

DATE: 04-10-1999

MATTER: ARGUMENT - SECTION 29 HEARING

MATTER: ROBERT McBRIDE MATTER

DAY: 5

-----CHAIRPERSON: Good morning everybody. I see that you have placed before us Heads of Argument, thank you very much, Mr Dehal. I take it these ones are yours Mr Richard? Thank you. As I said on Thursday when we adjourned, that this morning, today in fact is just going to, we are just going to hear argument on the question of the evidence which was given by Mr McBride at the Section 29 hearing during 1997. You will recall we said that we requested Heads and two sets have been provided here and then said that any legal representative, should he or she so desire, can emphasise points and make oral submissions. Could we start with Mr Dehal, ask Mr Dehal whether you have any submissions you would like to make, points you would like to stress on the arguments which you have submitted?

MR DEHAL: Thank you Mr Chairman. Mr Chairperson and honourable members, I would begin by saying that there is no point, it would seem for me to reiterate the argument contained in my Heads, least the incorrect impression be drawn from that submission, I wish to qualify it only on the one basis and that is as is the case with my Heads, I have only now seen my learned colleague's Heads, and once they have addressed you Mr Chairperson, perhaps if I am given the opportunity to respond, then I could deal with those aspects. Apart from that, just to highlight a few aspects on my case.

CHAIRPERSON: Are you in a similar situation Mr Richard, that you would want to have some time to read Mr Dehal's Heads?

MR RICHARD: I also only received his Heads in the last 45 minutes, I think we have started a bit late, but I am ready to proceed.

CHAIRPERSON: Yes. Mr Mall, are you going to make any submissions?

MR MALL: No, I am not going to make any submissions today.

CHAIRPERSON: Mr Prior?

ADV PRIOR: Mr Chairman, there were just one or two aspects I wish to highlight.

CHAIRPERSON: Are you ready to proceed Mr Richard, otherwise if you want some time to read these Heads, you can have it?

MR RICHARD: I am ready to proceed and in the same way as Mr Dehal has indicated, that he wishes to reply to me, I will in due course reply to him, rather than waste time reading, I am

ready to proceed now.

CHAIRPERSON: Yes, thank you.

MR RICHARD IN ARGUMENT: Thank you Chair. In this particular matter attention needs to be given to the context of the matter, its peculiar facts and background. To argue it as a matter of pure law, in my submission would be artificial. At page 2 of my Heads, onwards to page 7 I have outlined certain facts. One of the things to stress in that narration, is that the document which we referred to as Annexure C is the product of a Section 29 investigation at which Mr McBride was legally represented by Mr Brian Currin and in which as is outlined in page - for give me, gone too fast - page 5 referred to in the Section 29 hearing. I don't think it is a breach in anticipation or otherwise to refer the Committee to what is said at paragraph 1.19. The essence of it ...

JUDGE PILLAY: Mr Richard, I am just browsing through your Heads, at 1.27 the last paragraph on page 6 of your Heads, I think there is an error there, I think it should read it was explained that it was not deciding the question of whether the Section 29 transcript may be used for the purposes of cross-examination the fifth applicant.

MR RICHARD: I stand corrected, it is quite correct, there is a word "not" missing in the second line of paragraph 1.27. The transcript may not be used for the purpose of cross-examining the fifth, that is quite correct. I am sorry, I am not a typist, I made the error while typing it myself. Now, at page 179 of Exhibit C Mr Currin says -

"... what we have, which I will in a moment hand back to you Mr McBride, is a document which contains detailed information with regard to the Magoo's bombing and we would like (and then there is irrelevancy and it continues later in the paragraphs) which I think is fairly comprehensive."

And then at the end of that paragraph Mr Currin proceeds to state -

"... and it is also the - this will be part of his application *verbatim*, part of his application which we will lodge to the Amnesty Committee at a later stage."

It is important to note that that statement by Mr Currin was made in the context that on the 10th of April 1997, as appears from Exhibit A, Mr McBride's application was received by the Amnesty Committee, there is a date stamp on the first page of the amnesty application. Then this hearing took place a few days later, on the 21st of that month. So it is clear that whatever this document is, which we have never seen, was part and parcel of what was the then amnesty application and also part and parcel of the Section 27 enquiry record. I believe - it is at page 29 - and I believe that ...

ADV PRIOR: You said the Section 27 hearing.

MR RICHARD: Section 29 hearing, sorry, I thought people were reminding me of page numbers, Section 29 investigative proceedings. Now any law such as that applicable in this debate, has to be applied in a factual context.

Now the next issue that I would address is what in fact is the applicant's objection. In paragraph 13 under paragraph 3.2.2.5 and here I have used the work the fifth and first applicants appeared, I have stressed the word appear, because there have never been a formalised notice of objection, object to the use of the Section 29 transcript by the Amnesty Committee. If that is not correct, I would ask Mr Dehal to amplify or to alter it. Then the second point, the client provide the victim's legal representative and the Committee with copies of the document described as the and I set out the quote, as referred to in paragraph 9(b)(iii) in his application and mentions in paragraph 1.17 above.

The third one is an objection to the transcript and whatever is referred therein, being used in cross-examination. At that stage, since we both are reserving our rights to reply, I think I might ask Mr Dehal if there is anything that he would like to add to make sure that we are focused as to what objection is before us.

MR DEHAL: Mr Chairperson, in so far as that paragraph itself is concerned, that is page 13, paragraph 3.2.2.5, indeed subparagraph (a) is correct. Subparagraph (c) it would seem follows from subparagraph (a), but in truth is not an objection in principle raised by myself, relative to the applicants represented by Ms Koooverjee and I, but indeed by Mr Berger, relative to Mr Ismail when he then testified. It is not really a point I am taking, I simply supported Mr Berger. In so far as subparagraph (b) is concerned, the terminology is incorrect, the inference therefore is incorrect. I do not nor do my clients decline to provide the victims' legal representative with anything in that regard, I do not have any copies. In fact when you, Mr Chairperson, enquired from my appropriately what might the word application refer to if it does not refer to the evidence of Mr McBride in the 29 hearing, I endeavoured to suggest what it may possibly refer to. I do not have those documents. Mr Brian Currin represented Mr McBride, I telephoned Mr Currin, I sought to have his files sent to me, but he indicated after careful search that the files he did find, would be of no use to me. I do not decline to provide any documents, I do not have them, and I think in this regard, when I am given the opportunity to respond, what I will do is refer to non-committal aspects of bundle C, particularly the first seven pages, which allude to what that document application may possibly be. Thank you.

CHAIRPERSON: Sorry. Mr Richard, while you are on this, sorry Mr Prior, do you have any idea or whether any documents were handed in at the Section 29 hearing?

ADV PRIOR: Mr Chairman, I have been informed the documents were handed in. We are also at a loss to - the Cape Town office doesn't have anything more than what is in this bundle. Mr Currin is apparently in Ireland at the moment, but I hear what Mr Dehal is saying that he spoke to Mr Currin who says that he has nothing further in his files. It is a bizarre set of circumstances that we don't know what documents he is referring to. But we are pressing ahead with enquiries, Mr Chairman.

CHAIRPERSON: Because as I have said, I haven't as yet personally read this. I don't know whether in the evidence much is said about any documents being handed in or documents being referred to and relied upon, I don't know.

MR RICHARD: The only thing I can add to that is, the inference I can gather from the cross-examination, there was a document, one can see that people were using to find questions, but there is no direct reference to it. But I am at a complete loss as to what this document was or wasn't, I have never seen it.

MR DEHAL: Mr Chairperson, perhaps I should come in at this stage, just two aspects.

My learned colleague, Mr Prior, referred to Mr Currin and the quotation from me that he does not have anything further in his file. Mr Currin does not practice as he used to before, he practices from his residential premises, his files are somewhat in a disarray and that is the impression that I got from him. He searched through his archives, obtained a few files and said that those would not assist me in these proceedings. Mr McBride recollects specifically, when assisted by Mr Currin during the Section 29 proceedings, that an application was handed in and indeed that is referred to on page, or rather is more fully dealt with on pages 3, 4 and 5 of bundle C, some of the aspects I have quoted in my Heads, but particularly Mr Chairperson, if I may take you to paragraph 3, that the top of it is an address by Mr Currin which begins at the bottom of page 2 wherein Mr Currin says -

"... thank you very much, one doesn't - I certainly haven't had a long history of appearance before this Committee, so I am not quite sure what the procedures are. What we have which I will in a moment hand you back to Mr McBride (and this is relevant) is a document which contains detailed information with regard to the Magoo's bombing (and then much later, at the very end of that, I think at about lines 16, 17 the words) and it is also the, this will be part of his application, *verbatim* part of his application which we will lodge to the Amnesty Committee at a later stage."

Mr Chairperson, I may just say that this document was subsequently affirmed under oath by Mr McBride when his evidence began and then on page 4 from lines 11, 12 onwards, the Chairman says the following -

"... I can assure you that the information obtained at Section 29 hearings, are absolutely confidential, people are here sworn to secrecy."

And then Mr Govender below that says -

"... just one concern Mr Chairman, my learned friend referred to a statement that he is going to hand over to the Commission. Just to get clarity from my learned friend whether this is an amnesty application or a statement in response to the information that we require in terms of our subpoena. Perhaps he can clarify that for us."

Mr Currin's response in that regard is appropriate, he says the following -

"... it is an amnesty application which deals specifically with the incident which is referred to in the subpoena. In the amnesty application details are given with regard to that particular incident and the details which are given in our view, deal with the sort of information that we anticipate that this, your team, would require."

And then the next excerpt is very appropriate -

"... and the purpose of handing in this particular application is because Mr McBride would prefer if possible, to make one statement to the TRC. He would prefer not for the TRC to have more than one statement dealing with this particular matter for reasons of evidence and procedure when his application is heard."

And then in the next sentence again he refers to application, wherein he says -

"... once you have looked at the affidavit, once you have looked at the application which he is willing obviously to swear to the contents of it, to the extent to which it relates to his personal knowledge, you can then decide whether you want further information."

And then Mr Chairperson, much later, Mr McBride - sorry the Chairman on page 7 from line 7 deals with it as follows -

"... Mr McBride (he says), Mr McBride and Mr Currin, the document you are going to be handing up, is in essence an extract from a broader amnesty application. Does it contain any supporting documentation or extracts from other supporting documents as well?"

Mr Currin -

"... yes."

Then the Chairman says -

"... okay, well then perhaps Mr McBride you are under oath already, do you confirm that this document that you are about to hand up is to the best of your knowledge and belief true and correct? Yes, I affirm that" ... (says McBride).

Now three things, one it is the application for amnesty that appears to be a document referred to as the application in some respects, as the document in other respects and as the affidavit in other respects, but I understand in consultation with Mr McBride and this would come off in his evidence when he does testify, that this application which was handed in by Mr Currin, was not strictly speaking the application for amnesty that we have in bundle A, pages 103 onwards, but an application which was supported by annexures thereto, so as to more fully explain aspects, and those annexures you would see Mr Chairperson, are referred to on page 7 of this bundle C, when the Chairman deals with those supporting documentation and extracts, on line 10, 11 and 12. The words "does it contain any supporting documentation or perhaps from other supporting documents as well" and the answer is "yes." I do not have, nor did I ever have the benefit of seeing that complete document referred to therein, the annexures thereto, any supporting extracts, etc. I therefore am somewhat at a loss as to what document they are referring to, but crisply the point is whatever the document is, it is that

very document handed in by Mr Currin to the Section 29 Amnesty Commission which is referred to in Mr McBride's amnesty application, to be included herein by reference principally, crisply, one-pointedly for the purpose of including a list of the names of the injured and deceased persons *per se*. Sorry, I interjected at this stage when Mr Richard was addressing, I thought whilst I was dealing with that ...

CHAIRPERSON: Because I am just trying to think myself what sort of documents could have been put up in support, lists of names, newspaper cuttings, maybe extracts from a trial record or something like that. I am just wondering what other sort of documents there would be, besides that, medical reports, that sort of documentation. I am just wondering if there is any other type of documentation that could have been there, that we haven't got.

JUDGE PILLAY: Ballistics?

CHAIRPERSON: Yes.

MR DEHAL: Mr Chairperson, unfortunately I would not be able to help, in as much as I would like to, but may I just confine my address in regard to that application and the supporting documents crisply to this aspect. Sorry it would appear firstly that reference to Mr McBride's application for amnesty and the reference therein to any aspect of the Section 29 proceedings, is an aspect which is sought to rely upon in an endeavour to have the evidence included. My Heads and indeed my earlier submissions, I reiterate are the following briefly, one, one must understand that the word used there is application and not evidence. I see Mr Prior's Heads of Argument incorrectly refers to it as "the evidence", but I think Mr Prior would deal with that. His pages are not numbered, but in paragraph 7.3 he talks of evidence, he says -

"... the applicant refers in his amnesty application to his evidence at the Section 29 proceedings."

Now therein on a misunderstanding of the semantics of the ...(indistinct) lies the problem we are facing today. Mr McBride does not refer to his evidence, he refers to the application. And we have now, I think more than clearly established that the application Mr McBride refers to, is the papers or are the papers, he handed in through Mr Currin to the Section 29 Commission, which papers unfortunately none of us have, but which I submit are papers referred to in Mr McBride's amnesty application, purely to obviate the need, to retype, to reprint the 72 names of injured and deceased persons. There is merit in the reason for him to simply refer to it by reference, rather than retyping it. Obviously to save time, number of pages, etc, and the boredom thereof.

Now therein lies in my view, crisply the summation of that anomaly or ambiguity. In my Heads I deal with two additional points, firstly that the evidence Mr McBride tendered at the 29 hearings, in itself do not in any way include a list of the names of the injured and deceased persons, so it cannot be contended by any party that by reference to that, sorry to the 29 proceedings or any document therein, that for the intention that Mr McBride had to include the list of names of the deceased and injured, he could possibly have referred to the evidence. No, that couldn't possibly be so.

And secondly that the application handed in wherein reference is made to the Section 29 documents, was handed in on the 10th of April. The evidence was heard on the 21st of April,

much later. It cannot be said therefore that the evidence was intended to be included, because the evidence was not even heard at the time. And the other arguments which I have recorded in my Heads, those are the submissions for the present in response, thank you.

JUDGE PILLAY: The names, if that was the only aspect to be dealt with by those other documents, would be names that your client, or the applicant, McBride, would not have known himself, but would have submitted after perhaps research, etc. Because it would be impossible for him to know at the time of placing the bomb there, who the, or what the identities of the injured parties would be? Am I correct or ...

MR DEHAL: Sorry, bear with me. Judge, I cannot argue with that point, it must be so. It must be so.

JUDGE PILLAY: What I am trying to get at is that it was not in his personal knowledge who would be injured, but in order to supplement or fully substantiate his position at the Section 29 investigation, he was almost compelled to give whatever names he could. He could only attain those names by research and whatever else?

MR DEHAL: Absolutely, I must agree. May I just make one qualifying point and that is if you look at Mr McBride's application, perhaps I should just take you to it, in bundle A1, can I just get my bundle.

CHAIRPERSON: Page 107.

MR DEHAL: Thank you Mr Chairperson. On page 107 Mr McBride, three points made, on page 107 Mr McBride refers to the 29 application under the proviso dealing with list of names. He does not deal with that under paragraph 9(a) which deals with the acts. Had he dealt with it under the provisions acts, the anomaly, the ambiguity, the possible inference that it may refer to the evidence ...

JUDGE PILLAY: Would have been stronger?

MR DEHAL: Would have been stronger, indeed. Secondly, Mr McBride begins by referring to two other acts in 9(b)(i) on page 106 wherein he records the names in the Klein incident to the persons injured, principally that (ii) he refers by name to the persons deceased and injured in the Edendale saga, (iii) on page 107 he refers by name to the persons deceased, but he could not refer by name to the persons injured. He begins and that is the third point, he begins by referring to the trial record and charge sheet. I submit respectfully that in parenthesis, his reference to the application handed into the Commission is a reference and a submission and an addition *ex abundanti cautela* through excessive caution and perhaps if it did not have that, the understanding would have been just as complete and correct in the absence of the words in parenthesis. But the words in parenthesis was as I have said, added through excessive caution and nothing should be read into it, more than is intended. Thank you.

MR RICHARD: Chair, may I proceed. My first point is that between the 21st of April 1997 and the 14th of June 1986, number one the applicant was an accused in a very lengthy, hard and well fought trial and other trials had happened. Mr Derrick McBride, his father, and Mr Lecordier, Mr Gordon Webster and in those proceedings much evidence was led. The second point is whatever this document or statement or application is, or was, it was confirmed by him under oath in response to the questions put to him at the Section 29 enquiry. The third

point is what is now clearly common cause is that his applications for amnesty and the matters dealt with at the Section 29 enquiry, are the same. In other words the Parade Hotel incident. In other words he has given evidence on oath in relation to those incidents. Then I have no difficulty in the circumstances, that as at April the year before last, the fifth applicant was able to make the statement during the car bomb operation at the Why Not bar, three people were killed and 69 injured. He made that under oath. It is an admission which he is bound by and which he cannot withdraw. It is an admission of fact. He goes on to say -

"... those who were killed, were Marchelle Gerrand, Angelique Pattendon and Julie van der Linde."

They are names that must have been bandied about the court rooms at length. And then he proceeds to say -

"... for the list of those injured, refer to the trial record and charge sheet."

And then adds on as an afterthought, but it is a particularly relevant afterthought -

" ... further details are contained in the application handed into the Commission in Durban at S29 hearing."

I believe that the only consistent inference to be drawn from that parenthesised add-on is that what he is referring to is the overall picture, not something relating to some minor aspect. Now, where it takes this argument is that what is set out in Exhibit C and all the matters arising there from, are common cause with this current hearing, parallel thereto and intertwined and my submission is irretrievably so and it is impossible to separate the two. I then turn to the questions of law. At page 8, at paragraph 3, I deal with the first issue. What is the nature of the information contained in Exhibit C? Now, Section 29 has a particular word in it, that which is furnished. Now I have gone at length at pages 8 and 9 to detail how this hearing is a hearing in terms of the Act which is governed by the provisions of Chapter 6. Exhibit C has been furnished in the plain English meaning of being provided firstly to the Committee, secondly to me and thirdly that if one embarks on a careful analysis of Section 29(5), that Section and I would then proceed to refer to an appendice to my Heads of Argument, the last page thereof, the power, the authority of the Commission to prohibit the making public of the information emanating from a Section 29 investigation ends when the document, information, article has been and I will use the word provided as opposed to furnished, at a hearing that at has historically now happened. It is a past fact. Whatever power the Commission might have had prior to the furnishing or providing of Exhibit C and everything emanating from it, is now at an end. It is a public document which as I have outlined in the document before us, my Heads of Argument, which now falls in the public domain. There is no restriction on any one picking it up from the table here and taking it and publishing it.

JUDGE PILLAY: Well Mr Richard, in your argument shouldn't you persuade us that the word "furnished" and "produced" and even "publicise" is something that is akin to mere production here, or is there something more that needs to be done?

MR RICHARD: The Act is silent and does not qualify the word "furnished". If one looks at the plain ...

JUDGE PILLAY: I take the point, but I mean maybe it is a lacuna in the Act, but really speaking, if someone Joe Soap, produces such a document here from wherever he obtained it, is that sufficient for it to be declared publicised, or must some routine perhaps, procedure be completed before it is properly produced or furnished at this hearing?

MR RICHARD: In the facts of this particular matter, it was not Joe Soap, it was not an accidental act which landed, which resulted in the exhibit being provided to both the Committee and myself. It was part of what has become as is said in my learned colleague's arguments, the practice before Committees, to provide the Section 29 record. I see no irregularity in that act. To deal with the cases such as comes to mind where some Security Branch personnel in South-West Africa raided an Attorney's office and stole documents where the Court exercised its jurisdiction to exclude that evidence, there is no factual basis in this matter to proceed along that line of enquiry. In fact, I then refer to a section that I have headed "Openness and Transparency" at page 14, paragraph 3.3.

JUDGE PILLAY: Let's get back to my question to you. Are you then arguing that the mere production and I apologise if I have offended you by referring to Mr Soap, but whoever brought it into this hearing, and placed it on our table, you are arguing that is sufficient for furnishing if you want to call it that?

MR RICHARD: Judge, your argument ...

JUDGE PILLAY: It is not an argument, I am just raising a concern.

MR RICHARD: Your concern, forgive me, but the point, would imply that for me and I will use the analogy, to make a donation, would require some act of will. Pursuant to that decision or mind, I would then do something to carry forward the idea of taking whatever it is I want to take over to somebody else and do it. Now, your concern Judge is that in this matter, there was no preceding decision or application of mind. That is not so. I look at page 14 of my Heads of Argument, there I have a look at the situation where the Commission might apply its mind as to whether information such as that contained in and arising out of Exhibit C might or might not be made public. We immediately are confronted by the word may, which I refer to in paragraph 3.3.3.1 -

"... and the Commission may having due regard to the principles of openness and transparency declare that any article produced or information provided, shall not be made public."

It is phrased in the context that the decision which is the subject matter of the Commission's discretion, is to decide whether it should prohibit or do something not to make the information or other matter, public.

CHAIRPERSON: What you are saying is that the discretion is to prevent the production, so the starting point is that it will be made public unless a discretion is exercised to prevent that from occurring?

MR RICHARD: As the Chair correctly points out, and as I say in my argument, that is the plain interpretation on an analysis of the Section. It is not that the information is automatically not public. It is that until the decision applies its mind and exercises the discretion, emanating from the use of the word may.

JUDGE PILLAY: Isn't that the procedure that I was then referring to? It is not a discretionary power of one of the employees of the Commission to decide whether such a document must be included in the bundle or not, and if he so decides, then it is public. Isn't it for this Committee to decide that?

MR RICHARD: Well, that might be. I then carry on to have a look at the way in which such a discretion might be exercised. We are all familiar with the textbook arguments about the word "may" and I am not going to go through it.

CHAIRPERSON: I think we know that, I am sure Mr Dehal won't be arguing that. The use of the word "may", does not mean that there is a discretion. It does not mean "shall".

MR RICHARD: I think we have all answered an exam question or two on that one. But in my submission here the use from the context of the Section, is that it is not shall, it is the discretionary.

The next question is, once we look at the duty and obligation to use the discretion, we then have a look at the prescriptive manner in which the Act dictates that that discretion must be exercised. It enjoins the Commission to have regard to the principles of openness and transparency. At page 16, paragraph 3.3.6, I stopped my research after looking up what the meaning of the two words "openness and transparency" were and I have outlined. Transparent means having the property of transmitting light so as to render what is laying beyond, completely visible. That can be seen through, open, exposed to general view or knowledge and the meaning of the words is so plain, argument will take it no further.

I then revert to the fact that we are in a situation where the applicant has had the and I must concede the trauma and experience of giving evidence firstly at a lengthy trial, then at attending to the sequels of appeals and so on, then at a Section 29 investigation and now faces being questioned in these proceedings. In this regard I must point out that if one examines the version put up at the trial, and compares it with the version put up by the first applicant, Mr Aboobaker Ismail, and the as yet unknown version of the fifth applicant, it would fly in the face of every notion of openness and transparency if it were said that it was prohibited that any one of all these versions and everything emanating from them all, including the warning and interrogation statements, were precluded from the gamut of cross-examination. It would mean that the fifth applicant would be entitled in some manner or other, to not be called upon to explain inconsistencies, contradictions and in fact would lay the way open and I am not submitting that that is necessarily the case in this matter, because we haven't yet gone there and for me to say it, would be premature, to chose, to sensor a version so as to chose the most favourable which certainly is not consistent with transparency and openness.

Now, so to revert to the argument that the document falls as a public document, I ask the question how could any person exercising the discretion, not to allow the document and its information to remain public, justify a decision to make it secret? The next point is ...

CHAIRPERSON: I suppose you could get circumstances where it is in the public interest, that sort of situation?

MR RICHARD: Yes Chair, there are factual situations which one can hypothesise and theorise, public interest, State security and very special exceptions, but in relation to this particular incident which arose 13 years ago, there is no factual basis for any such

submission. Then parallel to that we have the debate relating to full disclosure. Again to go through it quickly and I don't intend labouring the point, I believe our learned Deputy President of the Constitutional Court set it out far better than I will ever do it, in the case of Azanian People's Organisation Azapo & Others v The President of South African & Others, I have referred to the case at page 12, paragraph 3.2.2.4 and I have set out the quotes therein, particularly the second quote lower down on the page and continuing on to page 13. There the learned Judge emphasised the utmost importance and quintessential essence of an amnesty application, that the victims are entitled to ascertain the truth and to know the truth and the applicant is under a duty to disclose the truth and make full disclosure. I then allude to the object of the Commission at paragraph 3.2.2.1, I refer to paragraph 1(a) -

"... by establishing as complete a picture as possible of the cause, nature and extent of gross violation of human rights."

And then paragraph (b) more importantly -

"... the object of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated ..."

Now, if one relates that back to the discretion I have outlined in terms of Section 29(5), again, there is only one defensible and justifiable decision that could be made as to what to do with a document and the information emanating from it, like Exhibit C, and my submission is that there certainly could have been no irregularity or mis-application of mind in making a decision not to do anything to declare it a document which shall not be made public.

Now, then we revert to some more what I call semantic arguments and there I refer to paragraph 3.4.2 of my Heads at page 17. Section 31(3) of the Act, that is the Promotion of National Unity and Reconciliation Act, contains a section which is interesting from a point of view from interpretation. In that subsection there is a phrase which I have emphasised by highlighting it - "shall not be admissible as evidence against the person concerned." Now, the word concerned creates a semantic convolution which can only be resolved by returning to (1) of Section 31, where the Section compels any person who is questioned by the Commission in the exercise of its powers in terms of this Act, or who has been subpoenaed to give evidence, to procure, etc.

Now, we then turn back to (3) and there before the tortuous phrase, derived from a questioning in terms of (1), my submission in that regard is that the only proper meaning that might be given to the phrase "against the person concerned" is that that person is the person who in terms of (1), was compelled to produce or to answer questions or to provide information. The next question is what does the Section relate to? Any incriminating answer or information obtained or incriminating evidence directly or indirectly derived - now that evidence shall not be admissible in criminal proceedings in a court of law, or before any body or institution established by or under any law.

Now, in the nature of things, any applicant before this Amnesty Committee is required to give particulars of an act or omission which constitutes a crime or a delict within the rest of the requirements. Now, the mere making of an application for amnesty is an incriminating

act. That fact in my submission means that an Amnesty Committee is not what was intended when ...(intervention)

JUDGE PILLAY: Furthermore Mr Richard, I don't think an Amnesty Committee could be regarded as a Committee from which penal consequences could flow?

CHAIRPERSON: Criminal proceedings?

MR RICHARD: That was my next point, I drop it there. It is a tortuous argument, but I thought ...

CHAIRPERSON: If one takes a look at this "against the person concerned" okay, here it comes "in criminal proceedings in a court of law or before any body or institution established by or under any law", so it would seem, I don't know, I am just raising it for argument from both Mr Dehal, yourself and anybody else, that whether it be in a court of law or any other institution or body, its got to be criminal proceedings. Okay, that raises the question, where can you have criminal proceedings other than in a court of law? Well, it might be I think the days are numbered, but a court martial, that sort of, some sort of tribunal or other.

MR RICHARD: Other than a court martial or that sort of criminal forum, the only other factual example that I could come up with last night while thinking about it, was a Disciplinary Committee in an employment situation, and it is clearly not what is intended by the Section.

CHAIRPERSON: Yes.

MR RICHARD: And then it means who has the rights in terms of the Section? The person who gave the evidence. Collateral, the word "person concerned", cannot be taken beyond that. At page 18, again that is Section 31(4).

CHAIRPERSON: It has just come to mind, what would be the situation if somebody then wants to produce evidence of this nature, Section 29 evidence in a court of law in a claim for damages? You say this Section wouldn't provide protection for that, because it is not criminal proceedings?

MR RICHARD: That is my submission. I know and I concede my guilt in relation to what is said on page 18. I also have been guilty of using very loose terminology. In all the other Sections that I quoted earlier, there is no mention of the word "privilege". When one considers Section 31(4), it is the first time that the notion is introduced, there is no provision in any of the other Sections creating any legal notion of privilege. It may create situations where a person might be compelled to give incriminating evidence, protect the person, remove the protection if a person does not, and so on. To ascertain what this Section means, my first consideration is what type of privilege is under discussion and I came to the conclusion that only two could be in point, and that is the standard common law of the privilege or now known as the right not to answer incriminating questions, and the right of privilege pertaining to communications between legal advisor and client. On reflection, I then understood the policy reason why this subsection was enacted. Firstly, I think it would have been an unjustifiable limitation of the rights of a client to abolish practitioner/client privilege. The Act does that in clear unambiguous terms. Then when one refers to the Section, the last number of words of the Section say -

"... the law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a court of law, shall apply in relation to the questioning of a person in terms of (1)."

So, subject to (1) and subject to the limitations and the right not to incriminate, provided (1) has been complied with, incriminating questions which breach the privilege against self-incrimination are permissible, provided the subsection has been complied with. So, to speak of the information contained in Exhibit B being privileged, is within the concept of legal notions and principles, not correct in its first instance.

CHAIRPERSON: What are you saying, are you saying that the question of privilege if any existed or if there was any reason to object to anything being said on the grounds that it contravenes the doctrine of privilege, should have been raised at the Section 29 hearing?

MR RICHARD: Correct.

CHAIRPERSON: I refuse to answer that, for the following reasons because Attorney/client or because it incriminates me, or whatever?

MR RICHARD: Quite correct. And for it to say that the evidence is now privileged, I don't know how any of us have ever extended this Section or the other Sections into that phraseology. I think what is being intended to be said is that it is protected and its use is circumscribed and conditional on all sorts of provisions within the Act, but to say that it is privilege, is not the correct notional concept. In fact what we have been arguing about, Section 29(5), is not, it has nothing to do with privilege.

JUDGE PILLAY: Isn't your strong point here that in the broad sense it is privileged as against any tribunal, be it a criminal court or otherwise, which has the power to impose penal punishment if you will, of whatever form whereas this Committee is not entitled to do that? Isn't that the cut-off point?

CHAIRPERSON: I think what, correct me if I am wrong Judge Pillay, what Judge Pillay, what I understand being put is that the question of privilege as contained in Section 31(4) is there to protect the person concerned, not with the person giving the evidence from any possible criminal sanction, etc, etc, whereas what we are involved with here, there is no need to protect any person from such sanction because we don't have the power or authority to impose any sanction?

MR RICHARD: That is correct and it goes further. Nothing emanating from this Section that we are dealing with now, creates privilege in the information beyond the loose notion that it is not admissible against the person in the situations that we have outlined at length earlier, and therefore to extend it as is the case in my learned friend's arguments, to say that he has a right of privilege in the information, is nonsense. He has no rights of such privilege. In fact, he has nothing to waive or not waive in the information. And then I return to the beginning of my argument and say taking the above into account, we now have a bundle of transcripts which is information emanating from an enquiry, investigation, conducted by the Commission. It is public information which must remain so in the interests of firstly full disclosure, openness and transparency and the other precepts which may emanate from Section 20.

Now, as Judge Pillay and the Chair have emphasised, this is not a penal tribunal, no penal sanction will be imposed by this body. I remember the Archbishop getting most annoyed when I called it a tribunal, I apologise. In the circumstances I submit that my learned colleague has not made out a case as to why, whatever is in this document, may not be placed before the Committee, used in cross-examination and generally be regarded as any other document of a sworn nature before this particular Committee and that clearly the onus and duty is on him to establish such a case. Factually no basis at all for such a case has yet been laid. The document hasn't even been alluded to in relation to his client. In this regard I question whether I should not take a point *in limine* at the start and say the argument is premature? Perhaps my learned colleague might be able through his client, to establish such a factual basis, I do not know. But in the absence of that, I cannot see a basis upon which this Committee or the Commission can make a ruling that cross-examination on Exhibit C of the fifth applicant can be precluded. That is my case.

CHAIRPERSON: Thank you Mr Richard. I think if we can just take, did you want to ...

ADV PRIOR: Mr Chair, yes, I just have three or four very short points.

CHAIRPERSON: But you see the Interpreters are working and I thought maybe just take a short tea adjournment and that will also give Mr Dehal time to digest Mr Richard's submissions.

MR DEHAL: I am indebted to you.

CHAIRPERSON: And then we can make any submissions after that. Just let us know when you are ready, thank you. We will take a short tea adjournment.

COMMITTEE ADJOURNS

ON RESUMPTION:

MR RICHARD: Thank you Chair, I had concluded subject to my original statement that once Mr Dehal has finished, I will make such reply as might be ...

CHAIRPERSON: Yes, thank you.

ADV PRIOR IN ARGUMENT: Thank you Mr Chairman. Mr Chairman, the preamble to the Promotional of National Unity and Reconciliation Act, I submit lays or indicates the wide scope that this Committee has in particular, in dealing with amnesty applications in respect of receipt of information.

In terms of the Commission's work as a whole in investigating gross violations of human rights, the establishment of as complete a picture as possible, of the nature, causes and extent of those violations, is required. Mr Chairman, it is apt to highlight the fact that the powers conferred upon this particular Committee on amnesty in terms of Section 5 of the Act, allows or allow the Amnesty Committee to set out working procedures and from there, develop practises as to how it would conduct its business. To that extent, the office or the position of Evidence Leader was not lightly determined. In fact the support of such a person or office forms an integral part of the work of the Amnesty Committee. A practice has developed since its inception, that information would be prepared, would be collated and presented to an

Amnesty Committee specifically dealing with a particular amnesty application. To that extent my submission is that the legislature had in its mind, at the time when it drafted or when it pronounced on Section 29, that very situation.

My reading of Section 29(5) in particular, I submit, caters for two distinct situations. The one situation is where the Commission having regard to the principles of openness and transparency may declare such Section 29 evidence, not to be made public as was argued by my learned friend, and as correctly pointed out by the Chairman. If or in the absence of such determination, that determination being that the evidence or the proceedings should not be made public, if that does not happen, the Act says until the article is produced at a hearing, which is an amnesty hearing in point, and then I don't refer to proceedings in courts of law, they are two disjunctive situations, it is not and or, it is not a condition that the Commission needs to pronounce upon .

CHAIRPERSON: Yes, if it does not, then the second part kicks in?

ADV PRIOR: Yes, and that is my submission. Maybe the Committee does not have to maybe go there, which would be my alternative argument, that I don't - my submission is that we are not incorrect, we are not acting unlawfully if we produce as Evidence Leaders, part of the Amnesty Committee, the Section 29 proceedings as envisaged by the Section. I would submit in any event, there is a far wider interest which is catered for by the Act in respect of the first proposition that having regard to those principles of openness and transparency, this Committee ought to allow it in any event.

Finally, we are indebted to both legal representatives of the victims and of the applicant, the fifth applicant, both their Heads of Argument are very helpful, however, if I may just briefly refer to paragraph 1 of Mr Dehal's Heads. With submission, all three points that he makes, being the basis of the objection to the inclusion, I submit are without any real substance. Subparagraph (a), I submit flies in the face of the clear language of Section 29(5), his argument that Section 29 evidence was never intended to be included in these or any other proceedings, is without any legal or factual foundation. Paragraph (b), he submits that by agreement at the 29 enquiry on the 21st of April 1996, the evidence is protected. With respect, there is nothing from the preamble or the prelude to those proceedings. If one gleans from the record, there was never any agreement struck between the Commission and the fifth applicant to that effect, and with submission, even if that was so, such agreement in the language or in the intention of the Section, would not have been proper, it would have been void. It would not have been a binding agreement, because the Act does not allow for such an agreement to be struck.

And thirdly, subparagraph (c), I submit has been adequately canvassed by Mr Richard on behalf of the victims that privilege does not exist in the sense in which it was argued, and certainly I would also go along with Judge Pillay's reference to privilege if in the broader sense, it has a particular meaning in so far as such evidence would not be allowed to be used in proceedings where there was a penal sanction or the possibility of a penal sanction. I would submit it would only be appropriate in that limited instance. Those are my submissions, thank you Mr Chairman.

CHAIRPERSON: Thank you Mr Prior. Mr Mall, you have no change of mind or anything like that?

MR MALL: I will not be addressing the Commission on this aspect.

CHAIRPERSON: Mr Dehal?

MR DEHAL IN ARGUMENT: Thank you Mr Chairperson. Mr Chairperson, firstly, briefly to deal with some of the legal aspects Mr Richard raised. Firstly in regard to what he termed the *in limine* submission, that this argument is premature. I have some difficulty with that in that you will recall Mr Chairperson, that when first bundle C came into play, when Mr Richard endeavoured to cross-examine Mr Ismail if I recall correctly, there on, there were objections to it and I outlined at that stage, that I would be objecting to its inclusion in these proceedings. I think it is you, Mr Chair, who decided that it would be prudent and in my view, correctly so, to have this argument aired out at this stage, before Mr McBride seeks to give evidence.

CHAIRPERSON: Yes, I think Mr Richard just made mention of a point *in limine*, he didn't really raise it *in limine* and deal with it as such, but I agree with what you have said. I think what Mr Richard was getting at when he mentioned it, not *in limine* rather, but towards the end of his argument was that in the context that when he made the submission that there was no factual basis upon which, which he knows being made by the applicant to justify the contention that the evidence, the document should be excluded. But it was as you correctly mentioned, raised and put on record that you will be objecting and secondly I think when all the legal representatives met on Thursday, as you said, it was deemed prudent to use this day which would have been a wasted day otherwise, for purposes of this argument.

MR DEHAL: Thank you Mr Chair, I will take that point no further.

The other legal aspect that Mr Richard raised is that relating to onus. As I understand it, it would appear as though his view is that I lead and he responds. As I understood it, I objected to his endeavour to have documents included and indeed to the Evidence Leader's endeavour to have the documents included. I persist in my objection thereto, as indeed is contained in my Heads, and I submit respectfully that the onus does not rest on me, but on those who seek to rely upon the inclusion of the document.

JUDGE PILLAY: Mr Dehal, to the extent that the onus is relevant, isn't it correct that the Act tends to lean towards accepting that such information and documents are presentable at this hearing, subject to any cogent reasons why it shouldn't? If that be the case, isn't it then for you or your client, to prove if an onus is necessary, that these documents should not be ruled admissible? On those cogent reasons, shouldn't they be coming from you?

MR DEHAL: Judge, if the approach is premised on the understanding as you formulate it, I would agree, but my submissions would be in due course that that understanding is also incorrect, that the view ought to be in the reverse and I will deal with Section 29 and Section 31 in that regard. Again, for fear that the incorrect impression may be created, my contention is that the onus does not rest on us, but on the other side, thank you. Mr Chairperson, before I even begin ...(intervention)

CHAIRPERSON: Sorry, just before you proceed, on the question of onus in a matter like this, it really relates to who starts and who gets the right to replying, but as you have seen, we are not dealing with this argument as if we were in a court of law, people are making submissions and then there is a reply and then more submissions, etc. Basically what we have

defined here is on the interpretation of the Act, etc, whether these Exhibit C should be made available at this hearing, it is hardly a situation where we are going to arrive at a conclusion and say well the onus was on X, and X hasn't shifted the onus, therefore we are not finding for him. It is not that sort of situation, so the onus is basically, relates to who starts and very little else. It does not have much significance, really.

MR DEHAL: Mr Chairperson, I agree totally with that submission, in fact it is my view that there is no need to find on whom onus rests, but principally because Mr Richard raised it, and I felt myself obliged to answer thereto.

Mr Chairperson, it would appear to me if I even begin to deal with the Sections and reiterate the legal aspects as I have in my Heads, there appears to be two fundamental difficulties.

The first I submit is the following - the question of privilege does not begin and rest nor end, where Mr Richard seeks to have it, or Mr Prior seeks to have it. The enquiry relative to privilege is a very much wider one, it is a factual and legal enquiry, and does have devastating consequences inasmuch as this Commission does not have any powers to impose penal sanctions. Let's look at the very real possibility of the corollary that if this Commission decides to refuse amnesty, then the document that is the evidence in the Section 29 proceedings, by its very inclusion in these papers, is a public document and within the realms of public domain, and may well be used in most any civil and criminal proceedings, not even those in criminal proceedings in a court of law.

JUDGE PILLAY: But isn't it protected, isn't the client, the applicant protected against criminal proceedings?

MR DEHAL: Yes Judge indeed, but my submission is that at the level that these documents are not included, these documents namely bundle C and the evidence of Mr McBride is more fully protected, is more, the protection is wider than when it is included in these papers.

CHAIRPERSON: Now, a person gives evidence at a Section 29 hearing, right, that same person gives evidence later at an amnesty hearing, okay. The evidence that was given at the Section 29 hearing is used in the amnesty hearing, made public, amnesty is for argument sake has to be refused, because if it is granted, then there is no other action, but if it is refused, are you saying then that because the Section 29 hearing evidence was used in the Amnesty Committee, it can then be used against that person in any subsequent criminal trial, but not the evidence that he gave at the Amnesty Committee, that he gave *viva voce* at the hearing here? Or are you saying that both can be used against him? Because if one takes a look at Section 31(3), I don't know if you - I am asking you Mr Dehal, are you distinguishing between the Section 29 evidence and the evidence given at an amnesty hearing?

MR DEHAL: Indeed Mr Chairperson. Briefly what I am submitting is this, the evidence in the Section 29 hearings is until now, protected. It is not open to scrutiny and public, it was heard *in camera*, in fact that is the very reason why we are arguing this matter today, and I am saying that once your ruling is that the evidence in the Section 29 hearings, ought to be included in these proceedings, then they become a part of the broader bundle of documents pursuant to these hearings and if applications for amnesty is refused, particularly in regard to Mr McBride, then the validity, the weight attached to the evidence in the Section 29 hearings, is exactly the same as with most anything in these proceedings.

CHAIRPERSON: Now, if we take a look at 31(3), it says -

"... any incriminating answer or information obtained or incriminating evidence directly or indirectly derived from the questioning in terms of (1), shall not be admissible as evidence against the person concerned, in criminal proceedings, etc."

(1) says -

"... any person who is questioned by the Commission in the exercise of its powers in terms of this Act, or has been subpoenaed to give evidence, etc ..."

wouldn't that protection in 31(3) apply to evidence given here by any applicant before us in an amnesty application and also evidence given at a Section 29 equally, whether it is being used later or not? I am just asking, you are arguing that there is a difference between the Section 29 and the evidence that Mr McBride will be giving tomorrow?

MR DEHAL: Mr Chairperson, I agree that it would have the same consequences, it would be the same, one way or the other, in that as you rightly read 31(1) and 31(3) read together, would give the consequence to both the documents included or otherwise, the same. But what I am submitting is this, if you look at the Section 29 proceedings, my learned colleague, Mr Richard, talked about the various versions, the need to cross-examine on the versions at the trial, the subsequent versions Mr McBride led, the aspects of the appeal, the documents during the appeal and indeed the evidence in the Section 29 hearings, and Mr Ismail's evidence. Now, I think in that submission lies somewhat the test and the aspects that I wish to address on. If one now seeks to introduce these various versions for the purpose, it would seem, of interrogation, of cross-examining Mr McBride on the various versions, then one talks of perjury, one talks of conflicting, contradictory versions and the possibility of perjury.

CHAIRPERSON: Yes, but wouldn't that exist, I am not talking now of Mr McBride, please understand me, I am talking generally, a person gives evidence in a Section 29 hearing and says X, 30 pages of it, he then comes to an amnesty hearing and says Y, 30 pages of it, now whether that Section 29 hearing has been made public or whether it has been kept confidential, does that have any - and in both instances take the oath prior to giving them - does that make any difference as to whether that person can be charged with perjury or not? Let's say for instance that the document is not used at all here, and then there is completely different evidence, how will that ...

JUDGE PILLAY: (Microphone not on)

CHAIRPERSON: I mean wouldn't the Commission then be obliged to lay a charge of perjury?

MR DEHAL: I submit yes, yes. Mr Chairperson, the other difficulty is this, if this Committee seeks to include the evidence of the Section 29 proceedings, a simple reading of the evidence under the Section 29 proceedings show clearly that it was premised on an acceptance and understanding of the documents handed in. There is reference to the documents therein. My submission is that even if that evidence were handed in here, without the documents referred

to therein, there is a major lacunae, and one wouldn't be able to fully understand that evidence in the proceedings.

CHAIRPERSON: Yes. You see, and also this question of perjury, look, it is always there, etc, but you know, I personally and I am sure my colleagues here have been involved in many, many hearings, many hearings, where we have the trial record and the applicant comes to the Amnesty Committee and says "I did it, this is what I did", etc, he explains his role, etc. When you take a look at the trial record, and it says "I was not there, I deny it, I don't know anything about it." Why did you say that in your trial "well, I didn't want to get convicted." It is very common and I have yet to hear of a perjury charge being laid against anybody that has been used against him, because the whole spirit is to - you know, if that was the problem, if he knew I am applying for amnesty, I am going to get amnesty, but I am going to go to jail for perjury, it just wouldn't work.

MR DEHAL: Yes.

CHAIRPERSON: So the perjury element is there, because it is on the books, but from a practical point of view, I must say I have never heard of it being implemented and it must, I don't see it as a huge threat.

MR DEHAL: I am glad to hear that from you Mr Chairperson, I was just very concerned about Mr Richard talking about the various versions and the contradictions therein.

CHAIRPERSON: Yes, but it is there, it is there in law, and what I am saying, I am taking more of a robust approach, practical approach, but I mean it is just a fact.

MR DEHAL: I agree, that ought to be the spirit of these hearings. Mr Chairperson, the other submissions that I wish to make, relate to Section 29 and to the full disclosure aspects, referred to by my learned colleagues. My submission is that both my learned colleagues referred to full disclosure and that in the spirit of full disclosure, the evidence in the Section 29 hearings, ought to be included. I submit respectfully that the enquiry is wider than that, and the enquiry relative to full disclosure is premature at this stage, that indeed Mr McBride does intend to testify in these matters. Perhaps once he has testified, the submissions, the enquiry, the question as to full disclosure will then be appropriate.

At this stage the criticism relative to full disclosure, premised purely on the argument on the Section 29 evidence, is in my respectful submission, inappropriate. For that reason the reference to the case of Azapo v The President, is in my respectful submission, irrelevant. That case does correctly set out the necessary principles in law and generally on the spirit of this Promotion of National Unity and Reconciliation, the need for full disclosure, I agree with all of that, but again I submit, that enquiry becomes appropriate at the end, when Mr McBride has testified, not at this stage.

As regards Section 29(5), Mr Chairperson, I am not absolutely certain of this, but in my discussion with senior legal personnel, dealing with (5) and the reliance now sought to be placed there on for the purposes of including this evidence, it seems to me clear that Section 29(5) by the very nature of the fact that it is (5) to Section 29, falls squarely within the purview of Section 29 which is Section 29 that deals with an enquiry on these proceedings, and it is Section 29 that caused bundle C to come about and that (5) perhaps is irrelevant for

the purposes of the present enquiry and the term Commission in (5), refers to the Commission that heard the evidence in the enquiry and not the Commission presently dealing with this.

JUDGE PILLAY: You see Mr Dehal, I fail at this stage to appreciate the importance of the contents of those documents, or the document. The issue that this Committee must decide is a question of principle, whether a record of what was testified to in the Section 29 investigation, is admissible or can be used in this hearing. That is the crux of the enquiry at this stage.

My understanding is that this whole process is run under the Act which establishes the Truth and Reconciliation Commission. There are sub-Committees of that Commission established, one for investigations in terms of which Section 29 in question, was held. Another Committee is this Committee, the Amnesty Committee. So really we have two in-house Committees and the record of the evidence given before one of the Committees, and here we are discussing whether that record given before a sister Committee can be used in front of this Committee. Really, is it not so that we can take cognisance of what was said in front of another Committee under the umbrella of a Commission? Unless you have cogent reasons why we shouldn't.

MR DEHAL: I agree totally with what you have said Judge Pillay, my only difficulty is that (5) under Section 29, to the extent that argument has been adduced to seek reliance there on for the purposes of inclusion of the evidence, in my respectful submission, falls outside the purview of this enquiry, because (5) is (5) to Section 29, but broadly speaking, I think even morally the submission is right that this Committee, the Amnesty Committee ought to have regard to any aspect before the Inquiry Committee, yes.

And that brings me to the penultimate aspect, and that is Section 31. Section 31 in my respectful submission is more apt, more appropriate, more on point on this enquiry, on this enquiry, as opposed to Section 29(5). To that extent and as included in the Heads, I respectfully submit that 31(2) is appropriate and ought to be relied upon. 31(3) in my respectful submission is to be read differently from what you Mr Chairperson, thought the difficulty related to and I would read it as follows when one deals with criminal proceedings. Indeed it is correct that criminal proceedings cannot be heard, apart from a court of law, and certainly not by a body or institution, so in line 4 ...

CHAIRPERSON: Unless a court martial, because a court martial is not a court of law, but they certainly can hear matters of a criminal nature, and they can impose fairly extensive punishments, as well.

MR DEHAL: Correct. Mr Chairperson, if I were to read it and add in the necessary words to give it the meaning I understand, I would read it as follows -

"... shall not be admissible as evidence against the person concerned, in criminal proceedings in a court of law, or before any body or institution established by or under any law."

If criminal proceedings were intended I submit, in regard to any of the other bodies, it probably would have read like this -

"... shall not be admissible as evidence against the person concerned in criminal proceedings in a court of law or criminal proceedings before any body or criminal proceedings before any institution established ..."

CHAIRPERSON: I thought about what you have submitted, after having looked at this, but it also leaves a problem with the interpretation. I hear what you say, but if you say "against the person concerned in criminal proceedings in a court of law, or before any body, institution established under a law", that means that it couldn't be used before any other body or institution established by law in respect of any matter, any evidence. Why then restrict the evidence in a court of law, to only criminal evidence, do you see what I am getting at? Why shouldn't it be - you know, I think what - you know if it was against the person concerned in proceedings in a court of law or any other body, then of course there would be no, then it would be quite clear, but the way that you ask us to interpret it, court of law is only criminal proceedings, but not delict or contractual whatever, anything else, civil, but in any other body can be anything. Whereas the problem with the interpretation as Mr Richard puts it, you know, is criminal proceedings in any other institution or body, you know, what did the legislature have in mind? Okay, we have come up with perhaps court martial and Mr Richard came up with saying well, you might get disciplinary proceedings where somebody is charged in-house by his employer of thieving or let's say, now can they use the evidence that he gave at Section 29 in the disciplinary proceedings where he admitted to thieving from his employer, that sort of thing. So, there is difficulties whichever way one looks at it.

MR DEHAL: I concede Mr Chairperson, there are those difficulties. The only interpretation I seem to come to is if you add those two comma's, it is probably there where the interpretation ends. I think if they used the words "in criminal proceedings", without the reference to "in a court of law", then it might have had a wider interpretation in criminal proceedings, perhaps before another Court like the other forums you have referred to, but I think it is confining itself to criminal proceedings in a court of law, and then deals different from that, to proceedings before any other body or institution, indeed. Mr Chairperson, apart from those submissions, I just want to see very quickly, whether I have anything else to say. Mr Chairperson, I concede immediately that Judge Pillay's apt recording of the question that this Committee is to rule on, is in fact correct. Whether this is admissible or can be used, and I submit that is the question to be answered. My submission is that the legal arguments I have adduced in the Heads of Argument, including the constitutional aspects, deal with this aptly and ought to prevent its inclusion. I reiterate, all the aspects in the Heads, thank you.

CHAIRPERSON: Thank you. Sorry, Ms Kooverjee, do you have any submissions that you would like to make?

MS KOOVERJEE: None, thank you Mr Chairperson.

CHAIRPERSON: Any ...

MR RICHARD IN FURTHER ARGUMENT: Very briefly. With regard to the question of perjury emanating from Section 31(3), I think the object of the legislature is plain. If one imagines the results that would flow if this Commission could not sanction

people who lie to it and commit perjury in its face, it is ...(indistinct), the extension of the interpretation, I go back to what I have said earlier - somebody commits an act, is tried for it,

during the course of his defence, lies, but he is not believed and convicted, and then comes out with the truth. I took it as part of, it is not legally correct, but ...(indistinct).

Then when we talk about the debate of the furnishing or providing of Exhibit C, well, none of us in the room were responsible therefore, it would have been useful if some rules had been written some years ago, none were, I think what our learned colleague Mr Prior, said, practices and procedures have evolved. My post-script to my point *in limine*, point *in limine*, I don't take it any further. Then when one talks about onus and that topic, I have often questioned what is the Truth and Reconciliation Commission, and I came to the conclusion that it is *sui generis*, it is neither an administrative tribunal in that sense, or body, nor a court of law. It certainly is charged with a duty as (20) outlines, to investigate amongst other Sections, consider, decide, but on what criteria? The word "its satisfaction" often comes up, I have cross-referred. Clearly because it has powers of investigation as is set out in chapter 6, its power to obtain information, articles, and so on, that are relevant, cogent, pertinent, are considerably higher and more effective than any court of law or other ordinary administrative, so at the end of the day, I don't believe there is much purpose in pushing the point of onus. It is really relevance, cogency and what in the end, is aimed at facilitating the outing of the truth. The agreement, I wasn't a party to that agreement, I wasn't there and I don't believe the victim class were even present or represented at the Section 29 hearing. An inference I draw that this supposed agreement that was arrived at, was really an agreement, might in fact and I take it no further than the word "might" an understanding as to what the law was. An admission of what the law is, has never bound anyone. The law is plain, what we have argued this morning is the law, and what was agreed, takes us no further. In fact, the agreement is in my submission irrelevant and of no consequence to the victim class. Thank you Chair, nothing further.

CHAIRPERSON: Anything ...

MR DEHAL: I am indebted to you, Mr Chairperson, there is nothing further I wish to add.

ADV PRIOR: Mr Chairman, I wonder if I may be permitted just by way of example, to - this information might be of assistance, where one looks at situations where it would not be in the interest of the hearing or in the process of full disclosure, with the Chemical and Biological Warfare Hearings, where certain aspects of proliferation of either weapons of mass destruction or in that particular case, the formula for certain drugs ...(intervention)

CHAIRPERSON: Which these days I think, all such formulas and designs and recipes are freely available on the Internet?

ADV PRIOR: I take your point, but that is the type of situation, and possibly in respect of ...(indistinct) between nations, that that information would obviously be looked at and maybe even protected in the interest of justice. We don't have that situation here. And just lastly, I don't think we can ignore the comments and the judgment of His Lordship, Mr Justice Mohammed in that AZAPO case. He goes right to the root of it, the trade-off in plain, blunt language is full disclosure, truthful full disclosure. If the victims cannot learn what the truth was, what happened, that is the essence of what these proceedings are all about. We cannot be seen to be subverting any information which may assist this Committee in determining what the truth is, or the victims hearing what the truth was, in fact. Thank you Mr Chairman.

CHAIRPERSON: Yes. Well, thank you. We will make our ruling tomorrow morning when we proceed. I would like to thank the legal representatives for their helpful argument and the Heads or argument. We adjourn until - what time did we mention, was it half past nine or ten o'clock?

MR DEHAL: Ten o'clock.

CHAIRPERSON: Ten o'clock?

MR DEHAL: Yes.

CHAIRPERSON: Was it ten o'clock tomorrow morning?

MR DEHAL: Correct.

CHAIRPERSON: Yes, so we will then stand adjourned until ten o'clock tomorrow, when we will continue with the hearing, thank you.

MR DEHAL: Thank you.

COMMITTEE ADJOURNS