THE TRIAL BEGINS

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A DAY or two before the trial began one of the accused persons remarked to me:

"You know, I'm getting ready to go back into another world. During the preparatory examination I lived a life apart from the people outside the Courtroom. The Court itself, with the Magistrate, the lawyers, each witness in the box, all of us in the dock seemed to make up a separate world . . . And yet as time dragged on something happened to me. I became so detached from the proceedings themselves, that it needed a real effort on my part to realise I was watching *my* trial . . . I felt like a spectator."

That was the numbing effect of the preparatory examination which began in December 1956 and continued until February 1958. What of the trial which began on Friday, 1st August, with estimates of its probable duration varying from six months to two years?

The accused persons, who all remain on bail, have assembled once more, this time in Pretoria, from all over the Union. Their number has been reduced from 156 to 91 persons, the charges against the remainder having been withdrawn before indictment.

The change of venue from Johannesburg where the preparatory examination took place has placed additional burdens on the ninety-one, for mostly they established themselves there during 1957 with accommodation and part-time employment. Now they have to travel daily to Pretoria, a round trip of eighty to ninety miles, depending on residence. The journey is free, in a bus provided by the government, but the Africans have to come in miles from the location to the central starting point. A mid-day meal is provided by a volunteer committee in Pretoria.

The Treason Trials Defence Fund which receives donations from many countries has provided funds for a strong defence team led by Mr. Maisels Q.C. Without the fund most of the ninety-one would have been undefended . . . and many would be destitute due to the prolonged proceedings.

The Court, a special criminal Court created some weeks previously by a special Act rushed through the Nationalist

dominated Parliament, assembled in an old synagogue specially reconstructed. Mr. Swart, the Minister of Justice who introduced the legislation appointed the three Judges—originally Mr. Justice Rumpff (presiding), Mr. Justice Kennedy and Mr. Justice Ludorf.

What of the charges? The main charge is high treason for which the sentence may be death. Originally there were two alternative charges, alleged contraventions of the Suppression of Communism Act 1950, which imposes criminal sanctions for (generally speaking) furthering "communism" as arbitrarily defined in the Act. The indictment detailing the charges totalled 406 pages, three bound volumes of foolscap size, and was of course, served on each accused to enable him to try and understand the allegations against him.

Let me try and explain these charges. From the mass of evidence led at the preparatory examination (40 volumes, 8,000 pages, about 10,000 documentary exhibits) on which the indictment was based, the Crown details a multitude of activities commencing in 1952 and continuing into 1956, mostly directed against *apartheid* and discriminatory legislation generally, activities such as speeches at meetings, articles, lectures, pamphlets and so on, all seemingly normal and lawful methods of extra-parliamentary opposition to government policies. They were carried on not only by the accused ninety-one, but also by lawful organizations such as the African National Congress, the Indian Congress, the (white) Congress of Democrats, and by about 150 individuals named in the indictment under the heading of "co-conspirators".

The Crown alleged, however, that these activities, while individually lawful, amount if taken together to a vast conspiracy to overthrow the state—the crime of high treason, or at least, contraventions of the Communism Act. The peak of these allegedly criminal acts, the conspiracy in which all the accused persons participated at different times, was the Congress of the People in June 1955 at which thousands of delegates, mainly non-white, adopted the Freedom Charter . . . the basis for action against discrimination.

So far, there has been only a mass of technical legal argument on two defence applications. In terms of the provisions of the Criminal Procedure and Evidence Act 1955 the Court procedure and the rules of evidence are similar to those in the English courts.

To the time of writing the accused persons have not pleaded

to the charges—that stage has not been reached.

Friday, 1st August—application to recuse. At the outset, and before an audience which included international observers and press correspondents (and non-whites in their own section of the Courtroom) Mr. Maisels Q.C. launched the opening defence attack, that the presiding Judge, Mr. Justice Rumpff, and Mr. Justice Ludorf, recuse themselves.

The objections to Mr. Justice Ludorf were twofold—(i) In July 1954, the Judge, then practising at the Johannesburg Bar, appeared for the police to oppose the confirmation of a Supreme Court order excluding them from a conference into which members of the special branch had broken without warrant. Ultimately, the police withdrew their opposition, after a consultation between the Minister of Justice, *his legal advisers* and senior police officers. The senior officer who made an affidavit to this effect revealed that the decision was taken on the ground that it was not in the public interest to disclose the full extent of a current investigation into high treason. However, prior to this affidavit, other affidavits had been filed in which the police had attempted to justify their action on the ground that it was believed that high treason was being committed at the conference. In support, documents were attached, including exhibits now before the trial court, and including speeches by certain of the present accused which were material. The conference was part of the preparations for the Congress of the People.

"What has been established," said Mr. Maisels, "in the minds of the accused, at least, is that the Minister of Justice (for that was his case) has appointed as one of the Judges in this case, his advocate in that case . . ." (ii) While it was accepted that when an advocate was elevated to the Bench he shed his politics, the present instance was not normal. The alleged crime commenced in 1952, before the Judge's elevation. At that time he had close and active political associations with the political party.

"Against whom, and against whose policies, the accused are alleged to have directed strong and intemperate attacks, which attacks are alleged to form part of the acts of High Treason."

"Your Lordship, with the best will in the world, as one actively concerned with supporting this party, may not be able to take a completely dispassionate view of the accused."

The objection to Mr. Justice Rumpff was, that during the

parliamentary debate on the Special Court's Bill, the Minister of Justice had been quoted in the press as having said that he had *consulted* Mr. Justice Rumpff on the further appointments to the Court.

Other press versions used words to indicate that the Judge had *recommended* the further appointments.

"Bluntly, it would appear to the accused that your Lordship was a party to the appointment of a Judge in this case, of the Minister's advocate in (that) case . . . in matters where the the allegations were the same . . ."

Mr. Justice Rumpff immediately remarked that the press reports were inaccurate.

"I never recommended the appointment of my two colleagues. I was not asked to do so and would never have had the audacity to do so."

The Court adjourned until the following Monday to consider the application for recusal.

Monday, 4th August. Mr. Justice Ludorf recused himself at the resumed hearing on the sole ground that there was sufficient overlapping on the facts between the present and the 1954 cases for the accused to have reasonable fears that he could not be unbiassed.

Mr. Justice Rumpff denied that he had been asked to nominate or had in fact recommended the nomination of any Judges to the Court.

"Whatever was said by the Minister of Justice, it is my duty to state the facts to the accused. On these facts their fear need no longer exist, as it was based on wrong information."

The learned Judge concluded ". . . I have no choice but to follow the dictates of my conscience and refuse the application for refusal."

A further postponement for one week then followed for the appointment of a third judge, if deemed necessary.

Monday, 11th August—Friday, 15th August—application to quash. During the adjournment Mr. Justice Bekker was appointed to the Court.

The defence then made its second application—to quash the indictment. Mr. Maisels addressed the Court for over nine hours. He was followed by Mr. Fischer Q.C. whose submissions took four hours. So it is possible to give only the briefest indication of the highly technical argument.

The purpose of the application was to obtain the dismissal

of the main and the two alternative charges.

Mr. Maisels submitted that the main charge, read with the further particulars thereto, did not disclose an offence. Various other points included material variance and inconsistence between the allegations made and the facts set out in support thereof; lack of particularity, misjoinder of the accused in one indictment; the repeated use of "and/or", and so on.

The elementary rules in framing an indictment had not been observed by the Crown, the object being to inform both the Court and the accused in clear language the nature of the charges.

Mr. Maisels suggested the general attitude of the Crown appeared to be:

"Let's throw in everything the police have been able to find and let's see what comes out at the end."

The indictment as framed was an abuse of the process of the Court ". . . to throw the whole case at us . . . sort it out yourselves . . . not in the interests of the accused or of justice."

Examples of the irrelevant documents which helped to swell the mass of exhibits included—a history essay on the Vienna settlement, a poem by an Indian schoolboy and a book of Russian recipes.

The indescriminate use of the words "and/or" meant there were 498,015 counts against each accused.

Referring to the Crown suggestion that the creation of discontent at a public meeting was high treason, Mr. Maisels remarked:

"We shall have to abandon what we have learnt over hundreds of years about the principle of free speech if that is correct."

Mr. Fischer Q.C. then dealt for four hours with the alternative charges under the Communism Act. Apart from technical points relating mainly to lack of particularity, his point was that no one could "advocate" communism without publication to an audience.

When the defence argument was completed on Thursday, 14th August, Mr. Trengrove and Mr. Hoexter in turn replied on behalf of the Crown.

The defence had "thrown in everything in an attempt to find some weakness in the indictment, in a desperate attempt that some weakness may come to light."

On the main charge each accused was solely and clearly charged with having committed the crime of high treason in his individual capacity. Each accused had had hostile intentions,

had disturbed or endangered the safety of the state, and had committed overt acts.

"In committing these hostile acts the accused were acting in concert and with common purpose."

Any act, whatever its nature, even if purely preparatory (since the plans of the accused had not reached successful fruition) were punishable if calculated to injure the state. The essence of the charge was hostile intent as evidenced by overt acts.

The safety of the state was so important that even the remotest danger must be nipped in the bud. Isolated acts may appear innocent. It was only when such acts exhibited the existence of a scheme or a conspiracy that high treason could be alleged. Thus the widest latitude as to the extent of the evidence led should be given to the Crown—to show facts from which the conspiracy could be inferred.

For an accused to join an organisation, in whatever capacity, was an overt act. The crime of high treason could be compared to a polluted stream. Anyone who entered the stream at any point became polluted. So, in the present case, where the "pollution" began in 1952, anyone who entered the stream later was in the position that evidence of prior acts of other persons could be proved against him, as evidence of the grand conspiracy.

Friday, 15th August—Mr. O. Pirow Q.C. interrupted the argument of his junior counsel to obtain an adjournment of the trial to discuss with the defence the possibility of limiting the scope of the trial.

Monday, 18th August—Friday, 22nd August—The Crown approach to the defence bore no fruit.

At the resumed hearing Mr. Maisels intimated to the Court that it would be better to consider the possible limitation of the trial after the Court had given a decision on the defence application to quash the indictment.

Mr. Trengrove then continued his argument, dealing in detail with the defence criticisms, submitting that the indictment clearly intimated to each accused the charges he had to meet, with sufficient particularity, and with the necessary allegations.

In this latter regard he made a noteworthy submission. Hostile intent in the crime of high treason was not merely to achieve government or a new government, it was achieving such government by means outside the constitution, and which were therefore illegal.

In reply to a question by Mr. Justice Rumpff, Mr. Trengove submitted forceful means were not necessary. Passive resistance would be treason in such circumstances.

"There is no intermediate action between the ballot box and a treasonable action by means of force. No programme aiming at change by other than constitutional means is a lawful programme."

"If the means were legal it did not absolve the parties to the conspiracy from responsibility if the aim was to achieve a change outside the constitutional sphere."

After Mr Trengove's address which lasted nearly twelve hours, Mr. Hoexter dealt with the defence submissions on the two alternative charges. In particular he submitted that "to advocate" did not mean revelation to a defined audience or a group of people. The policy of the Communism Act was that the danger of communism must be cut out at the root before the literature was published. Possession of a document was an offence under such circumstances.

Mr. Pirow then made an application to amend the indictment to limit references to the record of the preparatory examination, and further to excise certain documents.

Mr. Maisels immediately stated that the proposed amendments did not remove the embarrassment in the indictment.

The defence replied and the Court adjourned to consider its decision.

Wednesday, 27th August. The Court made an order on the defence application—

(*a*) Granting the Crown application to amend the indictment.
(*b*) Quashing the first alternative charge.
(*c*) Directing the Crown to supply certain further particulars on the remaining charges by 15th September.
(*d*) Dismissing the contention that the main charge disclosed no offence.
(*e*) Reserving the defence right to address further on the question of misjoinder in the light of the new particulars. No order was made on the application to quash the main and the second alternative charges.

The Court adjourned until 29th September, 1958.

Monday, 29th September—Thursday, 2nd October. During the adjournment the Court had furnished written reasons for its order, the Crown had furnished certain particulars, and the defence served notice of a further application to quash

the indictment in its new form.

At the outset, and with critical comment from the Judges, Mr. Pirow Q.C. after formally withdrawing the second alternative charge, made an admission on the remaining charge of high treason.

The Crown relied entirely on proof of conspiracy, and if it failed in that respect, there was no case—whatever else might be proved. Thus the Crown no longer relied on proving common purpose between the accused, or that they acted in concert.

Defence argument then proceeded until Thursday, 2nd October, on the new application.

The material points are as follows—

(*a*) Violence is an essential element of high treason. Thus the speeches and writings alleged could never be overt acts of that crime unless such formed part of a conspiracy or an incitement to commit violent acts against the state.

The majority of overt acts alleged in the indictment were incapable of constituting violence and (it follows) high treason.

(*b*) Possession of documents (the exhibits found with the accused) is not an 'act' at all and so is not an overt act of high treason.

(*c*) The order for further particulars had not been properly complied with and the indictment was still vague and embarrassing. For instance, reliance was placed on thousands of documents and speeches in the allegation of 'conspiracy'. Some were irrelevant. In other cases it was not clear what portion of lengthy documents was relied on. Documents were excised from the indictment in one part and yet relied on in other parts of the record.

(*d*) Misjoinder. The Court had earlier upheld certain Crown allegations on the ground that certain acts were "in a common course of conduct" on Mr. Trengrove's submissions. Mr. Pirow's admission that the Crown relied only on "conspiracy" contradicted him, and further showed that the acts referred to were those of individual accused and did not relate to all.

The defence also protested against an alleged irregularity, making a statement of the proposed evidence of the Catholic priest, an alleged expert on "communism" imported by the Crown, Fr. Bochenski, available to the Judges.

The Crown applied for an adjournment to prepare a reply to the defence application. The defence objected.

An adjournment was granted until the 13th October, 1958.

13th October—When the trial resumed on the 18th day, Mr. Pirow, before replying to the defence application to quash the amended indictment, gave notice of yet another application to amend the indictment and the further particulars thereto. He wanted a decision on this application before replying so as to speed up the case. He complained that the progress of the case was impeded as there was not the normal co-operation between the Crown and the defence in criminal cases. In making his new application he did not concede any defects in the charge, but admitted that nine-tenths of the Crown case was thereby abandoned.

"If our application is not granted we will withdraw the indictment and re-indict all the accused."

"If our application is not granted, we will have to deal with the whole of the argument of the defence, and quite frankly, we are not in a position to do so and we are not prepared to do so."

Mr. Pirow dealt with the technical aspects under constant questions from the Court.

Mr. Maisels then replied on this application, objecting to the amendments which still did not meet the defence objections to the indictment on the grounds of misjoinder of the accused in a single trial. Specific acts, not a course of conduct were alleged.

Mr. Justice Rumpff remarked:

". . . the Attorney General appeared not to have fully considered treason in peacetime without the use of violence or rebellion."

After Mr. Trengrove had begun to reply to the defence argument, Mr. Pirow rose at five minutes to one.

"I am afraid that my hopes that my application for certain amendments to the charge would shorten the proceedings have not been realized. In the name of the Attorney-General I withdraw the indictment."

Mr. Justice Rumpff immediately adjourned the Court, no date of resumed hearing being mentioned.

The Attorney General is entitled to proceed on a new indictment. Until he decides the accused can only wait.