit that no sufficient reasons have been given as to why any of the accused before your lordship should be disbelieved on any of the material facts that have a bearing on the main issues.

Let me illustrate what we submit. There is one completely unsatisfactory witness that three of the accused went to the immediate vicinity of Motjeane's (Motuane) house. By no stretch of the imagination can it be said that IC.8 was a better witness than accused no.2, accused no.5, accused no.13, but in any event let us assume for the purposes of the argument that one might be sceptical about their denial. It does not help the state one bit because the evidence

that your lordship has to weigh against is of such a poor quality that the inquiry must of necessity find a shutting off point at that level but for the purposes of developing the argument I would submit with respect that on the facts even if one or other of these three accused was in the immediate vicinity of Motjeane's house, it proves nothing. Not everybody who was in the vicinity of Motjeane's house is guilty of any offence in relation to this killing, but isn't that the sort of situation that his lordship SCHREINER J had in mind, even if there was absolutely credible evidence (10 that one of these three accused was there, which there is not. Does it mean that they lied about everything else or does it not possibly mean what SCHREINER J says, that well, I am innocent, I was merely there as an onlooker but it looks to me with the way things are going in this court that I find myself in that the more I distance myself away from that place, the better off it is going to be for me. Now assume that that did happen and if there was credible evidence your lordship would have found as a fact that they were there, their arguably false denial would not have helped the state (20 one iota in bringing anything home to any one of these three accused and we would submit that having those principles in mind an having regard to the poverty or the lack or quality of the state witnesses and the comparative quality of the accused, their evidence cannot be rejected. Indeed I would submit with respect that your lordship may even find as a fact on the probabilities on matters such as the nature of the march, what Raditsela said on the morning, that no violence was called for on the 26th, the accused if this had been a civil case with the onus on them would have (30

established / ..

established on a balance of probabilities that no violence was advocated and no violence was committed by anyone on the march.

The state as one final point of law that I want to mention because I am accused of much wrong puttings so to speak, I have been through it and sometimes our learned friends misunderstand an inquisitive question as to what the position was, not always, an inquisitive enquiry with a putting on behalf of the accused. Before anything can be used against an accused for what his counsel may have put to witnesses there has to be a finding that the accused authorised it either expressly or impliedly. Now the state asks your lordship to disbelieve the accused because something was put about the presence of Raditsela at the beginning of the meeting of the 26th as to whether the meeting would accept an impartial chairman or not. Your lordship will recall the long debate and the cross-examination that the accused had to face and the defence witnesses. Now I do not remember who gave that instruction and I do not know that I would be able to tell your lordship even if I did remember, but where one has a case such as this where on of necessity has to get instructions from a number of accused and let us assume hypothetically that one of the accused remembered this, and during one of the adjournments in Delmas said this question of the impartial chairman was mentioned by Raditsela before he left and it was put, your lordship does not know who gave it or whether it was an accused and not a witness, or whether it was some enquiry by an attorney from someone without taking particular care; whether it be counsel or attorney, mistakes can be made. And now what bearing has that got

on / ..

on the making of findings of fact in relation to this case? When it is common cause, because Mahlatsi said so, that an impartial chairman was sought, Lord McCamel was to be asked then accused no.6, Mr Mokoena, was asked and he could not make it. And then Mr Nkopane, accused no.8, was asked. What difference does it make whether that fact was wrongly put or not? And what game can be achieved by the state? Similarly in relation to the wet "lappies". If it were put that: go and wet your handkerchiefs so that you can storm against the police and that these will have the effect of preventing any harm coming to you in your aggressive behaviour, then of course that would have been and the accused have sat here and listened to it, and they did not react in any way - of course that may have been of some importance. But it was put on the basis of precisely contradictory to the state case, it was put on the basis that so much stress was laid by Raditsela on there being no violence that he said even if teargas is used rather have your handkerchiefs wet so that you do not have to run away so that we can achieve our main purpose to get to Houtkop. That is what was put. How does that help that none of the accused supported that? It does not help the state to establish that violence was advocated on the morning of the 3rd. The other - I know that your lordship question with respect correctly whether "putting" is a - we will use it as a shorthand for suggestions in cross-examination, m'lord, whether "putting" is really a correct English expression. The other, the other suggestions that I refer to is precisely what happened, that at various stages of the march from the BP Garage to Fowler's, to the intersection, the precise

meaning / ..

meaning of the word "vanguard" and whether or not the leaders of the march were those young people who carried the placards or the three appointed leaders that it was put. How does it help the state, or what advantage did the accused have in varying slightly some instances to be measured by micrometer that the one accused said something which was not precisely what was put to IC.8 and Mahlatsi, as to time when place where and what precise position of the march, when instructions came from various people who occupied various positions on the march and who had varied opportunities for observations as to what was happening at the intersection. It only shows the extent to which in our respectful submission the state has really scraped the bottom of the barrel to try and find some sort of support for the witnesses who really in our respectful submission were shown in cross-examination to be completely unreliable on the most fundamental issue on the Vaal case.

I have told your lordship that although admissions can be made against an accused person by what his counsel says nothing like that has happened in this case. There are no admissions anywhere supporting the state case. The trivia that has been referred to in the media cannot help. The approach of the courts in relation to these matters is to be found in S v W 1963 3 SA 516 (A) 523 C-F; S v Essa 1969 1 SA 238 (NPD) at 242B-D, S v Jonathan & Another 1987 1 SA 633A-B at 641E. Mputa v Santam Assuransie Mpy Bpk..

COURT: Is Puta with a "P"?

MR BIZOS: Mkuta 1975 4 SA 848 at 835G-H.

COURT: 848? 1975 4..?

MR BIZOS: 1975 4 848 at 853G-H.

ASSESSOR / ..

ASSESSOR: Which court?

MR BIZOS: I am sorry, I haven't got that. Generally speaking insurance companies cases judgments - only those that go to the appellate division, but I am sorry, I am not sure. I did not note it. We of course now have section 220 and it is clear that admissions which are not formally made in terms of the relevant section are not sufficient proof of the facts so admitted and the weight, if any, to be attached to them depends to a very large extent on the circumstances of a case and the nature of the admission. If a man said that he was not driving then of course that puts an end to the matter, but in the sort of minutia that we are dealing with here in our respectful submission, nothing turns on it. Your lordship will have regard to S v Mjoli and Another 1981 3 SA 1 233 (A) at 1 242 (C), R v Fouche 1958 3 SA 767 (TPD) at 779F.

Moreover it would appear that the weight of such an admission would be negligible if anything at all, if the admission was made in error. Your lordship will find that in the S v W judgment and the basis of the admissibility and the weight to be attached is that authority has to be proved and is to be found in volume 9 of South African Law under the heading "Evidence", paragraph 467 at page 270. And it is therefore arguable that if the accused has not been shown to have authorised his legal representative to make this specific assertion in cross-examination he is not bound by it. Now I have already indicated to the one putting that the state has made so much fuss about, about the wet cloths for their noses and indicated to your lordship that according to the evidence none of the accused were there. Your (30

lordship/..

lordship will also find, which only goes to show how old this problem is, a passage in Voet referred to if my memory serves me correctly in the S v W case, I find it so fascinating that the problem should be so old that I looked at Cane's translation that in his wisdom Voet says: and what happens if you are representing more than one party, who are you to hold it against. So there are hardly any new problems in this sort of thing. I have other things, but I do not know that your lordship..

COURT: Yes, this may be a convenient time for the adjournment. (10

THE COURT ADJOURNS UNTIL 5 SEPTEMBER 1988.