The Dean and the Sash

In November, 1971, the Dean of Johannesburg, the Very Reverend G. A. ffrench-Beytagh was convicted on charges under the Terrorism Act and sentenced to five years imprisonment. On 4th April, 1972, his appeal was upheld and he was acquitted. The following extracts from the two judgements relate to the charge on which he was found guilty in the Supreme Court, of inciting or encouraging an audience of members of the Black Sash to contravene the laws of the Republic.

The trial judge:

The State alleged that the accused incited or encouraged an audience of members of the Black Sash Movement in such a manner that the incitement or encouragement amounted to an act of participation in terrorist activities, set out in the indictment as follows:

'At a meeting of the Black Sash Movement, held at 4A — 2nd Avenue, Parktown North, Johannesburg, on the 2nd December, 1970, he incited or encouraged the persons present to contravene the laws of the Republic and to support and prepare for a violent revolution with the object of bringing about social, political and economic changes in the Republic.

"It is alleged that he said:

"He was a pacifist when he was an atheist. He changed his views when he became a Christian.

"He believed that violence was justified on certain grounds. He believed in just wars and re commended the reading of books by Colin Morris which have just wars a; their theme.

"He insinuated to the members of the Black Sash Movement that they would not achieve any notable results while observing the laws of the country.

"He mentioned the methods employed by negroes in their struggle against white people in America. He stated that political, social and economic changes could only come about by a violent struggle, and that he had come to the conclusion that such a struggle would erupt in the near future, remarking, *inter alia*, 'one more good Sharpeville would be the end of this country.'

"He referred to a railway accident which occurred during May, 1970, and blamed the authorities for having caused it."

Four witnesses gave evidence about the accused's address to the group of Black Sash women in a private home on that date. Although the evidence of these people does not differ very greatly, it is necessary to make one or two observations about the witnesses.

The first witness was Warrant Officer Helberg of the South African Police, who intended recording the accused's speech. The machine he used did not function properly but although he did not record the speech, he could use its earphones. He was stationed outside the house, hidden behind trees. While listening, he says, he made notes, and he gave evidence, refreshing his memory from these notes. He was under very severe attack from the defence, particularly because two topics did not appear in the position on the notes in which it was said they should have appeared had the notes been contemporaneous. Therefore the suggestion is that he compiled them afterwards. He conceded that he had thought of the name of a book mentioned by the accused later and added it to his notes. I do not think that the evidence about the order of all the topics is so clear that Helberg's evidence should be suspect because the order in his notes does not agree with the evidence of the others. A well-grounded criticism of his evidence is that the accused spoke in English while Helberg made his notes in Afrikaans. This could well mean that Helberg's notes were more incomplete than is usually the case with such notes. It could also mean that the meaning could be lost or obscured in the translation. Subject to these reservations, however, I do not think that the criticism is justified and that he could be called a lying witness.

The appeal judges:

Warrant-Officer Helberg was deputed by the police to record the address. He surreptitiously took up his position somewhere outside the house where the meeting was being held. He set up a secret device to enable him to listen in to, and record the address. State privilege against having to divulge the nature and details of the device was claimed and granted. That Helberg did listen in to the appellant's address is clear. But, unbeknown to him at the time, the recording part of the device failed to function properly. However, Helberg claimed to have made his own notes of the address while it was in progress, in order to assist him later in understanding the anticipated recording and having it correctly transcribed. These notes were produced and relied upon by him to refresh his memory while testifying in the Court a quo *about what the appellant had said. His testimony was subject to vigorous criticism by the defence both in the trial Court and before us. In particular, it was submitted that he had compiled the notes after he had found that the device had failed to record the address. The learned trial Judge, however, absolved Helberg of prevarication and accepted that he had made the notes while the speech was in progress. I am not persuaded that the finding was wrong. Nevertheless, for the reasons set out below, I do not consider that Helberg's notes or his testimony, which was almost entirely based on them, are of much probative value. Certainly where they conflict with the defence version of what the appellant said, they cannot safely be relied upon. Helberg did not attempt to note fully what the appellant was saying, since he obviously relied on the device recording the address verbatim: moreover, the appellant spoke in English and is normally a rapid and informal speaker. Consequently Helberg must have had considerable difficulty in taking notes in long-hand Afrikaans of what the appellant said. It is not surprising therefore, that this notes consist only of some twenty, mostly laconic, unconnected sentences of what the appellant was supposed to have said in an address lasting at least an hour. Consequently, as the notes do not give the context of most of the individual sentences or statements attributed to appellant, they may well be very misleading and not correctly convey the general effect of the address as a whole. The Court, in determining whether or not the appellant incited or encouraged the audience to do the things alleged in the indictment, must consider his address as a whole, not dwelling upon isolated passages or upon a strong word here or there, which may be qualified by the context, but endeavouring to assess the general effect which the whole address must have upon the minds of the audience . . . .*

Consequently, Helberg's notes and testimony are of little or no assistance to the Court in making such an assessment. To take but a single, striking illustration. The notes record the statement, attributed to appellant, as "Hy glo in revolusie." Standing alone, that obviously conveys that appellant said he was in favour of revolution. But Helberg admitted he could not recollect the words that were actually used or their context, which, as will presently appear, in fact conveyed quite a different meaning.

The trial judge:

A determined attack was made on Mrs. van Heerden as a witness. She is or was a member of the Black Sash and the suggestion was that she had views in conflict with those of Black Sash members and that she attended the meeting as an informer, so that her evidence would be biased. She denied the allegations. During the case I allowed, with some hesitation, the evidence of her superior at work. He said that she showed political leanings in conflict with those of the Black Sash, in argument and in discussions at work and it was said that she could not have been a genuine Black Sash member. Because she had not disclosed her true political views, it is argued her evidence is suspect. However, it seems to me that there is a conflict about her true political views and I do not think I should look at the evidence of a witness with suspicion because she says that she holds one view and her employer says that she holds another. This would be particularly dangerous when one realises how easily political views and leanings are attributed to people.

Two other criticisms were levelled at Mrs. van Heerden. One was that she said the accused had used the word "rabble" with reference to his non-white parishioners. It is said that such a word would not be used by the accused in such a case. I have not been referred to his denial but it is conceivable that it may have been used in a manner which is not as derogatory as it sounds. The other criticism relates to her supposed misunderstanding of a phrase used by the accused. I shall deal later with that phrase. I do not agree that Mrs. van Heerden's evidence is subject to suspicion because of the criticisms I have mentioned.

Mr. Kentridge suggested that Mrs. Gardner, a defence witness, was more intelligent than Mrs. van Heerden, better able to understand the address and therefore gave a more coherent account of the speech. I do not know that there is a sound basis for this argument. There are at least two matters on which her recollection did not seem to be as good as that of Mrs. van Heerden. They are the title of the address, and the reference to "pie in the sky". She could also not recall that the name Alinsky was ever mentioned, or that they were advised to read a book by Colin Morris. Her evidence in cross-examination about whether violence or unlawful action was suggested by the accused, was evasive and unsatisfactory. She, like others, could not remember the details of some forms of protest discussed by the accused. My impression is that she remembered very few details and could not be relied on to give a good picture of what happened. Indeed, there was some justification for Mr. Liebenberg putting to her that she was protecting the accused.

The appeal judges:

Mrs. van Heerden and Mrs. Gardner, members of the Black Sash organisation who attended the meeting, also testified for the State and defence respectively. Each remembered certain topics canvassed in the appellant's address that had made an impact on her, but — understandably, owing to the lapse of time — there were many things that neither could recollect. The learned trial Judge seems to have preferred the testimony of Mrs. van Heerden. He rejected certain defence criticisms of her evidence and found certain deficiencies in the content of Mrs. Gardner's evidence. It is true, as the learned trial Judge observed, that their testimony did not conflict in any serious respect. But as Mrs. Gardner's evidence is of some importance concerning the substance and effect of certain parts of the appellant's address, as will presently appear, it becomes necessary to consider her credibility.

There is, I think, substance in the submission advanced on appellant's behalf that the trial Court's finding of deficiencies in Mrs. Gardner's evidence was not wholly justified. She was not a member of the appellant's congregation — indeed, she was not a church-goer at all — and prior to the trial she had never met or seen him. There would, therefore, not appear to be any apparent reason why she should — as the trial Court seemed to think — desire to protect appellant by giving favourable testimony. Her suggested evasiveness about what the appellant said regarding violence and unlawful action, mentioned in the judgement of the Court a quo, could have been due merely to faulty recollection induced by the lapse of time. More-over she held an honours degree in English and was used to listening to and remembering lectures; and she had held office in the Black Sash Organisation, having been the Vice-Chairman of its Regional Committee for two years. It is therefore probable, contrary to the view of the court a quo, *that she would have been better able to understand and remember the substance, the import, and the effect on the audience of the appellant's address than Mrs. van Heerden. Indeed, her testimony about what the appelant said on the topics she remembered seems more coherent than that of Mrs. van Heerden. It is quite obvious, too, that the latter was mistaken about, or did not wholly understand, certain parts of the appelant's address. Thus, according to her, the appellant.* inter alia, *mentioned that he supported and had preached to the Bantu the doctrine of "pie in the sky when you die". If correct, that would mean that he had tried to induce their resignation to terrestial woe by holding out to them the prospect of celestial weal in their life hereafter. The appellant does not deny that he mentioned that doctrine in his address;*

but he denies that he said that he on that occasion supported it or had ever preached it. This is inherently probable; for Mrs. van Heerden's version would have been quite contrary to appellant's general philosophy that religion has to work towards achieving prosperity, both terrestrially and celestially.

The trial judge:

The Court finds the following to be the salient features of the address:

1. The subject of the address was "Violence and all that".
2. The accused said that when he was an agnostic — probably not an atheist — has was a pacifist; since becoming a Christian he has changed his views.
3. He praised the work of the Black Sash which was within the bounds of the law.
4. Their work was not effective and they had to think of more effective ways of protesting against the present state of things.
5. A violent revolution of black against white was inevitable. It was much nearer that he had thought earlier.
6. In such a revolution black would stand with black, irrespective of Christian teaching.
7. In certain circumstances the use of violence was justified to bring about change.
8. It would appear that only one of the three basic conditions, namely success, was referred to. There was no mention of the Christian alternative to violence.
9. He relied on the justification of love, firstly of a father for his child and then of a white for the suppressed black people.
10. He put to the audience examples of protest used or suggested elsewhere; some of them being illegitimate or perhaps slightly violent.
11. Although one of the members of the audience did not feel incited she did regard the accused's object as being to let her think of her own position in case there was a violent revolution.

With regard to this final object mentioned, it would be idle to suggest that the intention was that the white people ought to stand with whites, and keeping in mind the audience, it seems that he had intended that they should, although against violence, side with those in revolt because the revolution was justified. His desire that they should make their efforts more effective and then give them a justification of violence by love. can only mean that he wanted them to commit acts which would be outside the bounds of the law and would be in support of the revolution which he expected.

After considering the presumptions created in the Terrorism Act and all the facts relating to the speech and its effects, I have come to the conclusion that the accused encouraged the people present at that meeting, that he stimulated them with expressions of approval and favour to contravene the Laws of the Republic, and thereby to support and prepare for a violent revolution with the object of bringing about social and economic changes in the Republic.

The appeal judges:

Having regard to the address as a whole, I do not consider that the appellant incited or encouraged the audience to contravene the laws of the Republic or to support and prepare for a violent revolution as alleged. In the context his mention that under certain circumstances revolution, violence, and disobedience to a law was justified, was in the nature of philosophising or theorising ... Nowhere in his address did appellant directly advocate violence or contravening the law as a present, practical means of bringing about any social, political. or economic changes in the Republic. In his evidence he expressly denied that he did so.

Mrs. Gardner corroborated him, and Mrs. van Heerden did not gainsay him on that aspect. In effect, ... he warned against violence and its consequences, although at the same time expressing the view that it was inevitable unless this country changed its course. At the trial appellant said that he was "trying to wake them up to the fact unless this country changes its course it is going to end in bloodshed"; that, as people had failed to change their ways through love, which he had preached, he was trying to induce them to make the change through fear, since love and fear were the two strong emotive forces. There is indeed a crucial difference between saying violence is inevitable unless there is a change, and, violence is necessary in order to effect a change. The latter may be incitement or encouragement to violence whilst the former is not ... ... Counsel for the State, however, contended that the appellant, by means of his address, was indirectly inciting or encouraging his audience to do the things alleged in the indictment by subtly sowing in their minds the seeds of the need for violence and unlawful action for wider dissemination and burgeoning in due course. That contention is, in my view, wholly untenable. Apart from the appellant's sworn direct denial, it is in the highest degree improbable that he in fact had such an intention. For he could hardly have chosen a more infertile soil for sowing such seeds than an audience of women, including mothers and grandmothers, who were all members of an organisation avowedly opposed to violence and strictly committed to working within the law. Indeed, the very nature of his audience is strong support for the conclusion that appellant's address was not intended or likely to incite or encourage as alleged in paragraph (7) of the indictment ... Moreover, if that had been understood as the appellant's message, it would surely have evoked some reaction or discussion on the part of such an audience. But that was not the evidence. Mrs. Gardner said that she did not gain that impression from the address, and she very much doubted whether anyone else did. Mrs. van Heerden did not say that that was the message the address conveyed to her; she could not say what the audience's reaction to the speech was, but there was no discussion about it afterwards that she could remember — the general meeting just went on. Counsel for the State suggested that the absence of any reaction or discussion in the audience was because the address was so explosive or seditious that the ladies present were afraid to discuss it. In my opinion, that suggestion has no substance whatever.

Cillié, J. P., prefaced his conclusion convicting appellant in relation to paragraph (7) of the indictment with the following introductory words, viz: "After considering the presumptions created in the Terrorism Act and all the facts relating to the speech and its effect ..." It would thus appear that, although not examining the matter in any detail (indeed the above phrase contains the sole reference to presumptions in their bearing upon paragraph (7) of the indictment), the learned Judge President was in some measure influenced in convicting appellant in relation to that paragraph by the presumption created in sec. 2(2) of the Act. In that regard it suffices to say that, having regard to the nature of the allegations charged in paragraph (7) of the indictment, no room exists for any application of the presumption. It only remains to add that, in my view, the State entirely failed to establish that, in delivering his aforementioned address, appellant was either endeavouring to further the A.N.C. plan or actuated by "intent to endanger the maintenance of law and order in the Republic".

For the foregoing reasons, the conviction in relation to paragraph (7) of the indictment cannot, in my judgement, be sustained.

RONEOD COPIES OF THE APPEAL COURT JUDGEMENT, COMPLETE AND UNABRIDGED, MAY BE ORDERED FROM: THE BLACK SASH, 37 HARVARD BUILDINGS, JOUBERT STREET, JOHANNESBURG. (R1,50 per copy including postage).