A

IN DIE HOOGGEREGSHOF VAN SUID-AFRIA

(TRANSVAALSE PROVINSIALE AFDELING)

SAAKNOMMER: CC 482/85 PRETORIA

1988-12-08

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: ONSKULDI

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KONTRAKTEURS : LUBBE OPNAMES

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COURT RESUMES ON 8 DECEMBER 1988.

MR CHASKALSON ADDRESSES COURT: The question what is an appropriate sentence is always a difficult question for a judge to answer. It is a particularly difficult question when the sentence has to be imposed in a case, a political case, concerned with conflict between the state and its citizens which has its origins in legitimate and deeply felt grievances attributable to the way that the state is organised, and that is the situation in the present case. The grievances are of long standing and are well known and they have their roots deep in the history of South Africa and they arise out of the fact that for centuries the majority of the people of our country have been denied access to the levers of political power and as a result have become an under class excluded from the main stream of society and subjected to humiliation and discrimination. And it was inevitable that in the course of time there would be resistance to these policies and it was also inevitable that those who resisted would be brought into conflict with the state, and it is that which has led to the present case, to four persons having been convicted of treason and seven persons having been convicted of terrorism. The convictions of the four stand on a different footing to the convictions of the seven and there are also differences between each of the four and each of the seven which may have a bearing on the sentences to be imposed. We will deal with these differences later but first we want to deal with the context within which we submit the sentences on the accused fall to be assessed. Now the indictment initially covered the period January 1983 to April 1985 and although the period of the indictment was subsequently extended to cover certain

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specific incidents which occurred after April 1985 all the accused were in custody by then. The last of the accused to be arrested were accused nos. 19, 20 and 21, and they were arrested on 23 April 1985. So we have to take ourselves back to that period and to the country at that time. Now that time was a time of political ferment which was precipitated by the constitutional changes proposed and later implemented by the government, against fierce opposition from practically every political movement within the black community. Your lordship has found that the opposition commenced prior to the launching of the UDF and that it was a central issue around which mobilisation for the UDF took place. The issue was indeed taken up by the UDF and its affiliates after the launch in August 1983, as it was by the National Forum and its affiliates. Your lordship has heard that there was also opposition from homeland leaders, from intellectuals and from smaller political groupings as well and the reason for that opposition was clear. At a time when existing structures were being changed and a new dispensation was being created black people were being told by the government in no uncertain terms that there was to be no place for them in the new order. In passing sentence on the accused we ask your lordship to think back to that time, to January of 1983, and to the message that was being communicated to the black community by what was implicit and explicit in these proposals. They were being told that the laws that weighed so heavily upon them were to remain unchanged, that the hated pass laws were to be not only retained but were to be made more stringent by the imposition of fiercer penalties, that the migrant labour system that had devastated families and impoverished people living/....

living in rural areas was to continue and was to become more rigid by reason of the greatly increased penalties to which employers of unregistered workers would be subjected. The education system, which had been a source of so much anguish to the black community and had given rise to so much conflict and to such deeply felt grievances was to continue as before, the restrictions against ownership and occupation of land would persist and above all the exclusion of blacks from the political process was to be entrenched in the new constitution. It could have come as no surprise to the govern- (10)
ment that these developments would be resented and resisted. Certainly the response to its proposals should have left no doubt on that score. There was widespread press publicity detailing the protests against the proposed tricameral structure and the Koornhof laws, referring to the resentment that they had generated, there were mass meetings held around the country at which opposition to the tricameral system and the Koornhof laws was articulated and at which powerful calls were made for an end to apartheid and the introduction of a democratic government. The government chose to ignore these (20)
protests and to proceed with its plans notwithstanding the almost universal resentment that they had generated within the black community. The conditions for heightened conflict were created. That is shown not only by the evidence of the accused, particularly accused nos. 19 and 20, but also by the evidence of Professor Gerwel, Mr Mabuza and Dr Van Zyl Slabbert. Conflict was predictable and conflict resulted and in those circumstances it would, in our submission, by simplistic to deal in isolation with the mobilisation of the mass opposition to the government and to the violence that (30)

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has been held to have been a component thereof and to ignore the underlying causes and other factors which led to such mobilisation and violence. Now in its judgment the court has referred to the frustrations, indignities and sufferings which have accompanied the political, social and economic plight of blacks and to the sense of rejection implicit in their being excluded from governmental decision making processes that affect their very lives. The nature and extent of the frustrations, indignities and suffering is apparent from the evidence and the grievances that have resulted from this(10) are characterised in the judgment as genuine and serious. Dr Slabbert, whose evidence on this issue was not challenged, said that they were serious and legitimate grievances affecting the economic, social and political conditions of the black community. He stressed their significance and importance as a cause of conflict and a source of polarisation and the extent to which these grievances are experienced and resented is demonstrated not only by the evidence of the accused but also by the evidence of witnesses called in mitigation, such as Mr Mabuza and Dr Motsuenyane. The finding that violence(20) formed part of the policy of the UDF is of course relevant to sentence and so too is the connection found to exist between the UDF and the ANC. But these are not the only factors in this case and they should not, in our submission, obscure other and important factors which are also relevant to an assessment, both of the sentence and for that purpose of the UDF. The evaluation of ideas, events and actions depends a great deal upon the viewpoint of the evaluator. You have heard evidence from Dr Motsuenyane, Mr Mabuza and Professor Gerwel, each from a different background, and each (30)

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describing the attitudes within different constituencies. If you add to their evidence that of the accused and other leaders of the black community who testified during the defence case you have here a comprehensive picture spanning a wide cross-section of opinion which portrays the freedom struggle in the ANC from the viewpoint of the black people in a way substantially different to that in which they are seen by most whites in this country. They see violence as having been adopted as a last resort. They see those who have done so and those who have associated themselves with the ANC (10) as being heroic and willing to make sacrifices to the struggle for freedom. There is of course no single way of looking at events. Different perceptions are usually the result of evaluations made in terms of different attitudes and different criterions and courts, whose task it is to uphold the laws of the land, cannot condone violence or refrain from punishing people who have broken such laws. But what they can do is to attempt to place themselves in the position of such persons and to ask the question why did this happen. Mr Mabuza answered the question this way, he said "apartheid is at the centre (20) of the conflict in our country and I think you have to live in a bantustan where people have been forcibly resettled on arid land, barren, where they can hardly subsist, where breadwinners have to migrate, become migrant labourers in order to feed their families, where families are broken, one has to live in a township ghetto and smell the stench and see the poverty that exists there to understand the civil unrest. One has to be subjected to the enforcement of laws such as the now abolished influx control law, the pass laws, the Group Areas Act, one has to be classified as a black and thus have his (30)

destiny/....

destiny predetermined in terms of the Population Registration Act to understand the frustration, to understand the bitterness, to understand the powder kegs that have been placed by the apartheid policy in this country. So I see apartheid as being the centre and the cause of such violence. I, however do not condone it because I do not think it solves the problems." That passage is in volume 460 at pages 28 749 lines 4 to 21. There is also the fact that the UDF is much more than a violent organisation. It was a mass based organisation that articulated the aspirations of the black community, that gave them hope, that indeed put forth an idea of non-violence within the community as a means of solving problems and that had, that not only articulated the aspirations of the black community but which had an enormous following. That too is apparent from the witnesses we called to give evidence to your lordship in mitigation. Now these policies which were actively propagated and promoted during the period of indictment were indeed policies that enjoyed widespread support within the black community. That is shown by the evidence of Professor Gerwel, Dr Motsuenyane and Mr Mabuza. It also reached whites, as appears from the evidence of Miss Nadine Gordimer and offered hope to them as well. And the central policies, the central policies were these, the abolition of apartheid, the unbanning of the ANC, the release of Nelson Mandela and other leaders, the return of the exiles and the creation of a non-racial and democratic South Africa. Those were the central policies that it propounded and your lordship has heard evidence in mitigation from a diverse range of persons explaining the importance of those policies and the hope that they are perceived to offer for resolution

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of conflict in this country. And it was on that basis that the UDF promoted these policies and encouraged reconciliation between whites and blacks and did so openly throughout the period that it was mobilising and organising resistance against the Black Local Authorities and the tricameral parliament. All this took place over a period of approximately a year during which none of the campaigns was violent and no violence occurred. Your Lordship has found that the campaign against the Black Local Authorities and that the campaign against the constitution did not involved violence. Now if the govern- (10) ment had responded constructively to these policies and to these calls that had such widespread support within the black community and had not chosen to push through its legislation against a strongly felt and clearly articulated opposition the course of events in 1984 and 1985 would almost certainly have been different. Dissent, based on legitimate grievances, will disappear or change its character if the grievances are addressed in whole or in part and in the complexity of causes that contributed to the unrest of 1984 and 1985 this failure on the part of the state and its officials to hear (20) the voice of the UDF and to respond to the political, social and economic grievances of the black community undoubtedly played its part. The making of a moral judgment is implicit in the process of determining an appropriate sentence. Given the legitimacy of the grievances of the black community and their long standing duration a question that has to be confronted before passing a moral judgment on the accused is what can a black person lawfully do that will bring about the fundamental changes which are necessary to redress their legitimate grievances. According to Mr Mabuza the answer (30)

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is very little indeed. His balance sheet after all these years of working within the government created structures, showed an ability to fend off the cession of his territory to Swaziland and the helping of two communities in the Eastern Transvaal to avoid being forcibly removed to KaNgwane. But he said he could point to little else and it was precisely because of that that he refuses to condemn persons who have turned to the armed struggle. And the same point was made by Professor Gerwel, and what they tell your lordship is that black people experience apartheid as being a violent policy through which they through the force of the state have been denied a say in the running of the country and have been coerced into patterns of living that are totally unacceptable to them. According to Dr Slabbert the causes of violence are to be found in these and other structural conditions in our society. He identifies racism, economic inequality and the absence of political redress as the primary causes of politically motivated violence. And of course possibly the most important of all must be the absence of political redress because the structures of the political process are the institutionalised structures through which conflict is resolved. They are created and designed for that purpose and if one of the important, and indeed the biggest section, of our community is excluded from that institution it cannot serve the purpose for which it was intended. Now history provides many examples of people who, having been excluded from society at various times and at different places in the world have resorted to violence. There is also, there are also examples in our own history in this country of whites having turned to violence in order to redress grievances that they had, though/....

though they, unlike blacks who have taken a similar path, did indeed have the vote. And in the present case an important element, and indeed a crucial element in passing judgment on the accused is that there is no place in the parliamentary process for blacks and they can only seek to further their interests through surrogates or through protests or through extra-parliamentary actions and history has also shown that successive South African governments have been largely unresponsive to protests. So it is not surprising that there should be resort to extra-parliamentary action and (10) that there should also have been a resort to violence, should occasion no surprise. The universal declaration of human rights which was adopted by the General Assembly of the United Nations on 10 December 1948 in the wake of one of the greatest upheavals the world has ever known warns of this danger. Your lordship is conversant with this document. In its preamble it records that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and that it is essential if man is not to be com-(20) pelled to have recourse, as a last resort, to rebellion against tyranny and oppression that human rights should be protected by the rule of law. And your lordship knows that if one goes through the catalogue of fundamental human rights recorded in the charter that you will find that the most important of these rights have been denied to blacks in South Africa. The right to be governed by people of your choice, the right to own land, the right to freedom of movement and the right to full citizenship. The universal declaration was intended to provide safeguards against conflict. It reflects the wisdom(30)

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of ages and the collective wisdom of the nations of the world and on Saturday of this week we will celebrate the fortieth anniversary of this document which has been assented to by all but two countries of the world. We ask your lordship to bear its terms in mind and its message in mind when you decided upon sentences to be passed. Dr Slabbert alluded in his evidence to the difficult role the courts have to play in a divided society and that is well illustrated by the present case. On the one hand there is the need for the court to preserve the integrity of the state, on the other (10) hand there is the deeply and sincerely held attitude within the black community that political leaders, including those who have accepted violence as a component of the struggle, are brave and respected people who have shown themselves willing to make sacrifices for their community. Dr Motsuenyane, in an eloquent and moving plea to your lordship, urged you to show understanding for the predicament of the accused and to pass a sentence that will promote reconciliation in our divided society. And there is good precedent for this for that is how our courts dealt with persons convicted of treason after (20) the 1914 rebellion. General De Wet, who was one of the leaders of the rebellion which resulted in much loss of life and damage to property, was sentenced to six years imprisonment without hard labour and a fine of £2 000. General Kemp, another leader, was sentenced to seven years imprisonment and to a fine of £1 000. General De Wet's case is reported in 1915 Orange Free State Provincial Division, 157. I do not have the reference for General Kemp's case because it is not reported. I think the decision is fairly well known. I once had the reference to it in the Transvaal Supreme Court but it is (30)

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referred to in 1974 South African Law Journal at page 67. And it appears from that Law Journal article that General De Wet was released on probation in December of 1915 and that General Kemp was released in the following year. So in all they served less than two years imprisonment for leading that rebellion. Now the defence witnesses called in mitigation stressed the importance of reconciliation and the adverse impact that a sentence perceived to be unduly severe would have on that process and this is a factor, and we submit an important factor, in assessing the interests of society (10) which is one of the criteria to which the courts have regard in determining what an appropriate sentence should be, and society of course embraces all the people of the country. And your lordship will not be unmindful of the fact that you are a white judge sitting in judgment on black leaders who occupy symbolic positions within the eyes of their community, that you are required to pass sentence on persons who are perceived to be representatives of their people and to express their aspirations. They are all important figures in their own communities. The UDF leaders are national figures. The (20) Vaal accused include important local leaders, leaders of the youth and other sections of that community. They are not mavericks. They are respected people. In your judgment your lordship observed that we are living at the time of the birth of a new South Africa. Now the accused are not colluding with foreign invaders, nor are they supporting a foreign enemy. They are South African citizens anxious, indeed demanding to participate in the creation of that new South Africa. They are seen by their community as patriots struggling for freedom, for their people, in a society that will accommodate (30)

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all South Africans. They are respected leaders and they do indeed have an important role to play in the new South Africa. And the witnesses called in mitigation testified to that fact. It is ironic in a way that at a time when the release of old leaders seems imminent a new group of young political leaders is about to be sentenced. There is, in our submission, every reason for them to be dealt with in a way that will make it plossible for them to play their part in the creation of that new South Africa. Now it is against that background that we would turn to deal with the position of each of the accused. (10)

I will deal with the position of accused nos. 19, 20 and 21 and my learned friend Mr Bizos will deal with the position of the other accused. And if your lordship has no objection I think I would like to continue and make my submissions to your lordship in regard to accused nos. 19, 20 and 21. Now they have all been in custody since their arrest on 23 April 1985. That means they have already been over three and a half years in prison. That is in fact longer than the period of imprisonment served by General De Wet and General Kemp. According to the judgment COSAS has been held to have been (20) the cause of the violence that occurred in seven areas. These are Attridgeville, De Duza, Grahamstown, Soweto, Tembisa, Tabong and Tsakane. In two areas, Mankweng and Craddock, the finding is that UDF affiliates were probably associated with the violence. In three areas, Graaf-Reinet, Huhudi and Worcester, violence is attributed to the overheating of the climate by affiliates of the UDF. In two areas, Leandra and Tumahole, violence is attributed to organisations that were not affiliated to the UDF but were closely associated with it. At Somerset East there was violence following a funeral (30)

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service at which the crowd is held to have been incited to violence and there was a finding that a UDF officer was present at the service and remained silent. And in Daveyton it is said that the UDF supported the struggle. Now the events are of course spread out over different periods of time. I do not want to go back and look at each of them in turn but most of these incidents took place after the detention of the leadership of the UDF in August of 1984, and at a time when the affairs of the UDF were disrupted by those detentions. Indeed accused nos. 19, 20 and 21 were all detained during part of the period during which most of these events occurred. Accused no. 19 was in detention from 2 October until 10 December 1984. When he came out of detention he was involved in the Black Christmas campaign but the evidence shows, and I am not aware of anything contrary in the judgment, that there was no violence associated with this. The evidence also shows that the UDF stressed that the campaign should be conducted without coercion. Accused no. 19 then took a holiday and shortly after that he had to lie low because other leaders of the UDF had been arrested and it was considered unsafe for him to attend the office regularly, and this continued until 23 April 1985 when he was arrested. So it was a period of disruption of the organisation's activities, the loss of its top leadership and the inability of certain of the important officials to give their attention to the affairs of the organisation. It was a period when events began to take on a dynamic of their own. Accused no. 20 was in detention from 21 August until 10 December and from then onwards his situation was much the same as that of accused no. 19 save that he did not take a holiday. He was arrested on

23 April 1985 as well. Accused no. 21 was a part time co-secretary of the Transvaal Region. He did not have his own office or desk at the UDF. He did not even have his own pigeon-hole. He went out of office on 9 March 1985 and he was also arrested on 23 April. Now some of the incidents attributed directly or indirectly to affiliates of the UDF occurred during this time or after the arrest of the accused. There is no evidence that any of the accused were direct participants in any of these events or at any occasion directly played any role which could be characterised as violent. (10) In none of the areas referred to were there any deaths. The damage that was done was in the main damage to immovable property. There was of course police action and certain protestors - and I have not examined that in detail - may have been injured or shot by the police during that period. Now the evidence does not show who was responsible for the deaths and damage in other areas and these events cannot be attributed to the actions of the UDF or its affiliates. Implicit in the judgment is an acceptance of the fact that there could have been other causes for such violence. Thus the finding that (20) in fifteen of the thirty-one areas mentioned in the indictment the state had failed to establish any linkage between the violence and the activities of the UDF and its affiliates. And there is, in addition, the evidence of Mr Mabuza that the violence in his region was not associated with any organisation. Indeed it was not suggested that the UDF had any affiliates in that area at all. The remoteness of the connection of the accused with the actual events which occurred in the areas where there has been found to be some linkage between the damage and the affiliates of the UDF is in our submission (30)

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a relevant factor to be taken into account in assessing the sentence. There is also the fact that most of the speeches and writings that have been referred to in the judgment were the words and deeds of persons other than the accused. The accused now face punishment partly and in a significant extent, as a result of those words and deeds, when the persons actually responsible for them have been acquitted by another court and carry no responsibility. And the irony that those others should go free and that these three should be symbolically the ones to be punished will not be missed. (10) Let me say a few words about each of the three accused on whose behalf I am now speaking. You have heard the evidence of the background of Mr Molefe. His is a story of a struggle in the face of the most appalling adversity. He triumphed when most would have failed. He has quite extraordinarily emerged as a man of great character, personality and of ability. And in all that he has emerged without bitterness or a desire for retribution. He is obviously a man of compassion with a sensitivity for the suffering of his fellow human beings. He has acted not in the furtherance of his own (20) narrow interests but in the advancement of the cause of his people. And that of course is true of the others as well. Mr Lekota is a man with natural leadership qualities. He too has displayed a commitment to the creation of a non-racial democracy in South Africa. He is an eloquent speaker and the theme of racial reconciliation runs through his speeches. There is no trace of bitterness or of self pity in any of his speeches or writings. He has a vision of a different future for his people which he has pursued fearlessly and with determination. I asked Mr Lekcta whether there was anything(30)

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particularly he wanted me to say when I addressed you on his behalf and he replied that he would serve his sentence without any bitterness. Mr Chikane's involvement in the affairs of the UDF were at a lower level than that of the other two. He did not have the same high profile that they did and on the few occasions when he spoke publicly he showed himself to be a person anxious to resolve conflict. We have referred to these occasions in our argument at the end of the trial and there is no need for me to repeat them now. Your lordship will find the passages at pages 25 483 to 25 485 of the record. It (10) is a tragedy that our society should be one in which people such as these find themselves in conflict with the state, that this should have happened in the circumstances that exist in our country is perhaps understandable though nonetheless tragic. For they are people of courage and commitment. Their life is testimony to that and it is people such as them who throughout history have sacrificed their personal lives to the struggle for freedom. It is not surprising, therefore, that these three persons should have taken up the struggle of their people. And your lordship now has to decide how to (20) deal with them, to do so severely and cause dissent can affect perceptions and can bring out feelings which are latent within our society. To do so with understanding might help to lay a foundation for reconciliation and a lessening of the conflict. The choice is yours.

MR BIZOS ADDRESSES COURT: The seven accused found guilty of terrorism by your lordship are entitled, with the greatest respect, to have publicly stated what sort of terrorists they are. Your lordship has given an answer to that question on page 923 of your lordship's judgment. The indictment that (30)

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they could have faced or that they should have faced on your lordship's finding is an indictment which really should have been drawn in half a dozen lines. Your lordship's finding on page 923 could have formed the basis of that indictment. We find that accused no. 5, and your lordship deals on the same basis with the others, with the intent to induce the town council to resign or at least to repeal the rent increase organised a stay away and march which were aimed at bringing about and contributing to violence and that he encouraged others to participate. Consequently he is guilty of con- (10) travening section 54(1)(c)(2) and (4) read with 54(8) of the Internal Security Act read with section 84(1)(f) of Act 32 of 1961. This offence is called terrorism in the act. I read this deliberately in order to draw to your lordship's attention that none of the connotations of an emotionally charged word such as "terrorism" is really applicable to any of the seven people. I am not even going to try to tell your lordship what the emotions that are aroused by the use of the word "terrorism". But your lordship will, in our submission, take into consideration that this statutory terrorism of (20) a legislature in which the accused are not represented may be an ugly name to put on them but with the greatest respect your lordship will be careful not to allow the emotions that are aroused by the use of the word to misinterpret the real act of which they have been found guilty. The act is that they addressed meetings, they used strident language, on your lordship's finding, they called councillors insulting names and they took part in the organisation of a march which was destined, on your lordship's finding, to induce the town council to resign or to abandon the rent increase. We (30)

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would submit that an analysis of section 54 of the Internal Security Act shows that even in the various types of statutory terrorism created this must be by far the least serious. What the section punishes is conduct which is intended to overthrow or endanger the state authority in the Republic. That is not the case here. Achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the Republic. That is not present in relation to these accused. (c) your lordship found to be present at the local level, to induce the government of the Republic(10) to do or to abstain from doing any act or to adopt or to abandon a particular standpoint and put in fear or demoralise the general public, a particular group or the inhabitants of a particular area in the Republic and to induce the said public or such population group or inhabitants to do or to abstain from doing any act. Now it is with that intent that the greatest punishment must be reserved for those who actually commit acts of violence under sub-section (1) which your lordship did not find in this case. Your lordship found them guilty of performing an act aimed at bringing about violence.(20) Your lordship did not find under sub-section (3) that there was a conspiracy among them and your lordship did find that they incited the performance of an act aimed at causing violence. So that in our respectful submission this is the least of the various permutations that the act actually, the least serious of the various permutations. Now what we are asking your lordship to take into consideration is this, that this indictment could have been formulated on a page or page and a half, particulars could have been requested, most of the facts in relation to the meetings having taken place and (30)

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the march having taken place and the accused having participated in that march would have been, as they were before your lordship, common cause and there could have been a comparatively short trial at which their guilt or innocence could have been determined as to whether or not they had that particular intent. That, however, was not to be. Your lordship had to listen to almost a dozen witnesses - and we would submit falsely deposing that the accused actually incited violence and that they actually committed acts of violence. Those allegations were not proved. It took the accused over three (10) years to disprove those allegations and that is a factor which in our respectful submission must be taken into consideration, not on the basis that it is inevitable that trials become lengthy but on the basis, we would submit, that reasonable foresight on the part of the state would have prevented this injustice being done to these accused from the Vaal. Speaking of foresight it is really the basis upon which the accused themselves have been convicted of contravening this section and what I would appeal to your lordship to take into consideration, the fundamental error that can be committed by (20) reasoning by hindsight. What happened in the Vaal is tragic, councillors were killed, dozens of people were shot by the police, the whole community was disorganised. But that is not the responsibility of the accused. This is one of the main reasons why Professor Helm was called. In order to persuade your lordship that blame has to be apportioned. But let me deal first with the question of forseeability. There can be no doubt, on your lordship's finding, that this was the purpose of the march, that they intended to get to Houtkop in order to induce the councillors to resign or to reduce the (30)

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rental. It is implicit in your lordship's finding that that was the aim of the march, on the finding, and not what the witnesses whose evidence your lordship could not accept may or may not have said. Now could they have foreseen what in fact happened on the facts presented before your lordship? Your lordship found, and we must accept as a finding, that they performed acts which were aimed at bringing about some form of violence. Your lordship spoke of coercion, of people not to go to work. Let us try and put, with respect, ourselves in the position of the accused in the meeting of 2 September (10) where they discussed how the march should proceed, when marshalls were appointed, when it was emphasised that they should get to Houtkop in order, on your lordship's finding, to get the councillors to resign or to reduce the rent. They could not have known how many people were going to turn up for this march. They did not know that violence would have broken out the night before at Bophelong. They would not have known that far away from their march very early in the morning of the 3rd that violence would have broken out in Sharpeville. I do not want to repeat what we argued but Brigadier Viljoen (20) did not expect any trouble. He was not told by the local security police officers of any march, although it is clear that the then Captain and later Major Steyn knew about it. Why should one say with hindisight that they must have foreseen the catastrophic results? Your lordship has not found any one of them to have committed any act of violence, nor to have incited anyone to have committed any act of violence. I am dealing with the Vaal accused - I am excluding for this purpose Mr Manthata, accused no. 16. We submit on the question of punishment, in the absence of any direct (30)

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intent but a constructive intent such as the sub-section requires. And in the absence of any evidence that they themselves participated in any act of violence or incitement of violence thereafter - we are not unmindful of your lordship's judgment of what happened in the Vaal afterwards, particularly in November and continued on into 1985. As your lordship will be referred to later most of the accused that have been convicted by your lordship from the Vaal were in custody at the time. Nor can they be held responsible for anything that happened thereafter in the rest of the country. We would submit, therefore, that your lordship should try to disabuse your lordship's mind, from your your lordship's mind all the terrible things that happened in the Vaal where people were killed, where property was burned, where life was made particularly difficult for many and not only those who were councillors. All those facts or happenings are not the responsibility of these accused. The other factor that your lordship will, with respect, take into consideration is this - there are lots of convictions for terrorism, for taking up AK 47's, planting bombs and limpet mines and that is terrorism. And sentences are imposed on young people who take up those acts varying from three, ten, sometimes fifteen years, where sometimes life has been lost and sometimes serious injury has been inflicted. Your lordship's sentence on these accused from the Vaal should be so vastly different from that sort of sentence lest the impression is created that if you publicly call for the redress of grievances and your calls are ignored - and on the evidence it was thought necessary to go in large numbers so that you may be heard, if that is going to be terrorism and if that is going to be

punished/....

punished in the same way as taking up of arms what is the purpose of peaceful protest in the country in order to redress grievances. Your lordship with respect does not live in a vacuum. There have been protest meetings and marches from which no violence has resulted and although your lordship may be of the view that a long term of imprisonment in this case may induce others not to hold protest meetings or call councillors by ugly names or be restrained from holding marches it may well be that the holding of protest meetings and participating in marches is so much a lesser evil than the other(10) that your lordship's sentence should not equate them at all but there should be a very substantial disparity for offences in which violence was plotted or actually committed as against the resultant or incidental violence which may arise as a result from otherwise peaceful protest. We submit that any sentence imposed on any of these accused that would give that impression may, with the greatest respect, be counter-productive. The other evidence which we would ask your lordship to take into consideration is Professor Helm's evidence which was not challenged, that often marches or gatherings create (20) their own momentum, that although they may have been planned for one purpose they may finish up differently to what they were originally intended. We are not unmindful that this may have been part of your lordship's reasoning in deciding that the conduct was foreseen but we would also ask your lordship to take into consideration Professor Helm's evidence that these facts in relation to crowd control and the behaviour of crowds are not generally known except to social scientists of her calibre. And the fact that there was difficulty in Sharpeville in 1960 and difficulty in Soweto in 1976 and (30)

some/....

some difficulty in Tumahole in 1984 may well be contrasted with other perhaps even bigger marches in South Africa's history which in recent years, and during the same period, which did not lead to any difficulty. It is a notoriously known fact that a single senior police officer turned around some 30 000 people in 1960 shortly after Sharpeville by merely promising them that he will arrange a meeting between its leader and the Minister. And this is where the apportionment of blame comes in. There was no communication and if your lordship has regard to the table appearing on the second (10) and third pages of Professor Helm's report and scores the conduct of those responsible for law and order, not in relation to the Vaal in general, it may well be that what may have been contained became a general tragedy because people are treated on the same basis, because there was trouble at Caesar Mo'jeane's and because there was trouble at Dlamini's house therefore the people marching, three or more thousand, even though they may have been singing had to be dispersed by teargas and rubber bullets rather than someone asking a couple of simple questions when the march slowed down, it is common (20) cause that that is so. It came almost to a stop, "Where are you going and why" and "What can we do in order to avoid further trouble". So both on the basis, we submit, of hindsight reasoning and on the basis of the apportionment of blame the persons before your lordship cannot be held responsible for it. I intend dealing with each accused individually.

In relation to accused no. 5 your lordship will take into account that he actually spent 1 033 days in custody of which 260 days were in social isolation. His personal (30)

circumstances/....

circumstances your lordship will find on page 10 732 to 10 740. He was described by your lordship as bright and talented. He is a person who has a previous conviction for public violence. It was, in our respectful submission, a long time ago and although there can be a debate on its relevance on this issue even if your lordship considers it relevant the act of which he has now been found guilty is materially different.

COURT: Why do you say there can be a debate about the relevance? (10)

MR BIZOS: Because that was when he was 20 years of age. He deliberately committed, with special intent, an unlawful act. This was not a deliberate act to bring about violence. There is a fundamental difference between what he was, I think he was then 19, together with his friends throwing stones. There is a fundamental difference between that and his standing up at a public meeting, openly in the presence of newspapermen or women saying that at another meeting a resolution was taken to have a stayaway. Your lordship has found that that was aimed at bringing about, there is a completely different intent. (20) Your lordship has found that he ought to have foreseen. That is a, there is a fundamental difference between the two, the actual and the constructive intent. There are a number of things that I want to remind your lordship about accused no. 5, Mr Malindi. In your lordship's judgment, with the greatest respect, your lordship's impression was that this was a dedicated youth leader. Yes that he was a youth and that he is a leader and that he has some dedication as a result of his having to deny that his father was his father so that he should not be taken in for a pass offence, yes that probably (30)

gave/....

ave him a considerable amount of motivation to become dedicated. But let me remind your lordship that his role in fact was a secondary one. At the formation of the VCA the uncontradicted evidence was that he was at his friend's wedding. On the evidence he was asked to speak at the afternoon meeting of the 26th at the last minute. Your lordship has not found that there was a conspiracy between him or Raditsela or anyone else. In fact his failure to mention the stayaway during the morning meeting is valid corroboration for his statement to your lordship that he was requested to speak as one of the (10) youth by Raditsela at the last minute. Your lordship of course poses the question, correctly in my respectful submission, would Raditsela have left it to chance. But of course the facts show that the march was actually proposed by someone else and it may well be that Mr Raditsela had sent another or others to this meeting for this purpose and that Mr Malindi, accused no. 5, in fact pre-empted that person by suggesting the stayaway. There is support for that, on your lordship's finding. Accepting what your lordship called the unchallenged evidence of Masenya, that before Mr Malindi, accused no. 5 (20) spoke Mr Matlole, accused no. 17, if he had not made a very clear call at least had alluded to a stayaway on the 3rd. Which is further supported by your lordship's finding that a decision taken at another meeting on the 25th would of necessity have spread, that information would have spread in the community. Your lordship will recall that it was on the meeting of the 25th. So that to elevate accused no. 5, Mr Malindi, as the other ego of Mr Raditsela is not supported by the facts in our respectful submission. He must be treated in sentence, in our respectful submission, as a young (30)

person/....

person with a strong sense of grievance, bright, intelligent, but who did not advocate violence. Your lordship will recall that there were days in this trial, many days in this trial when evidence was led not affecting any particular accused. Well I am pleased to inform your lordship that he actually used that period in order to study. He is a registered student at Unisa and he has just written - he hopes successfully - the first series of examinations. And this is the difficult task that your lordship has. Three and a half years of this young person's life have been wasted. If he committed any offence (10) he was entitled to have had it dealt with within a reasonable period of three or six months. A term of imprisonment and particularly any term of imprisonment of any length can only further waste his young life. The period of imprisonment will not wipe away the bitterness. It will not make his grievances disappear, personal or communal. He showed by his employment before his arrest that he is a person who can make a useful contribution to society and we would submit that the mitigating factors in his case are overwhelming. Your lordship has his present age as 28. Your lordship will recall that (20) gave your lordship his personal circumstances in relation to his unemployed father and his mother being employed as a part time domestic worker in order that the family may be kept together. I now want to turn to Mr Mphuthi, accused no.7.

COURT ADJOURNS FOR TEA. COURT RESUMES.

FURTHER ADDRESS BY MR BIZOS: May I just add in relation to Mr Malindi, accused no. 5, one correction that I said it was three and a half years. It is in fact over four years. He was actually arrested on 23 September 1984. One gets a period in one's mind and ... (30)

COURT:/....

COURT: Yes. Was he not out on bail?

MR BIZOS: Yes he was out on bail. The dates on which, the days of actual imprisonment are actual days calculated, excluding the bail. So, but the time of his involvement is over four years in the pre-trial and trial procedures. And also because they had to attend court on the part of the case that did not really affect them, and because of the conditions of course your lordship will bear in mind that they could not really lead ordinary lives even during the period when they were out on bail. Now in relation to Mr Mphuthi who is now 51 years of age he spent a total of 762 days in prison of which 204 were in social isolation. He was arrested on 18 November 1984 and he has been involved in this process for over four years. On your lordship's findings that he attended the council meetings of the UDF, attended the Daleside conference, I would submit, with respect, that your lordship must have got the impression that Mr Mphuthi does not in fact initiate anything. Being associated with others he probably accompanied them rather than the initiator of any particular matter. He did not speak at the meeting of the 26th. He took part in the march and this is perhaps a significant fact. There was no evidence that he was on the march, from the state. He candidly admitted that he took part in a part of the march. Your lordship will recall the evidence of the bicycle in connection with that. I do not know whether your lordship actually made a clear finding one way or the other but what is clear is that there is no evidence from the state that he actually took any leadership role at all on the morning of the 3rd. His taking part in the house meetings, the evidence was uncontradicted that the house

meetings did not concern themselves with the planning of any act which was intended or aimed at disturbing the maintenance of law and order. His involvement must, as small as it was, his degree of foresight must have been commensurate with his lack of taking any leading part. His personal circumstances appear on page 10 434 to 10 444 of the record. And what we submit in relation to him is that he is a self employed person in his community, has in fact been removed from his community for a period of over four years, even though he was amongst the first to be let out on bail and he, together (10) with others, spent the least time in custody.

Mr Nkopane, accused no. 8, is now 44 years of age. He was arrested on 18 November 1984 and he therefore also has
C.1570 been involved in this for over four years. He also has spent 977 days in custody, 204 of which were in social isolation. It is of course correct that he was the chairman of the meeting of the 26th at which the stayaway and the march were agreed upon. He also at the request of Raditsela was apparently the person responsible for making the placards early on the morning of the 3rd and he took some part in the forma- (20) tion of the march. But your lordship will recall from his personal circumstances from 8 718 to 8 731 his family circumstances and long period of employment with the same employer. What I submit would have struck your lordship in relation to Mr Nkopane is that he actually became a leader by default, with due respect to him. He was the third or fourth choice for the chairmanship of the meeting of the 26th and your lordship will recall that he actually had to be helped out when there was the hiccup at the meeting with Mr Masenya, had to be helped out by the erstwhile accused no. 10, Mr Vilakazi. His attendance (30)

at/....

at the formation of the VCA appeared to be incidental and his attendance of the house meetings, it is common cause there was no planning of any act aimed at any of the results that subsequently emerged. He too would not have been in a position to foresee the consequences of those actions. Your lordship has acquitted Mr Vilakazi, accused no. 10. I take that as a starting point as to what the irony of fate, one might say, brings about which is after all a relevant factor in passing sentence. We have, and what I am saying is I am not arguing against your lordship's judgment in relation to the offence of Mr Nkopane but the person who did have a leadership position, accused no. 10, Mr Vilakazi, was in fact the most senior VCA person at a meeting, on the platform at which the stayaway was agreed upon, the march was agreed upon but because he had a trade union conference in Natal he did not attend the march. And on your lordship's finding that it is both really that make the offence charged. And then one takes the irony of fate with the erstwhile accused no. 2. He attended three meetings in Sharpeville and the march as the leader of AZAPO in the Vaal. Why I am relating these facts and ask your lordship to contemplate on them is this, that even though your lordship found Mr Nkopane to be guilty of the offence of terrorism which is really an amalgam of what the erstwhile accused no. 10 did and what the erstwhile accused no. 2 did but because each one of them did not do both, through accidents of fate, they are acquitted and this is the offence of terrorism. And the point that I make is this that this form of terrorism, or this offence is so easily committed, on your lordship's finding, by people who come together in order to address their grievances. There is no suggestion that

Mr Nkopane did anything on this march which was more than what the erstwhile accused no. 2, Mr Hlomoka, did. And we would submit your lordship's findings in relation to these accused is evidence of the ease with which people can fall foul of this far reaching section in the act. Legal liability is one thing, your lordship has made a finding on that and I have to argue the case on that basis. But what is the difference in moral responsibility. After all moral blameworthiness is that which determines the sentence that one is to suffer. The other factor in his favour is that your lordship relied on what was happening in the various areas, the destruction in the various areas on the morning when people, on your lordship's finding must have seen on their way to the march or whilst taking part in the march. Your lordship's finding in relation to the erstwhile accused no. 2 that he was coming from zone 3 and the evidence was that that was an area which was quiet your lordship will also take into consideration that Mr Nkopane was actually coming from the same area in zone 3 so that he would not have had the notice that others might have had who came from zone 11 and other places. I may say that that point applies equally to Mr Malindi, accused no. 2, although your lordship ....

COURT: No. 5.

MR BIZOS: Oh no. 5, I beg your pardon. No. 5 although your lordship, if my memory serves me correctly, may have been sceptical about his having spent the night in zone 3. Nevertheless there is no evidence to the contrary and he was not challenged on that aspect. So that that point, in our respectful submission, applies with equal validity to accused no. 5, Mr Malindi.

I now turn to Mr Ramagula, accused no. 9. He too was arrested on 27 November, no I beg your pardon, 23 November 1984 and he has been involved in these proceedings for over four years. He was one of the first to be granted bail on 10 June, no I beg your pardon, he was one of the first but he has spent a total of 956 days in prison of which 199 were in social isolation.

COURT: What does that mean? Does it mean solitary confinement or does it mean something else?

MR BIZOS: I use the words social isolation because the police object to solitary confinement because they say they once a day see a warder that brings them food and that sort of thing and it is not solitary confinement and I was picked out at an inquest where I was cross-examining so I have changed my ways.

COURT: I am not picking you out. I just want to know what you are meaning.

MR BIZOS: What in truth and in fact is that you are alone, you are ...

COURT: In a cell on your own.

MR BIZOS: In a cell on your own. You cannot see relatives, you cannot see your lawyer and you, but you do not see anyone but those who guard over you, whereas solitary confinement may be throw the key away type of thing. There is a sensitivity about solitary confinement, this is why I use social isolation. Which in itself is a very drastic punishment. Now your lordship will find his personal circumstances in 9 197 to 9 204 and if ever anyone had a personal grievance to want to lead a march, as he did, Mr Ramagula was one. I want to recall the removal of his doors from his house to your lordship's

memory/....

memory but I do not intend giving your lordship the detail. I do not think that many of us will forget his description of what happened. Now he is the person who is a young diabetic, in the medical sense, and your lordship has heard the evidence of Professor Kalk. Of course the prison can deal with a diabetic. We have no doubt that if an effort is made it can be done, save that his experience and in three other cases - I am sorry two other cases in Dr Kalk's experience, this has not been done. Your lordship will have regard to the contents of the letter to the Commissioner of Police when we were at (10) Delmas. What has happened here, and I do not want to bother your lordship with details but even after Dr Kalk gave evidence here there were occasions on which his insulin was not given to him or given at the wrong times. It is not for lack of goodwill or lack of care but a prison is not geared for personalised attention and we would submit that if an unsophisticated person such as Mr Ramagula found himself with personal grievances in the middle of a situation where he led a march and let it be remembered that that was not the evidence of the state. He believed that he was doing the right thing, that (20) at a very early stage it was put by me on his behalf that he led the march, he volunteered to lead the march. Now four years away from his home in the Vaal, with his health problem, may be thought to be sufficient punishment for a man who has a disease which will affect his expectation of life and where imprisonment may, due to the lapse of the changing of the guard or the going of the particular warder on holiday - and there is no reason to believe that there was any less care exercised at Modder B or at the Pretoria prison that there is going to be exercised in the future. And the fact that a (30)

professor/....

professor of medicine had to give special instructions to a lieutenant both in writing and communicate with her telephonically from time to time in order to secure proper treatment is further evidence that imprisonment for him would be an additional burden which we submit he should not be called upon to bear. There is of course on Professor Kalk's evidence a risk of permanent damage to his health as a result of the regimen that prison life compels people to live under because of, well prisons are not geared to serve six carefully planned meals a day, nor to inject people in the right place twice a day. (10)

COURT: Well let us say it is not a hotel with room service.

MR BIZOS: No. No certainly not. But when it comes to danger of health I submit that we should be particularly helpful. It is not even a room with an alarm bell when there is great danger. I now turn to Mr Mokoena, accused no. 11, who is 36 years of age. Your lordship will find his personal circumstances in volume 212, pages 11 218 to 11 229. He spent, he was arrested on 14 November 1984. He has spent 981 days in prison, 208 in social isolation. Now on your lordship's findings that intended march actually broke out into violence, unlike the Sebokeng march and your lordship in your lordship's findings found that Mr Mokoena was responsible for that. Now what I want to submit to your lordship is this, your lordship if need be should make a specific finding - the evidence was not contradicted - that he was at the meeting of 2 September at the Small Farms Catholic Church. It was intended that both marches on that evidence and on your lordship's finding, that the Sebokeng march was not intended to go out and commit acts of violence, that they should have been similar marches. (20) (30)

The fact that the gathering at the square in Boiphatong went off to the house of Mpondo and stoned it is completely consistent with Professor Helm's evidence that what is intended at times does not come about and we submit that having regard to his personal circumstances and more particularly the evidence of the lack of pre-planning of any such matter from Mohape and others, that having regard to the fact that four years of his life has been taken up and the other similar considerations he too has already paid heavily for his involvement.

Mr Hlanyane, accused no. 15, this is our respectful submission is a minimal involvement. For all practical purposes he became involved only late in August. If my memory serves me correctly he only attended one of the house meetings, he did not speak at the meeting of the 26th. It is true that he was elected treasurer of the area committee but I do not know, your lordship having heard of the paltry sums involved whether that makes him a particularly important office bearer of any important committee in that organisation. And his participation in the march was incidental. I do not want to say much more because if my memory serves me correctly your lordship in your lordship's judgment already, dealing with the legal liability, foreshadowed the mitigating factors that applied to him. He was detained on 17 December 1984, he has spent 733 days in prison of which 175 were in social isolation.

I now deal with Mr Matlole, accused no. 17 who is 64 years of age. May I return to no. 15, Mr Hlanyane's employment history which was a good one as an electrician employed by Escom if I remember correct and his personal circumstances perhaps I should give to your lordship. Well he did not of course give evidence and they have to be, the others spoke of him,

of being an electrician and the bail papers which really were admitted in that regard, his personal circumstances. But he is a trained person.

COURT: What is his age?

MR BIZOS: Forty my lord. I now turn to Mr Matlole. Your lordship found him to have been a particularly active person in the Vaal but I submit that his personal circumstances, his present personal circumstances are such that he should be dealt with on the personal circumstances now prevailing rather than his activities then. He was detained on 12 February 1985. (10) He spent 891 days in custody of which 118 were in social isolation. Your lordship heard from others that he is a family man with children and that he was self employed as a collector of dry cleaning, the manner in which he made a living. The evidence of the person with whom he was friendly, Mr Mphuthi, that he has suffered a lapse of memory was not contested by the state. Your lordshiop will recall what Mr Mputhi's evidence was, that he did not remember from day to day who visited him before and that he had difficulty in orientating himself as to time and place. He, this picture of course is corroborated (20) by the two reports that have now been placed before your lordship by consent and it is clear that the condition from which he is suffering is, the organic condition is atrophy of the brain and the functional condition is senile dimensia. Once those facts are admitted we would submit, with respect, your lordship will also recall that his general health, as is inevitable with this sort of condition, has been particularly bad. Your Lordship will recall that leave was granted, with the consent of the state, for him to undergo an operation to the uritary(?) tract and with senile dimensia setting in (30)

matters/....

matters such as blood pressure, sugar and other conditions make it, make this life difficulty. We submit that his case is no different to that of Mr Mpetha whom your lordship has seen on video. And the case is reported in the appellate division, 1985 3 SA 688. The case really was concerned whether the amendment of the, or rather the replacement of the Public Safety Act for the Terrorism Act which provided for a minimum sentence was retrospective or not or whether a person who had committed the offence whilst that act was there had to receive a minimum sentence of five years. His lordship Corbett, J. (10) at page 706 has the following to say - it is a very short judgment dealing with the situation that we are faced with here:

"In this matter I concur in the judgment of Van Heerden, J.A. and in the order that the appeal should be dismissed."

I may say that it was a divided court of three to two as to whether it was, whether a minimum sentence should be imposed or not as a compulsory sentence.

"I do with regret for this case illustrates the injustice which can flow from a statutory enactment which lays down a compulsory minimum sentence and takes away from the (20) trial judge the discretion which he normally enjoys in the imposition of sentence. In this case the trial judge, having held that he was driven to the conclustion that he had no discretion to impose a sentence of less than five years imprisonment stated with reference to the appellant (that is Mr Mpetha):

'He is 74 years of age and is very ill. Dr Disler has described in detail the seriousness of his condition which flows from diabetes and its complications. He must shortly undergo an amputation of (30)

the/....

"'the left leg because of gangrene. His expectation of life is very limited and is no likely to be more than a couple of years at best. Even given the best medical treatment it is clear that he has not long to live. Although what he did is undoubtedly serious I think that justice does not require that he be imprisoned.'"

I may say that it was a direct call to violence, his offence.

"'The end of his life is too near for such a punishment to be of any benefit either to him or to society. Because of his very special circumstances compassion should in my view be the overriding consideration. If it were in my power to do so the sentence of imprisonment which I would have imposed would have been totally suspended.'"

This was the judgment of Williamson, J. as the court of first instance.

"In the result the trial judge imposed a minimum sentence of five years imprisonment. The difference between this and the wholly suspended sentence is manifest. Although there is a difference of opinion in this court as to whether or not the compulsory minimum sentence provided in section 2(1) of the Terrorism Act 83 of 1967 was applicable in this case it is the considered view of all the members of this court that such a minimum sentence is wholly inappropriate as far as the appellant is concerned and that a wholly suspended sentence should have been the proper punishment. In the circumstances I echo the hope expressed by my brother Van Heerden that the appellant's sentence will be ameliorated by administrative action."

We/....

We submit that on the facts before your lordship and insofar as a clinical picture may be necessary to decide the precise nature of his medical condition your lorship's observation of Mr Matlole during these long years of trial must inevitably have led your lordship to the conclusion that he is an old and broken man who cannot be of any danger to society or to anyone else in his present condition and we submit that his is a very clear case for a wholly suspended sentence.

The other person is Mr Manthata, accused no. 16. His personal circumstances are to be found in volume 274 on pages 14 934 and at pages 14 936 to 14 937. You also have had the evidence of Father Thlagale who gave evidence before your lordship very recently in Volume 460 on pages 28 779 line 14 to 28 781 line 4. You also have had the evidence of Dr Kistner in volume 460 of the evidence before your lordship. What is clear from the evidence as a whole is that the act which your lordship found him guilty of was an aberration, having regard to his past history. It is not only he that spoke of his personal circumstances and his general reputation but your lordship will recall the evidence of Dr Kuswayo, the evidence of accused no. 19, the two witnesses who gave evidence in mitigation that he was a high profile person with the qualities that had been described. Your lordship will, with respect, punish him on the basis that it was an aberration such as has been described. What is also clear is that there is no nexus between his conditional incitement to violence and anything that happened in the Vaal. The events described by Mrs Mokati to have taken place on 20 August 1984 in Sharpeville are not related to this incitement. The unbridled violence that there was in Sharpeville on the morning of

the/....

the 3rd could not have been as a result of anything that was said at the meeting of the 19th and the reason why I say this is that your lordship has had a detailed description of what has happened that morning from Nozepa Mjeza whose evidence was uncontradicted and which is indeed corroborated by other evidence, that she herself was called a councillor and that she and her father were endangered. On your lordship's findings she was one of the persons who spoke at the meeting of the 19th and had there been any nexus between this riotous group and anything that was said one would have expected some form of recognition from the large group that was responsible on the attack on her. Your lordship has found that he had no business in the Vaal. We must naturally accept that for the purpose of your lordship's judgment on the legal liability of the accused but the uncontradicted evidence on sentence would tend to show, with respect, that he had or that he was at least expected to do this sort of work, not necessarily to address a particular meeting but to keep in touch with whatever was going on. And for a person who is involved in public life to be called upon to address people is not an unusual occurrence. The meetings at Sharpeville were materially different to most of the other meetings that your lordship saw on video and whatever limitations there may have been on your lordship's judgment on the film made by Mr Kevin Harris, if the evidence is to be believed that the meeting of the 19th was substantially similar to the meeting of the 26th, and we submit that there is no reason to hold otherwise, then it was not the type of meeting where there would be the excitement. It is significant that after these words were uttered, on your lordship's finding, that the next meeting really continued with

discussion/....

discussion as to what is to be done about the rent, the consulting of lawyers in order to determine whether the rent increase could be challenged or the drawing of a petition in order that the councillors may not go on with the proposed increase. The uncontradicted evidence before your lordship, that this is an avowed Christian who went about the business of his employer, whose faith has been testified to by what I would submit was a particularly good witness and whose dedication to reconciliation was deposed to by both his parish priest and Dr Kistner. He spent, like the others, a long (10) time - although he was only detained on 15 February 1985 - he has spent 852 days in custody of which 115 were in social isolation. I want to make certain general remarks in conclusion and again refer to the report of Professor Helm. In apportioning blame it would be simplistic, in my respectful submission, to punish severely people who have been found guilty of the offence of which your lordship has found them guilty without taking into consideration firstly the ineptitude of those in authority. They would not listen. Your lordship heard evidence, and was correctly critical of the (20) accused and the defence witnesses who said why did you not go and talk to the councillors. The question is that is equally valid is why did not the councillors talk to the people that they are supposed to have governed. The uncontradicted evidence of state and defence witnesses is overwhelming, with due respect to your lordship's judgment, that it was not only four councillors that were corrupt. The evidence is overwhelming of general corruption. When 22 bottlestores are shared out among 14 councillors in contravention of the section that says that they will not vote on matters on (30)

which/....

which they are personally interested is corruption. Charging themselves 25 cents a square metre for shop premises and six or eight times that for rent or service charges for homes is corruption.

COURT: Was that not an historical figure charged by the administration board and later by the development board?

MR BIZOS: But the evidence was whether they considered increasing it, and someone did and the unanimous, and the decision was no we will not increase the shop - for people in authority to say that we found a ridiculous rent for our shops and (10) we need to increase our income to leave their own rent at 25 cents and to increase by over 20% the rent of the people that they are supposed to govern in a wide sense is corruption. But Professor Van der Walt's report says that he spent months in the Vaal shortly after these events took place and he could hardly find a single person who had a good word to say for the Lekoa Town Council. Now if that is the finding of Professor Van der Walt - and your lordship heard from so many witnesses of what is happening there - to confine the corruption to merely the three or four persons who were actually convicted (20) of corruption would not, in our respectful submission, be taking a broad view of the facts of the case for the purposes of sentence. This brings me to the paragraph on the second last page of Professor Helm's report. I wonder whether your lordship remembers the name Kodisang.

COURT: Yes I remember Kodisang.

MR BIZOS: Your lordship will recall that he was the unfortunate recipient by mistake of a slap intended for another councillor and I remember your lordship's remark at the time that blessed be the peacemakers in relation to Mr Kodisang (30)

because/....

because actually trying to stop the woman from slapping the other councillor he got the slap himself. Well it would appear that his peacemaking efforts have now enabled him to oust Mr Mahlatsi who was the head of this council against whom there were so many complaints. And your lordship has heard of the spirit of reconciliation that he is trying to imbue into the community. The Vaal triangle, as other townships in the country, have got to come to terms with themselves, they have to solve their problems and the question to be asked which is relevant to the issue now before your lordship is (10) are the people who actually were in the forefront in protesting at meetings and marches against the erstwhile council to be punished in a manner which will assist or disrupt the process of reconciliation that one is hoping is taking place. We submit that those are the factors that your lordship will take into consideration in sentencing the accused from the Vaal. Thank you my lord.

(20)

(30)

MNR. JACOBS SPREEK HOF TOE TEN AANSIEN VAN VERSAGTENDE OMOMSTANDIGHEDE: Edele, met respek ek stem saam dat die moeilikste taak wat die hof nou het, is die oplegging van 'n gepaste vonnis. Daarmee gaan ek honderd persent eens, maar my respekvolle submissie aan die hof is dat die verdediging in die hele betoog, soos ek dit gevolg het, het oorvereenvoudig.

Die eerste aspek wat ek onder die hofie van oorvereenvoudiging wil noem is die kwessie dat - ek wil eers vat wat mnr. Bizos behandel het, die verskillende beskuldigdes, die sewe beskuldigdes, dat die werklike bevindinge van die hof ten (10) opsigte van elkeen van hierdie beskuldigdes is nie bespreek of daaromtrent iets gesê nie. Die indruk wat ek gekry het van mnr. Bizos se toespraak was dat al hierdie mense blykbaar toevallig betrek was in hierdie onluste en gebeure in die Vaal en dit was nie die bevinding van die hof gewees nie. Ek gaan dit nie uitlees nie, maar ek wil graag net ten opsigte van elke beskuldigde na die spesifieke bladsye verwys waar die hof besondere bevindings gemaak het ten opsigte van hierdie beskuldigdes. Dit begin by beskuldigde nr. 5 dan wil ek die hof daar verwys waar die hof baie meer gevind het as waarna mnr. (20) Bizos verwys het op bladsy 912. Daar is 'n kern paragraaf daarso. Daar is 'n hele lang uitspraak van heelwat bevindings wat die hof gemaak het, maar die kern wat ek dink wat van belang is hierso is dat die kennis wat die beskuldigde gehad het in sy meedoen in die vernietiging van swart plaaslike besture. Dit word gevind op bladsy 912.

Ten opsigte van beskuldigde nr. 7 is bladsy 936 hierso van toepassing. Ten opsigte van nr. 8 is bladsye 941 en 942, is daar twee besonder belangrike paragrawe wat die hof se bevindings uiteensit. Ten opsigte van beskuldigde 9 is bladsy 946 (30)

hier/..

hier van belang. Ten opsigte van beskuldigde 11 bladsy 969 belangrik en ten opsigte van beskuldigde 15 bladsy 980. Ten opsigte van beskuldigde 16 984 en 985. Beskuldigde 17 s'n het ek nie nou hierso nie. Ek sal nou beskuldigde 17 s'n kry, maar wat besonder belangrik is ten opsigte van hierdie beskuldigdes is dat die hof het 'n bevinding gemaak hulle het doelbewus gewerk saam met die VCA, dié van hulle wat in die VCA was of in ander geaffilieerde organisasies van UDF saam met UDF om met geweld die swart plaaslike besture te vernietig. Beskuldigde 17 is bladsy 992. (10)

Edele, dit kan beswaarlik beskou word as insidente of heel toevallige betrokkenheid van hierdie mense net omdat hulle oor hulle griewe gekla het.

'n Belangrike feit wat die hof ook in hierdie saak gevind het, is dat die beskuldigdes was nie aangekla vir hulle geloof of wat hulle geglo het of vir hulle griewe nie, maar vir hulle dade. Dit maak 'n besondere groot verskil. Dit het die hof spesifiek gevind op bladsy 12 en 13 van hierdie lywige uitspraak van die hof.

My respekvolle submissie is dat dit kan nie nou net (20) oorvereenvoudig word en gesê word dat die beskuldigdes het aan 'n sekere iets geglo en nou is hulle daarvoor gevang nie. Dit is nie.

'n Verdere argument wat ek hier wil bybring hoekom ek sê daar is 'n oorvereenvoudiging, die argument en ook die getuienis aangebied deur die verdediging het daarop neergekom dat die beskuldigdes, almal van hulle, dit geld ook vir 19, 20 en 21 en in die besonder vir hulle, dat hulle het 'n rol te speel in versoeningspolitiek in hierdie land om dit teweeg te bring, maar wat vergeet word en wat nie genoem word by hierdie hof (30)

nie/..

nie en waaraan nie gedink word nie, is dat eerstens - kom ons vat die ANC. Hulle is nie bereid om geweld af te sweer en dan met die regering samesprekings te kom voer oor versoeningspolitiek nie. Hoe gaan hulle andersins daar kom, is die groot vraag dan. Die tweede is UDF self en sy leiers en by monde spesifiek van beskuldigde nr. 20 ook, dat hulle is nie geïnteresseerd in gesprekvoering met die regering nie. Hulle is nie geïnteresseerd in magsdeling in hierdie land nie. Hulle is net geïnteresseerd in een ding, in magsoorname en dit word ook duidelik bewys deur die eise wat gestel word vir 'n nasionale (10) konvensie.

Dit is maklik om hier in 'n hof te kom praat op hierdie oomblik en die woord nasionale konvensie uit te dra en die persepsie by die mense wat hier in die hof is skep dat hulle so redelik is, maar wat is die eise. Dit word nooit gesê nie - dat die regering moet abdikeer nie, dat die grondwet moet opgeskort word nie, dat die veiligheidsmagte van hierdie land ontwapen moet word nie en wat in die kruisondervraging uitgekom het, dat as die verbanne organisasie ontban word dan kom daardie opgeleide terroriste terug met hulle wapens, hulle sit (20) die gewapende mense hierso - die magte wat die land se veiligheid en die mense in hierdie land se veiligheid moet verseker, hulle sit sonder wapens. Daardie tipe eise wat gestel word - dit is daarom wat ek nogmaals sê dit is 'n oorvereenvoudiging. Dit is maklik om te kom sê kyk hierdie mense moet 'n rol speel in die ontlonting van die politieke situasie en vir 'n demokratiese regering in hierdie land, dat hulle samesprekings moet voer, maar wat word gedoen deur daardie organisasies. Ons getuienis is baie duidelik, soos die hof dit bevind het, dat UDF en die ANC 'n gewelddadige rewolusie in hierdie land na- (30) streef.

Nou/..

Nou kom ons toets dit, edele. Van al die tye wat UDF bestaan het of die organisasies in die Vaal, het een van hulle met klagtes na die regering toe gegaan? Daar was uitnodigings van die regering, van die leiers van hierdie land om met die regering te kom samesprekings voer. Het UDF van daardie reg gebruik gemaak? Het hy ooit gegaan om dit te gaan doen? Hulle het dit nooit gedoen nie, maar eise gestel wat onaanvaarbaar vir enige regering met 'n bietjie selfrespek is, en griewe wat gelig word kan ons vandag van enigiemand in hierdie saak - dit is nie genoem nie - kry dat, sê in die Vaal, daar na die owerhede toe gegaan is met die griewe van die mense? Dit het nooit gebeur nie. Wat gebruik was, is die griewe was gebruik om die onskuldige mense wat, soos die hof dit bevind het, partykeer oor wettige redes gegrief gevoel het, om hulle te mislei en hulle haat aan te blaas. Dit is wat gebeur het en dit is die groot verskil in hierdie saak en dit is waarom ons vir die hof vra om dit in aanmerking te neem wanneer die hof 'n gepaste vonnis oplê.

Ons moet onthou dat hierdie massas wat daar buitekant sit, die hof het die stelling ook baie mooi gestel in hierdie uitspraak, waar so baie mense deur so min mislei is en gelei is na geweldpleging, dat daardie mense wat saam met die regering en die regering se beleid saamwerk, wat probeer het om van binne af van hulle kant af - die swartmense praat ek van - om ook vir hulle mense regte te kry en te verbeter, om as 'n spreekbuis te gaan optree met die regering. Hulle het ook 'n reg op lewe. Hulle het ook 'n reg op beskerming in hierdie land en dit het ons gevind is UDF en sy trawante, UDF en sy affiliale het daardie mense se lewens juis in gevaar gestel.

Ons weet uit die getuienis in hierdie saak dat dit was

een/..

een van die belangrike stellings en een van die belangrike vereistes van UDF gewees, dat enige organisasie wat hoegenaamd saam met die "establishment" werk, dat so 'n organisasie nie toegelaat word in die geledere van UDF nie. Dit bring verder uit daardie hele tendens dat UDF en die ANC verlang nie gesprekvoering en samewerking en ontlonting van 'n politieke situasie en verkryging van politieke regte nie. Dit gaan hier oor magsoorname en dit is die end en die einde van die storie. Daar kan niks daarby verder gevoeg word nie. Die getuienis het ook bewys, afgesien van die getuienis wat hier ter versagting (10) aangebied was, kon sê of nie sê nie, is dat die getuienis het bewys dit gaan nie hier net oor 'n demokratiese regering nie, dit is die lokaas wat uitgehou word na die menigtes. Dit is eintlik die lokaas wat uitgehou word na die blankes toe, maar dit is die erkende en aanvaarde beleid van die ANC, met sy trawant UDF, dat dit is maar die vestiging van die sogenaamde demokratiese regering op grond van die voorskrifte van die Freedom Charter, is die leidende faktor en die oorgangsfaktor na 'n sosialistiese regering en die ANC bewys homself - hy bestaan omtrent driekwart uit lede van die Kommunistiese Party. (20)

Die getuienis wat hier aangebied was ter versagting, 'n ander aspek wat ek dan wil meld in hierdie geval, is dat hier is eintlik propaganda gemaak om die ANC in 'n goeie lig te probeer stel, maar nie een van hierdie getuies wat hierso kom vertel het dat hulle simpatie het met die ANC se redes het vir die hof vertel dat die ANC se uiteindelike doel is 'n sosialistiese regering nie. Nie een het kom vertel dat daarso 'n alliansie en 'n samewerking is met die Kommunistiese Party nie. Nie een het probeer om 'n verduideliking te gee hoekom die ANC en selfs ook UDF nie bereid is om geweld af te sweer, net daardie (30)

toegewing/..

toegewing te maak en dan samesprekings met die regering te voer nie. Die blaam word net altyd op die regering geplaas vir alles wat gebeur en vir alle geweldpleging.

Edele, al daardie aspekte wat nie genoem word nie, kan nooit die brutale en liederlike moorde wat gepleeg word onder daardie dekmantel dat hulle nie 'n forum het waar hulle kan praat nie, geregverdig word nie, nooit nie. Nie by UDF nie, nie by die ANC nie, want hulle het botweg geweier dat, toe die veranderingspolitiek in hierdie land begin het, om met die regering te onderhandel onder omstandighede wat dit bevorder, dat daarso vrede tussen die groepe, dat daar magsdeling in die land kan kom, dit is verwerp en die ANC se beleid is baie duidelik. Hulle stel nie belang in magsdeling nie. Dit is ook duidelik deur UDF gestel, hulle stel nie belang in magsdeling nie. Dit is gesagsoorname.

'n Verdere aspek oor hierdie getuienis wat aangebied was hierso. Die verdediging het baie waarde geheg aan die getuienis van professor Helm. Ek wil haar eerste kortliks net behandel. Dit is 'n persoon wat na hierdie hof toe gekom het om deskundige getuienis te kom gee in die hof ten opsigte van die gebeure in die Vaal sonder dat sy as 'n deskundige haarself op hoogte gestel het van die feite in die Vaal. Die omstandighede wat sy hier geskets het in haar getuienis is dit is die algemene teoretiese omstandighede, maar watse getuienis het sy om haar opinie wat sy hier so vrylik uitgespreek het en, met respek gesê, wat volgens my siening neerkom op kritiek van die hof se uitspraak, watse reg het sy om so 'n opinie te kom uitspreek as sy ses mense vir 'n kwartier lank gesien het voordat die hof begin het en ons moet onthou op daardie stadium was haar verslag kant en klaar getik, aanvaar en soos hy hier is.

Sy het/..

Sy het hom net daarna kom ingee - vir 'n kwartier. Watse reg het sy om 'n opinie van die gebeure in die Vaal te kom uitspreek as sy nie eers die getuienis in hierdie saak bestudeer het om te sien wat is die getuienis nie. 'n Paar grepe uit die uitspraak van hierdie hof is aan haar gegee. Sy het nie eers die hele uitspraak bestudeer en gekyk en gesien hoe het die hof die getuienis geëvalueer vir die hof se gevolgtrekkings waarna sy gekyk het nie. So, edele, as deskundige getuie vir die gebeure in die Vaal beteken sy niks, met alle respek.

Haar opinie wat sy uitspreek is 'n reëlregte botsing met hierdie hof se bevinding dat die gebeure in die Vaal georganiseerde geweld daarso was en dit na oorweging van 'n massa getuienis deur hierdie hof.

Edele, in hierdie getuienis aangebied deur die verdediging ter versagting is - as ek dit reg verstaan is daar by die mense wat hier geroep was, die nege getuies en van hulle is wat nie medici is nie, dr. Kalk uitgesluit, was dit mense wat geroep was vir hulle kundigheid en ek het aanvaar, as ek na hulle indrukwekkende titels geluister het wat hierso voorgegee was, dat hulle as soort van deskundiges kom getuig het. Nou, my respekvolle submissie aan u is dat hierdie mense kom - almal van hulle het hier gekom en soort van deskundige getuienis gegee en soort van, en dit sê ek weer met alle respek, die indruk wat ek gekry het, ek mag verkeerd wees, maar die indruk wat ek gekry het, om te sekere aspekte van hierdie hof se uitspraak te kom kritiseer en dit het hulle kom doen op geen studie van die UDF se beleid nie. Hulle het hier vir die hof vertel van hulle het die deklarasie van UDF gesien, 'n paar het ander dokumente gesien, maar die feit bly nie een van hulle kon vir die hof hierso sê ons deskundige menings

waarop/..

waarop ons hier kom praat het hoekom ons nou nog sê, want dit was aangehou met die storie dat UDF is 'n vreedsame organisasie, nie een van hulle kon vir die hof die gesag gee waarop hulle dit sê nie. Op die grond van die deklarasie. Wat beteken sulke deskundige getuienis dan ter versagting as hulle kom en vir die hof op een dokument 'n opinie gee? Dit beteken niks nie.

Dan die verdere aspek, almal van hulle het "hulle idees", wat ek in aanhalingstekens beklemtoon, "hulle idees" van die persepsies van die mense gegee. Watse bewys of gesag het hulle vir die hof voorgelê dat hulle met gesag kan praat oor die (10) persepsies van die mense? Het hulle ondersoeke gaan instel oor die mense se persepsies? Eintlik as 'n mens na hierdie saak in sy geheel kyk en die getuienis in sy geheel beoordeel, dan was die persepsies van UDF en die ANC juis oorgedra aan die mense op veelvuldige vergaderings. Daar was die persepsies oorgedra, die geskiedenis van die ANC was aan hulle gestel. Daar is 'n vergadering waar beskuldigde nr. 20 aan die mense duidelik gesê het ANC het op 'n stadium gekom of in so 'n situasie dat hy moes kies, hy het hierdie rigting gekies, een van twee moontlikhede wat hy kon kies, die uitweg van geweld is gekies (20) omdat dit dan nie anderste kan nie en hy het op dieselfde vergadering nog vir die mense gesê ons staan vandag voor dieselfde keuse, ek weet watter kant toe ek gekies het. Dit is die tipe dinge, maar die feit en die punt wat ek wil maak is dat hierdie persepsies is geskep in 'n groot mate deur UDF en sy trawante op die vergaderings wat hulle gehou het en die mense so gelei het. So, daar is hoegenaamd niks om te sê dat die persepsies wat hierdie mense hier kom vertel het vir die hof wat sou geld op die verskillende plekke is 'n wetenskaplike persepsie en vasgestelde persepsie wat daar is. Daar mag mense wees wat (30)

daardie/..

daardie persepsies het, mense wat miskien op die vergaderings was of mense wat miskien dieselfde idees het, daar kan miskien van hulle wees, maar daar kan nie gesê word dat dit is die oorheersende persepsie nie. Net so 'n mens kan aan hierdie hele kwessie van hierdie persepsie wat hier beklemtoon word byvoorbeeld toets aan die ledetal van UDF. Dit word hierso beklemtoon hoe belangrik die UDF is en dat hy vir die massas - se organisasie is, maar is dit so? Ons het organisasies wat daaraan behoort wat hoeveel duplikasies is. Waar kom hulle - hulle het op 'n stadium - u sal onthou, edele, hulle het geroem op (10) meer as 'n miljoen lede van UDF, maar hoe is dit bereken. Toe die beskuldigdes in die getuiebank hier 'n verduideliking moet gee hoedat hulle dit bereken toe kon hulle dit nie gee nie. Ons het gevalle soos in die Vaal van VCA wat nie 'n demokratiese verteenwoordiger, soos die hof bevind het ook, van die massa is nie. Ons weet nie eers watse ledetal hulle het nie, maar hulle bereken hulle ledetalle in die honderde - in die miljoene en hulle organisasies in die honderde, maar dan sien ons dat daar so baie duplikasies is dat geen mens weet nie. Nou hoek kan enige wetenskaplike, feitelike stelling gemaak (20) word dat dit verteenwoordig die massas. Vat nou maar 'n goeie voorbeeld van uit hulle eie geledere uit, die "million signature" kampanje. Hulle wou 'n miljoen handtekeninge ingevorder het, hoeveel het hulle geslaag om te kry? Nie eers 'n kwart miljoen as ek reg onthou nie en dit uit 'n moontlikheid van 28 miljoen mense. So, waar kom die gedagte dan vandaan dat hulle so verteenwoordigend is van die massas. Dit is 'n propagandaset om dit wêreldwyd te verkondig en te sê hulle verteenwoordig die massas, maar my respekvolle submissie is dit is nie so nie. Wat baie duidelik is, is dat hulle is 'n klomp radikale, dit (30)

is/..

is al, dit blyk daaruit.

Edele, wat my ook getref het uit die getuienis wat aangebied was ter versagting is dat verskeie van hierdie getuies - 'n mens kon nog verstaan het as hulle by die hof gekom het en gepleit het vir versagting, wees hulle genadig, wees hulle simpatiekgesind en so, dan kan ek dit verstaan, maar wat ek nie kan verstaan nie is hoekom - elkeen van hierdie getuies of die meerderheid van hulle 'n swaard bokant hulle pleit gehou het, gesê wees hulle genadig anders dan gaan daarso reperkussies wees, mense gaan dit doen. Dit is vir my 'n eienaardige manier van doen, dat hulle kom om vir die hof te kom vra om genadig te wees, maar as die hof nie genadig wil wees nie dan die swaard van Damokles oor die hof se hoof te hou. In my respekvolle submissie is dit 'n inmenging met hierdie hof se jurisdiksie en hierdie hof se diskresie waar dit by vonnisoplegging kom.

'n Ander aspek wat ek ook wil vra dat die hof in aanmerking moet neem is dat volgens ek hierdie getuienis ook verstaan het kom dit neer op 'n soort van dekriminalisering van geweldpleging en hoogverraad. Nou word dit gegooi oor die boeg, weer eens, van hierdie kwessie van die massas wat nie 'n forum het om hulle griewe te gaan lig nie of ligter gestraf moet word, maar die feit is die hof het 'n plig, nie net teenoor die beskuldigdes nie. Die hof het ook 'n plig teenoor die land, teenoor die ander inwoners - ek het alreeds daarop gewys. Hierdie ander mense wat op sleeptou geneem was en die mense wie se lewens in gevaar gestel was. Hulle het ook reg op beskerming en die kwessie dat daar nie 'n forum is nie, dit kan nie opgaan nie, want daar is uitnodigings aan die swart leiers gerig om met die regering samesprekings te kom voer oor politieke regte. Dit was 'n direkte uitnodiging gewees.

Ek wil dan/..

Ek wil dan - op ander aspekte wat ek kortliks wil antwoord, dit is op die betoog dan van die beskuldigdes, 'n aspek wat ook weer deur mnr. Bizos aangeroer is, en dit is dat blaam op die staat gelê moet word omdat daar nie 'n een-bladsy-klagtestaat opgestel was en hulle binne drie maande verhoor was en die verhoor klaar gemaak gewees het nie. Een aspek wat uit die oog verloor word, is dat 'n getuie van die staat, Edith Lehlaka, het weggeraak. U sal onthou die omstandighede was deur die hof ondersoek, onder watter omstandighede daardie getuie weggeraak het. U sal onthou uit die getuienis wat aangebied is watter belangrike rol het sy gespeel in die hele organisasie van die Vaal. Nou, daardie getuie, soos u weet, het weggeraak nadat sekere instansies met haar in aanraking was net voor die saak begin het, drie dae voor die saak begin het. As daardie getuie hier sou gewees het, dan is ek seker dan sou ons baie meer op baie aspekte meer helderheid gekry het en om sommer nou goedsmoeds hier op hierdie stadium te kom en die staat te blameer dat die staat het so gemaak en dit is nie bewys of dat is nie bewys nie - edele, die staat het sy probleme gehad. Daardie getuie se wegraak kon ons nie verhoed het nie. Dit het hierdie hele prentjie drasties verander.

Edele, hierdie aspekte het ek aangeroer omdat ek gevoel het dit is noodsaaklik. Ek wil nie probeer om met die hof se diskresie in te meng nie, want ek besef hoe moeilik dit vir die hof is. Ek het kortliks beantwoord op wat ek dink van belang is op die verdediging se antwoorde. Die feite van hierdie saak soos u dit gevind het, toon die werklike omstandighede ook wat die hof aan die anderkant, behalwe die persoonlike omstandighede van die beskuldigde, die omstandighede waaronder hulle geleef het, ook die ander sy van die saak - en ek glo nie

dit is nodig dat ek dit hier vir die hof weer moet alles herhaal nie. Ons het geweldpleging wat losgebars het, ons het die kwessie van moorde wat gepleeg is. Ons het die kwessie van eiendom wat beskadig was en dan ten laaste wil ek net vra vir die hof om in aanmerking te neem, ek weet die hof sal dit ook doen, is dat beskuldigdes nr. 5 en 20 het vorige veroordelings. Beskuldigde 20 se vorige veroordelings spreek direk teen watse soort van vredeliewende mens hy is en wat hy sou gedoen het en hoedat hy vrede nastreef. Hy was nie baie lank uit die gevangenis uit vir vorige terroristiese aktiwiteite nie (10) waar hy tien jaar gekry het en waarvan ses jaar uitgedien was op twee klagtes toe is hy in hierdie saak weer betrokke en aan die roer van sake. Beskuldigde 5 het ook in 1981, as ek dit reg onthou, het hy 'n vorige veroordeling van geweldpleging, openbare geweldpleging. Vandag is dit miskien 'n lang tyd, maar toe hierdie misdade gepleeg is in '83 en '84 toe was hy nie lank uit die gevangenis uit op daardie vonnis hom opgelê nie, toe was dit kort daarna.

Wat ons die hof dan vra om te bevind of nie te bevind nie, om in gedagte te hou is dat die beskuldigdes wat hier voor (20) die hof is, almal van hulle, of dit nou onder die UDF se leiers, die mense wat skuldig bevind is aan hoogverraad en of die mense onder terrorisme skuldig bevind is, maar almal wat hier was, het 'n aandeel gehad en was in die verskillende organisasies leiers gewees of het 'n groot aandeel gehad met die aansporing en die opsweping en die mobilisering van die massas tot geweldpleging teen regeringsinstansies in hierdie land en moet 'n mens in aanmerking neem dat hulle wat die massas gebruik het vir hierdie doel behoort swaarder gestraf te word as byvoorbeeld 'n persoon wat nou net op hulle aanstigting sou gereageer het (30)

en maar/..

en maar net deelgeneem het. Hulle word die leiers. Dit is 'n beginsel van straftoemeting dat 'n persoon wat in die leidingsposisie is dikwels swaarder gestraf word as die persoon wat net die leiding volg.

Edele, tensy daar iets anders is wat die hof wil hê ek moet toelig om die hof te kan help as die hof enige hulp nodig het - ek sê nie die hof het nie, maar ek noem dit net as daar enigiets is wat die hof nog miskien iets wil weet oor, dan is ek bereid om te sê, maar anderste is dit wat ek aan die hof wil oordra. (10)

MR BIZOS ADDRESSES COURT IN REPLY: I will be brief in reply. Much of what your lordship has been told is not based on the evidence on record and we submit with the greatest respect that much of it is going to be ignored for that purpose. I very briefly want to reply in relation to the Vaal accused. It has not been suggested that they all found themselves there
C.1571 by accident. I think I used the expression in relation to two, that leadership was really cast upon them almost by an accidental basis. Your lordship's finding, in our respectful submission, was not correctly represented to your lordship (20) and I do not want to spend too much time on it. Your lordship specifically found that the UDF plan for the destruction of the BLA was not known to the accused from the Vaal, so that that peroration in relation to that case is not based upon a correct understanding of your lordship's judgment. As far as the criticisms of Professor Helm are concerned we submit that the state did not understand the evidence of Professor Helm. She did not purport to give a report on the social conditions in the Vaal. She assumed the correctness of your lordship's judgment and referred to it by page number and she assumed (30)

the/....

the correctness of the findings of Professor Van der Walt. The six people that she spoke to early in the morning was in order to corroborate for herself just one fact, that Mr Kodisang was the new mayor. The criticism levelled against the evidence led in mitigation is not well founded. It was led in order to show to your lordship what the perceptions of the people generally in South Africa were in the opinion of these persons who are involved, not in order to contradict your lordship's judgment but in order to show the wide, coming from different fields, acceptance of the ideas that the accused represent. (10) For sentence it is particularly relevant as to the acceptance or otherwise of these ideas. Of course the state is entitled to use the language of others to describe the accused as a bunch of radicals, whatever that may mean. If I remember correctly the primary meaning of "radical" is he who wants fundamental change. I think that if that is what was meant the accused will probably accept the description. The word "klomp" I will ignore. The other point that was made was that there was no real intention to negotiate and then there was a run of words as to what the composition of the ANC executive(20) is supposed to be, and other matters, and also that the UDF could not have been serious in its intention to hold talks. Also the state told your lordship that they are not really interested in reconciliation. What in fact is happening here, in our respectful submission, is that the dialogue of the deaf that has being going on for so long is in fact continuing. If the primary conditions set, leaving aside those which were disputed by Mr Molefe, accused no. 19, about the army and the police force, if in fact the government considered some of the conditions completely unacceptable then it could have said so(30)

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and tried to find some common ground on acceptable conditions and that this attitude of ignoring letters written to the government, ignoring protests, may be a political matter, decision of which will have to be taken by politicians. But what your lordship is concerned with is something else and what we have done here in presenting the evidence we have, there is an age old tradition for, based upon the old authorities and even more recent ones, that when men differ and differ fundamentally in relation to the government of the country in which they live the courts must be particularly careful - and I am not using my own words but the words of good authority which your lordship no doubt will recognise - the courts must be particularly careful that their punishments are not so harsh on those who have seen fit to try and put right things that are wrong in a society that it may be deemed that it is not worthwhile trying to put things that are wrong right. I think it is quite wrong for the state to submit to your lordship that we hold the Sword of Damocles, or anyone else, over your lordship. The circumstances in which people such as the accused before you find it necessary to take action which is found to be a contravention of the law must be very carefully considered and the perceptions of people of their action living in the country is particularly important. Because if those perceptions are ignored by any important organ of the society in which we live, including the judiciary, a society cannot put itself right. Thank you my lord.

COURT: Mr Jacobs and Mr Bizos I will pronounce sentence this afternoon, after the luncheon adjournment. After that the court will adjourn till Monday morning at 10h00 for the purpose of application for leave to appeal, if you feel

like/....

like it. The attendance of the accused will not be required there. They will, I want you to address me on the question whether general or limited leave to appeal should be granted and if so how limited.

MR BIZOS: If I could ask my learned friend Mr Chaskalson to deal with the question of leave to appeal because it may be, well we will welcome any guidance but if we have to put up an application for leave to appeal and for certain special entries I do not know that we can really be ready for Monday.

COURT: You cannot do it by Monday? (10)

MR BIZOS: No my lord, if we are expected to argue it, or even to formulate them properly we will require much more time than that. Unless of course an indication is given to us that we merely have to formulate them and do not have to argue them. If we have to argue them we have to go to the record for support of what we are going to submit to your lordship and, but perhaps we should really address your lordship on this question after your lordship has passed sentence.

COURT: Yes, you can address me on that on Monday morning at 10h00. (20)

MR BIZOS: As your lordship pleases.

COURT ADJOURNS UNTIL 14h15.

PAGES 28 947 TO 28 956 - AWAITING REVISED SENTENCE

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC 482/85 PRETORIA

1988-12-08

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS (10)

S E N T E N C E

VAN DIJKHORST, J.: The approach of our courts to the question of an appropriate sentence can be summed up in the dictum of our appellate division in R v Rabie 1975 4 SA 855 (A) at 862:

> "Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."

This will also be my approach. I do not propose to deal in detail with the evidence led in mitigation. It has all been (20) given due consideration. So have the able and lucid arguments of defence counsel.

I deal first with the Vaal accused, that is the accused excluding accused nos. 16, 19, 20 and 21. The crime of which these accused were convicted is terrorism in terms of section 54(1) of the Internal Security Act 74 of 1982. This section covers a wide range of acts and when determining a proper sentence the details of the offence are of the utmost importance. When regard is had thereto this offence does not fall in the most serious class of crimes conceivable under this (30)

section./....

section. This does not mean that it is an offence which can be lightly shrugged off. To organise a stayaway and prohibited protest march with the aim to bring about or to contribute to violence and to encourage others to participate is a serious misdeed. This was not done during a period of tranquility but the acts were conceived against the background of a history of violence stretching as far back as 1976 and earlier. The action was taken and proceeded with when the Vaal was exploding. No court of law can countenance this type of conduct. No society can survive if this becomes (10) the accepted form of political protest.

I now turn to the accused themselves. Some are young men and some are not so young. Some are more sophisticated than others. Some were deeper and longer involved than others. Two have health problems. I seriously considered differentiating between them on this basis but will not do so in view of my ultimate conclusion which by this equalisation does not penalise those with lesser guilt but favours those who bear the greater. Two factors have great weight. The first is that these accused, after an initial long incarceration (20) awaiting trial and when they had been on trial for a lengthy period were granted bail which effectively banished them from their place of abode and cut them off from their livelihood and families. This was done for good reasons as set out in the judgment given at the time but the reasons do not diminish the hardship to the accused. The second factor is that I hold the view that the Vaal accused should, as soon as possible, be reintegrated into their community and that the wounds caused by the Vaal riots should be healed sooner rather than later. In this respect I would rather err on the side of (30)

lenience./....

lenience. In arriving at the ultimate sentence I have given due weight to the history of hardship of each accused and his personal sense of grievance. I have dealt with much of this in the judgment and will not repeat it here. On the other hand the reintegration of the accused into the community should not create the same tensions and fan the old flames that existed prior to the riots of 3 September 1984. The solution lies in my view in the imposition of conditions incorporated into a suitable order of suspension to avoid this situation. A court is empowered to do this in terms of section 297(1)(b) of the (10) Criminal Procedure Act. The alternative would be direct imprisonment. The conditions I will impose will on the one hand be a deterrent to further illegal action but on the other hand be part of the punishment as the normal civil rights of these accused will be curtailed to a certain extent. In this respect these conditions may be novel but they are preferable by far to the imprisonment which the accused in fact wholly deserve. These general remarks have to be qualified in the case of accused no. 5, Malindi. This accused has a previous conviction for an offence much akin to the instant (20) one. On 13 October 1981 he was convicted in the regional court, Vereeniging of the crime of public violence. He was sentenced to a fine of R300 or one year imprisonment and a further four years imprisonment suspended for five years on condition that he be not found guilty of the crime of public violence, arson and/or malicious injury to property. The period of suspension has expired. This previous conviction is therefore only relevant in the sense that it indicates that this accused has previously committed an offence of a similar nature to the one of which he has been found guilty by this(30)

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court and that he then received a lenient sentence coupled with a warning to desist from such conduct. This accused therefore has had his warning. He persists in his course of conduct. He should not expect leniency from this court. He committed this crime while he was still subject to the suspended sentence.

The sentences are as follows: Accused no. 5, G.P. Malindi, accused no. 7, T.D. Mphuthi, accused no. 8 N.B. Nkopane, accused no. 9 T.E. Ramagula, accused no. 11, S.J. Mokoena, accused no. 15, S.J. Hlanyane and accused no. 17, H.S. Matlole are each sentenced to five years imprisonment. In the case of accused no. 7, no. 8, no. 9, no. 11, no. 15 and no. 17 the whole of this sentence of imprisonment is suspended for five years on the following conditions:

1. That the accused within the period of suspension not be found guilty of one of the following offences committed within the period of suspension:
   (a) Treason.
   (b) Sedition.
   (c) Public violence.
   (d) Terrorism, sabotage and subversion in contravention of sections 54(1), 54(2) and 54(3) of the Internal Security Act 74 of 1982.
   (e) Arson.
2. That the accused for a period of two years does not attend any public meetings with the exception of bona fide church services in the parish church of the denomination of which he is a member and bona fide sports meetings. For the purposes of this condition any gathering of more than 20 people will be regarded as a

public/....

public meeting.

3. That the accused during the said period of two years does not issue public statements to the press or otherwise and does not grant interviews to journalists.

4. That the accused during the period of suspension does not serve on the executive of any political or civic or youth organisation and does not participate in the organisation of any meeting of such organisations or speak at such meeting.

5. That the accused during the period of suspension does not participate in or organise any form of public protest action.

Before dealing with the remaining accused a few remarks of a general nature on the approach to sentencing for the crime of treason are apposite. Treason, which endangers the continued existence of the state, is a very serious crime which generally is punished severely, in extreme cases with death. When determining a proper sentence the effect of the deeds of the accused has to be taken into account. His personal circumstances, which include his motive, age and state of health will be given due weight. A factor which weighs heavily with me is the lengthy period of detention the accused have already undergone. This will be taken into account.

I deal now with accused no. 16, Manthata. This accused was found guilty of treason on the following facts. At the mass protest meeting on 19 August 1984 in the St Cyprian's Anglican Church, Sharpeville accused no. 16 vehemently attacked the town councillors and said words to the effect that they should be killed if they refused to resign, they should

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be attacked with stones and set alight. It was his intention that the councillors be intimidated into resigning or be killed. We found that the UDF leadership had the aim to destroy the Black Local Authorities by mass action which would include violence and render South Africa ungovernable. We found that accused no. 16 was aware of that aim and that he identified therewith. A paper of which he was co-author, Exhibit B.6, is a document that expressly espouses Marxist revolution. A position statement found in his possession, Exhibit AL.149, and drafted just prior to his speech predicts bloodshed in South Africa after August 1984. Documentation found in his possession shows an interest in Marxism and revolution which becomes propagation thereof in Exhibit B.6. I recap these facts as the defence in mitigation led evidence which turned a blind eye to the facts found by this court and blithely proceeded on a false premise.

The crime of treason is one of the most serious kind. Not only in our society but all over the world. It is here punishable by the death penalty and if that is not imposed there have always been stiff sentences of imprisonment meted out in respect thereof. On the other hand I have to bear in mind that despite accused no. 16's affinity for revolutionary thought only one occasion of actual incitement to violence was proved against him and though the incitement was serious there was no evidence that anybody acted upon it. We found that the state did not prove a nexus between the meetings in Sharpeville and those in the rest of Sebokeng and we did not find that the action of accused no. 16 was part of a greater UDF plan, though he identified therewith. If the crime of treason can be notionally divided into categories his action would

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clearly fall in a less serious class. I take into account the age of accused no. 16 and that he has no previous convictions. I listened carefully to character evidence led by the defence. The witnesses clearly know only one side of his character. Due weight will be accorded this evidence. There can be no doubt that a sentence of imprisonment is called for. I take into account that accused no. 16 was detained in 1985 and only released on bail on 30 June 1987. His conditions of bail did, however, not effectively banish him from his home and family as in the case of the Vaal accused. I take into (10) account that he had to attend the hearing of this case for many monotonous months. The sentence which I impose is low for the crime of treason. I am lenient in the hope that accused no. 16 will, upon his return to society, resume a leadership role but in a more responsible and constructive way. Accused no. 16 is sentenced to six years imprisonment.

I turn now to accused no. 19, Molefe, accused no. 20, Lekota and accused no. 21, Chikane. This court found that the UDF was a revolutionary organisation whose policy of mass action against governmental institutions included the violent (20) option and was intended to render South Africa ungovernable. We found that the UDF had a conspiratorial core and that these three accused formed part thereof. We found that the dominant core of the leadership of the UDF formulated and executed a policy of mass organisation whilst fomenting a revolutionary climate in order to lead to mass action against governmental institutions. Violence was an intended, necessary and inevitable component of such action by the masses. Accordingly we found these three accused guilty of treason. Their conviction can, on the scale of seriousness, be distinguished from (30)

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that of accused no. 16. In their case it was a well conceived plan that was executed over a prolonged period with devastating effects. Though not all unrest and unrest related damage can be ascribed to the UDF and some of its affiliates the UDF has a lot to answer for. The defence led evidence of a number of prominent figures in the political, educational and literary fields that they saw nothing wrong with the UDF. When regard is had to the limited perspective of some of them and the bias of others it was a futile exercise. I must repeat here what we said in the judgment, namely that (10) there must be many members and supporters of the UDF, especially those on the periphery, that would not have become aware of the course which the UDF took. There must be many more, woven in the cocoon of their political outlook, who closed their eyes to the fact that this course was leading to revolt. To call such persons as witnesses to give opinion evidence on the UDF is an exercise in futility. I accept that in order to work out, through negotiation, a peaceful co-existence of all people in South Africa a credible leadership is needed. I accept that the UDF was seen by many to have an important (20) role in that process. I fully appreciate that the demise of the UDF may leave a void which may take a number of years to fill. It may well be that this will slow down the process of reform as was alleged. For these consequences, however, the UDF has itself to blame. It was a viable movement with a message which merits attention in our political debate. It had a large and enthusiastic following. It chose the path of violence instead of the path of moderation. Thereby it did South Africa a disservice.

A few remarks on the role of the courts in political (30)

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cases of this nature are apposite. In our sharply divided society which is a cauldron of conflicting forces from which the amalgam of our future is to be forged the courts are in an invidious position. The courts of the land have to uphold the law of the land and in sentencing are to reflect the sentiments of the community. Where the community itself is divided any sentence imposed will by some be seen as far too lenient and by others as far too severe. If that is the result achieved the sentence will probably be fair and moderate.

I have taken serious cognisance of the evidence in (10) mitigation, especially that of men prominent in the black community, like Mr Mabuza and Dr Motsuenyane. When the sentences imposed are regarded against the background of past sentences, for example those of the Rivonia trialists, it will be noticed that the pleas of these gentlemen for leniency have not been in vain. There is some cause for leniency in this case. None of the accused has been found guilty of executing or planning direct violence. Our appellate division, in S v Mange 1980 4 SA 613 (A) at 619 stated that in our turbulent history cases of high treason mostly originated (20) from situations in which military forces were openly engaged against persons who could be called rebels. It was not a crime for which the death sentence was ordinarily imposed yet with the advent of terrorism a complete change of approach would not be unjustified. This is not the situation in our case and the extreme penalty would be wholly unwarranted. I hold the view that these accused, especially accused no. 19, can in future play a constructive role on the political scene provided they, by word and deed, foreswear the violent option and act within the law. The sentences should (30)

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therefore not frustrate this possibility. On the other hand our appellate division has laid down that sentences for serious crimes should not be too lenient as that may bring the administration of justice into disrepute. (R v Karg 1961 1 SA 231 (A) 236B).

Accused no. 19 and accused no. 21 have no previous convictions. That is not the position with accused no. 20. On 21 December 1975 he was sentenced to a total period of imprisonment of ten years on two charges under section 2(1)(a) of the Terrorism Act 83 of 1967. The charges were that he conspired to commit acts intended to endanger law and order in the Republic of South Africa. As the sentences to an extent ran concurrently accused no. 20 only served six years imprisonment. He was released on 20 December 1982 and did not wait long before joining the UDF leadership conspiracy. He did not learn from his experience. He has scant respect for the law. He is not entitled to leniency to the same extent as the others. I bear in mind that the accused are relatively young men and that they have been in detention since early 1985. Their sentences are as follows:

Accused no. 19, Molefe, is sentenced to ten years imprisonment. Accused no. 20, Lekota, is sentenced to twelve years imprisonment. Accused no. 21, Chikane, is sentenced to ten years imprisonment.
