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# TREASON RESEARCH PACK

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# CRIMINAL LAW

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[Excerpts from Ch IX without footnotes.]

**Acts of high treason**

(*a*) *Role of intention in determining whether there is a treasonable act* It is impracticable to posit a certain type of act as a requirement for the crime, because the hallmark of high treason is not a certain type of act but the hostile intent with which an act is committed. Any act, however innocent it may seem to be when viewed objectively, may constitute high treason if it is committed with the necessary hostile intent.

From a dogmatic point of view, high treason is a good example of a crime which is structured in such a way that the intention cannot be regarded as exclusively forming part of the element of culpability. It also forms part of the definitional elements of the crime. Put differently, the intention forms part of the "wrongdoing" in the structure of the crime. ("Wrongdoing" comprises all the requirements for liability other than culpability. In a broad sense it is equivalent to what the courts call the *actus reus*.) Otherwise it is impossible to identify the conduct which must be unlawful. It is exactly the presence or absence of X's intention or knowledge which determines whether conduct which, viewed from the outside, may be completely innocent, yet nevertheless constitutes an act of high treason.

This point may be illustrated as follows: Y asks X, who is walking in a street in Pretoria, to show her the way to the Union Buildings. X does this. Has X in so doing committed high treason? Here one has to distinguish between the following two possibilities: Had X not known who Y was, and had she thought that Y was merely a tourist who wished to admire the Union Buildings' architecture, she has obviously not committed high treason. If, on the other hand, she had recognised Y as the person who was striving to overthrow the government by violence, and who wanted to get to the Union Buildings in order there to kill the head of state as part of her scheme to overthrow the government, and had she nevertheless proceeded to explain to her how to reach the Union Buildings, she has indeed committed high treason. Viewed objectively, that is, from the outside, there is nothing to indicate that X had committed the crime. It is only X's subjective state of mind (knowledge, intention) that brings her act within the definitional elements of the crime.

(*b*) *Committing high treason by omission* Even an omission to act which is accompanied by the requisite hostile intent constitutes high treason. Every person who owes allegiance to the state and who hears or otherwise becomes aware of the fact that high treason is being committed or that there is a plan to commit it, has a duty to communicate this fact to the authorities as soon as possible. Failure to do so constitutes high treason.

(*c*) *Acts of high treason in time of war* High treason may be committed in times of both war and peace. The following are examples of high treason committed in times of war: assisting the enemy by fighting for it against the Republic or against one of its other enemies; furnishing information to the enemy; committing acts of sabotage against the Republic, thereby weakening the Republic's resistance; broadcasting propaganda on behalf of the enemy; providing invading enemy forces with food, shelter or military equipment, or voluntarily accepting a post under the command of the enemy, for example, as guard, interpreter, or even as a cook. A South African subject who in time of war leaves the Republic and settles in enemy country also commits treason, for she thereby places herself under the enemy's protection and owes the enemy allegiance.

(*d*) *Acts of high treason in times of peace* Examples of high treason committed in times of peace are the following: organising, taking part in or instigating an armed revolt or rebellion against the Republic; inviting an attack by an outside enemy; taking up arms to coerce the government to follow a certain course of action or to refrain from certain action; endeavouring to bring about the unconstitutional secession of a certain area of the Republic from the rest of the Republic; murdering, or attempting, conspiring or inciting to murder the political or military leaders of the country; plotting the overthrow of the government or the replacement of the constitution by unconstitutional means, attempting to overthrow or endanger the government by undergoing military training abroad and, upon returning to the Republic, setting out to achieve these aims by, for example, committing acts of sabotage, attacking a police station or establishing a secret military base, and concealing quantities of weapons in a certain place for later use by people wishing to overthrow the government.

(*e*) *General* Violence against the state, either actual or contemplated, is not a necessary element of the crime. The act of high treason may be committed either within or outside the territory of the Republic of South Africa.

**Intention** The intention which must accompany the act can be described as the definitive element of high treason. It is known as *animus hostilis* or hostile intent.

All authorities agree that hostile intent is present if it is X's intention to overthrow the state itself. For the purposes of high treason the government is completely identified with the state, therefore, X acts with hostile intent if she intends to overthrow the government unlawfully.

What is the position if X commits her act not with the intention of overthrowing the government, but in order to achieve a goal which seems to be less serious, such as merely to endanger the state's security or independence, or merely to coerce the state (government) to adopt a certain course of action? In *Erasmus* the Appellate Division rejected the narrow interpretation of hostile intent, according to which such intent must be limited to an intention to overthrow the government; instead, the court accepted a broader interpretation of the term, according to which the meaning of hostile intention may include an intention to achieve a goal which may at first glance appear to be less
drastic or dangerous, as explained above.

A fair interpretation of the relevant authorities is that hostile intent comprises the following, namely an intention (unlawfully) (*a*) to overthrow the government of the Republic; (*b*) to coerce the government by violence into any action or inaction; (*c*) to violate, threaten or endanger the existence, independence or security of the Republic; or (*d*) to change the constitutional structure of the Republic.

It is submitted that although violence is not a general prerequisite for a conviction of this crime, it ought to be required where X has the intention as described in (*b*) above, otherwise the definition of the crime would be too wide and vague. A hypothetical example of an act committed with the intention of coercing the government into a certain course of action is where X and her co-perpetrators arrest high-ranking government officials (such as cabinet ministers), hold them hostage and threaten to kill them if the government refuses to yield to certain demands of X such as to release certain prisoners from gaol. A hypothetical example of an act committed with the intention of unlawfully changing the constitutional structure of the Republic, is where X commits an act aimed at replacing a democratic, multi-party form of government set out in the constitution, with a dictatorship, without achieving such a transformation in a constitutional way, that is, without first obtaining in an election or a referendum the consent of the population to

such a change.

X's motive must not be confused with her intention. Her motive (ie, the ultimate aim of her conduct) may be to create a society or a constitution which in her opinion is more just than the existing one, but this will not avail her, if, in fact, she harbours a hostile intent, as described above.

**Conviction of attempt, conspiracy, incitement, or of being an accomplice or accessory after the fact is unlikely** The state need not actually be overthrown before high treason is committed. If it were a requirement for the crime that the state must cease to exist or lose its independence through the act, it would be impossible to commit the completed crime, because there would then be no state or government left to prosecute such an "act of high treason". All acts of high treason are essentially attempts to destroy the existence, independence or safety of the state. These acts are nevertheless punishable as completed, and not attempted, high treason.

It is, therefore, difficult to envisage a case which would amount to only attempted high treason. One can think of only one example in which X might be convicted of attempted high treason: this is where X commits a treasonable act (such as attacking a police station with rocket launchers) whilst under the impression that she owes allegiance to the state, whereas she in fact owes *no* allegiance to the state. This would be a case of attempting to commit the impossible. This example is, however, exceptional. If one disregards this rather theoretical possibility and concentrates on the typical case which serves before the courts, one must conclude that in practice attempted high treason virtually never occurs.

Because of the wide definition of the crime not only attempt, but also conspiracy and incitement to commit high treason are unlikely to occur in practice. With the exception of the unusual example mentioned above (where X wrongly thinks that she owes allegiance) such acts are simply acts of high treason. For the same reason no difference is made in high treason between perpetrator, accomplice and accessory after the fact, because every person who, with hostile intent, assists in the perpetration of the crime, whether before or after the event, complies with the wide definition of the crime.

# THE LAW OF SOUTH AFRICA

**Criminal Law (Volume 11 - Third Edition)**

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[Excerpts from Vol 11 without foonotes.]

## HIGH TREASON

**Origin** High treason stems from the Roman law crime known originally as *perduellio*, and later as *crimen laesae maiestatis*. After the fall of the Roman republic, *crimen laesae maiestatis* was used as a generic term to describe all the ways in which the *maiestas* or supreme power of the state or emperor could be impaired. *Perduellio* or high treason came to be regarded as the most important. The other species were *crimen laesae venerationis* (impairment of the *dignitas* of the *princeps*), sedition, and *crimen laesae maiestatis* as a particular crime. The vague term *crimen laesae maiestatis* referred to a variety of acts against *maiestas*, ranging from coining to the raising of a private army. In both Roman and Roman-Dutch law these different forms of *crimen laesae maiestatis* were ill-defined, and their descriptions frequently overlapped.

**Definition** High treason is committed by any person who, owing allegiance to the Republic of South Africa, unlawfully engages in conduct within or outside the Republic, with the intention of:

(a) overthrowing the government of the Republic;

(b) coercing the government by violence into any action or inaction;

(c) violating, threatening or endangering the existence, independence or security of the Republic; or

(d) changing the constitutional structure of the Republic.

**Who can commit high treason?** Only persons owing allegiance to the Republic can commit high treason. Some authorities have based the concept of allegiance on a tacit agreement between an individual and the state whereby the state confers its protection on the individual and grants the individual certain privileges in return for which the individual undertakes to subject him- or herself to the law of the land and to act in such a way that the state will not be harmed by reason of its having admitted him or her as a resident. Persons who owe allegiance to the Republic include citizens, people who are domiciled here, and residents, but not casual visitors such as tourists.

If, in the course of hostilities, part of the country is occupied by enemy forces, South African subjects in such occupied territory continue to owe allegiance to the Republic as long as the occupation lasts. This is because temporary occupation of a part of the Republic, involving a *de facto* withdrawal of the Republic's protection of its subjects in the occupied territory, is not the same as a total conquest of such a territory. During the occupation, South African subjects in the occupied territory may not voluntarily take up arms for the enemy, or otherwise assist them, for example by performing tasks for them thus

setting free more of their own men for combat. The same rule applies where a person owes

allegiance to the Republic because he or she is a resident here, even though he or she is a citizen of a foreign state, and even where it is this foreign state which occupies the territory in which the person finds him- or herself. Such person may not now conveniently cast off his or her allegiance by aiding the forces of the country of which he or she is a citizen.

The duty of allegiance of an alien resident does not end if he or she leaves the country temporarily, with a fixed intention of returning, or while the state's protection of him or her continues for other reasons, for example because his or her family still resides here and receives an allowance from the government, or where a person is a soldier who has taken an oath of allegiance.

The rationale for the duty of allegiance, according to Snyman, "lies simply in the undesirable practical consequences which would flow from its absence", coupled with considerations such as birth in the country or the voluntary performance of an act "which tend.to *associate a person with the character*, *aspirations and fortunes of that country*".12 However Burchell has criticised South African treason law as "anachronistic and inappropriate" for a modern popular democracy on the basis of its reliance on an outdated notion of allegiance, which is not compliant with "modern conceptions of the relationship between the citizen and the state".

**The act** It is impracticable to posit a certain type of act as a requirement of the crime, as the hallmark of high treason is not a certain type of act, but the hostile intent with which it is committed. Any act, however innocent it may seem to be when viewed objectively, may constitute high treason if it is committed with the necessary hostile intent.2 It follows that the state need not actually be overthrown, coerced or endangered by the act. If it were a requirement of the crime that the state must cease to exist or lose its independence through the act, there would be no state or government left to prosecute such an "act of high treason". Therefore all acts of high treason can in a certain sense be described as attempts to overthrow or coerce the government. In practical terms, there is therefore no such thing as attempted high treason.4 Because of the wide definition of the crime, not only attempts, but also conspiracy and incitement to commit the crime are acts of treason. But mere discussion of the possibility of acts of treason, not culminating in any agreement nor involving any mutual incitement, does not amount to high treason.6 Any person who, with a hostile intent, assists in the perpetration of the crime, whether before or after the event, is guilty of high treason itself, and not merely as a *socius* or as an accessory after the fact.

Every person who owes allegiance to the state and who hears or otherwise becomes aware of the fact that high treason is being committed, or is to be committed, has a duty to communicate this fact to the authorities as soon as possible. Failure to do so constitutes an act of high treason.

The act of high treason may be committed either within or outside the territory of the Republic.

In time of war the crime is committed by any person who owes allegiance to the Republic and who assists the enemy, either by fighting for the enemy against the Republic, or helping it in some other way, such as fighting against another of its enemies; obstructing or weakening the forces of the Republic; furnishing information to the enemy; committing acts of sabotage against the Republic, thereby weakening its resistance; broadcasting or publishing propaganda on behalf of the enemy; providing invading or occupying enemy forces with food, shelter, military equipment and the like, or accepting an appointment

under the enemy, for example as a guard, interpreter, or military cook. A South African subject who in time of war leaves the Republic and settles in an enemy country also commits treason, as the subject thereby puts him- or herself under the protection of the enemy and has to give allegiance to the enemy.

High treason can also be committed in peace time, and even where there is no external enemy. Examples of acts of treason in such circumstances are: organising, taking part in, or instigating an armed revolt or rebellion against the Republic; inviting invasion by foreign forces; taking up arms to coerce the government to follow a certain course of action or to refrain from certain action; endeavouring to bring about the unconstitutional secession of a certain area of the Republic from the rest of the Republic; murdering, attempting, conspiring or inciting to murder the political or military leaders of the Republic; and plotting the overthrow of the government or the replacement of the Constitution by unconstitutional means. Violence directed towards the state is not a necessary element of high treason.

The constitutionality of the crime of treason has been questioned in the light of the vagueness of the definition of the crime. In particular, the requirement that any conduct committed with the intent to threaten or endanger the independence and security of the state has been identified as an example of the breadth of the crime potentially being open to misuse by the state, prejudicing basic rights.

**Hostile intent** High treason can never be committed unless committed *hostili animo*, that is, with hostile intent. This is the definitive element of high treason, and the element which distinguishes this crime from the other species of the genus *crimen laesae maiestatis*.

All authorities agree that the hostile intent is present if it is the wrongdoer's intention to overthrow the state. Hostile intent can, however, be present even though something less than the overthrow of the state is intended. It is sufficient to prove that the wrongdoer intended to impair or endanger the independence or security of the state, or to coerce the government to adopt or to refrain from adopting a certain line of action. For the purposes of the law of treason, the state is identified with the government. There is ample support in the Roman and Roman-Dutch authorities for the view that treason is committed not only when a person wants to overthrow the state, but also when a person merely wants to endanger, disturb or injure its independence or safety. It makes no difference whether one instigates an outside enemy who seeks to destroy the existence or independence of the state, or supports an inside enemy who seeks to coerce the government or injure the security of the state. In many prosecutions for high treason the hostile intent has been described in the indictment as an intent "to disturb, injure or endanger the existence or security of the government",8 and it is submitted that a formulation of hostile intent which covers all the examples in the common-law authorities and case law of this crime is "an intention unlawfully to overthrow, coerce, impair or endanger the existence, independence or security of the government of the Republic".

The wrongdoer's motive has nothing to do with his or her hostile intent. The wrongdoer's motive may be the formation of a new society or constitution which (at least in his or her eyes) would be more fair and just than the existing one, or the fulfilment of personal ambition, but this is completely irrelevant. Once it is proved that a person knew (whether by *dolus directus*, *indirectus* or *eventualis*) that by striving to fulfil his or her aim he or she would impair or endanger the existence, independence or security of the government, the necessary hostile intent is established.

# S v BANDA AND OTHERS [1990] 4 All SA 152 (BG)

**Division:** Bophuthatswana General Division
**Judgment Date:** 27 October 1989
**Before:** Friedman J
**Parallel Citation:** 1990 (3) SA 466 (BG)

**Keywords**

*Criminal Law - Common purpose*

*Evidence - Admissions*

*Public Safety - Internal Security Act*

**Cases referred to:**

*Attorney-General, Israel v Eichmann* 1961-62 36 5 District ILR Court - Referred to

*Auditeur-General Pres La Cour Militaire v Muller* (1949) 16 Ann Dig 400 (Ann Dig) - Discussed

*Keighley v Bell* (1866) 4 F&F 763 - Discussed

*Llandovery Castle* 1920 P 119 (P) - Followed

*Minister van Polisie v Ewels* 1975 (3) SA 590 (AD) - Applied

*Ohlendorf, In re, (Einsatzgruppen trial)* (1948) 15 Ann Dig 656 - Considered

*R v Adams and Others* 1959 (1) SA 646 (SCC) - Considered

*R v Arlow en 'n Ander* 1960 (2) SA 449 (T) - Considered

*R v Baartman and Others* 1960 (3) SA 535 (AD) - Approved and applied

*R v Bekker* (1901) 18 SALJ 421 - Referred to

*R v Celliers* 1903 ORC 1 - Discussed

*R v Christian* 1924 AD 101 - Referred to

*R v Duma and Another* 1945 AD 410 - Referred to

*R v Erasmus* 1923 AD 73 - Applied

*R v Heyne and Others* 1955 (2) SA 539 (W) - Applied

*R v Kahn* 1955 (3) SA 177 (AD) - Applied

*R v Kefasi and Another* 1966 (1) SA 364 (SRA) - Referred to

*R v Labuschagne* 1941 TPD 271 - Applied

*R v Levy and Others* 1929 AD 312 - Applied

*R v Louw* (1904) 21 SC 36 - Referred to

*R v Mardon* 1947 (2) SA 768 (T) - Considered

*R v Matsitwane* 1942 AD 213 - Referred to

*R v Matthews* 1960 (1) SA 752 (AD) - Applied

*R v Mawaz Khan* (1967) 1 AC 454 (PC) - Referred to

*R v Mayers* 1958 (3) SA 793 (SR) - Referred to

*R v Mayet* 1957 (1) SA 492 (AD) - Considered

*R v Miller* 1939 AD 106 - Applied

*R v Shezi* 1948 (2) SA 119 (AD) - Referred to

*R v Smith* (1900) 17 SC 561 - Discussed

*R v Valachia and Another* 1945 AD 826 - Referred to

*R v Van Vuuren* 1944 OPD 35 - Criticised and not followed

*R v Vermaak* (1900) 21 NLR 204 - Approved

*R v Viljoen* 1923 AD 90 - Referred to

*R v Wenzel* 1940 WLD 269 - Approved

*R v Werner and Another* 1947 (2) SA 828 (AD) - Approved

*Rex v Kumalo and Others* 1952 (1) SA 381 (AD) - Referred to

*Rex v Leibbrandt and Others* 1944 AD 253 - Approved and applied

*Rex v Mardon* 1948 (1) SA 942 (AD) - Approved

*Rex v Neumann* 1949 (3) SA 1238 (T) - Referred to

*Rex v Strauss* 1948 (1) SA 934 (AD) - Considered

*S v Andreas P en 'n Ander* 1989 (1) PH H 38 - Discussed

*S v Banda and Others* 1989 (4) SA 519 (BG) - Applied

*S v Cooper and Others* 1976 (2) SA 875 (T) - Referred to

*S v De Blom* 1977 (3) SA 513 (AD) - Referred to

*S v Essack and Another* 1974 (1) SA 1 (AD) - Applied

*S v Ffrench-Beytagh* 1972 (3) SA 430 (AD) - Approved and applied

*S v Gaba* 1981 (3) SA 745 (O) - Referred to

*S v Hlapezula and Others* 1965 (4) SA 439 (AD) - Applied

*S v Hlomza* 1983 (4) SA 142 (E) - Referred to

*S v Hogan* 1983 (2) SA 46 (W) - Considered

*S v Jama and Others* 1989 (3) SA 427 (AD) - Applied

*S v Mbambo* 1975 (2) SA 549 (AD) - Applied

*S v Mgedezi and Others* 1989 (1) SA 687 (AD) - Approved and applied

*S v Mongalo* 1978 (1) SA 414 (C) - Referred to

*S v Mule en 'n Ander* 1990 (1) SACR 517 (SWA) - Considered

*S v Rosenthal* 1980 (1) SA 65 (AD) - Referred to

*S v Safatsa and Others* 1988 (1) SA 868 (AD) - Approved and applied

*S v Serobe* 1968 (4) SA 420 (AD) - Referred to

*S v Shaik and Others* 1983 (4) SA 57 (AD) - Considered

*S v Shepard and Others* 1967 (4) SA 170 (W) - Referred to

*S v Sigwahla* 1967 (4) SA 566 (AD) - Referred to

*S v Zwane (3)* 1989 (3) SA 253 (W) - Referred to

*The State v Bondi* 1962 (4) SA 671 (AD) - Referred to

*United States v Calley* 22 USMCA 534 (MCA) - Considered

*United States v Goering* Unknown - Referred to

*United States v Kinder* (1954) 14 CMR 742 – Discussed

**Judgment**
FRIEDMAN J:

*A: The indictment*

The 143 accused are charged with the crime of high treason, alternatively contravening s 22(1)*(a)* of the Internal Security Act 32 of 1979 (B), alternatively contravening s 45(2)*(a)* of Act 32 of 1979, alternatively contravening s 45(2)*(b)* of Act 32 of 1979, in that (and I quote the indictment):

'Whereas during the whole period covered by this indictment the said accused owed allegiance to the Republic of Bophuthatswana (hereinafter referred to as the State) the said accused did unlawfully and with hostile intent against the State, to overthrow or coerce the Government of the State, commit certain acts on 10 February 1988 in the district of Molopo, the particulars whereof are as follows:

1. During the early hours of the morning the house of the President of the State was attacked and the President was captured. An unsuccessful attempt was made to force the President to resign from his post.

2. During the early hours of the morning the houses of certain Cabinet Ministers of the State were attacked and they and their families were captured. The Ministers were coerced into signing resignation papers.

3. The command of the Molopo Military Base was taken over and the base was occupied. Movements in and out of the base were restricted.

4. Certain Ministers and military personnel of the State were captured and unlawfully detained at the military base.

5. The Bophuthatswana Broadcasting Centre was occupied. The announcers were coerced into broadcasting a communication concerning the overthrowing of the State. All further broadcasting was restricted to this communication.



6. The President, Ministers, Commissioner of Police, military personnel and personnel of other forces of the State were kept hostage inside the National Independence Stadium. They were guarded at gun point.

7. An attempt was made to remove the hostages from the National Independence Stadium to the Molopo Military Base, to frustrate the liberation of the said hostages by the South African Defence Force.

8. Garona Government Building was occupied. Public servants were refused entry at gun point and told to go home.

9. Meetings were held at the Molopo Military Base during which soldiers and officers were informed that the Government had been overthrown by the Defence Force, that the President and all Cabinet Ministers had resigned their posts, that a new President had been sworn in and a new Cabinet appointed. The "new" President and a number of "new" Cabinet Ministers were introduced.

10. During the early hours of the morning the Commissioner of Police and other officers of

various forces of the State were captured and unlawfully detained at the National Independence Stadium.

11. Attempts were made to force the Chief Justice of the State to swear in a new President.

12. The Molopo Military Airfield was occupied. Military personnel of the State were captured when reporting for duty, and unlaw- fully detained inside the airfield. They were later taken to the National Independence Stadium where they joined the other hostages.

First alternative count: That the accused are guilty of the offence of contravening s 22(1)*(a)* read with ss 1, 22(2) and 22(4) of the Internal Security Act 32 of 1979; in that, on the date referred to in the main count, the said accused did wrongfully and with intent to endanger the maintenance of law and order in the Republic of Bophuthatswana or any portion thereof, in the Republic or elsewhere, commit certain acts or attempted to commit any acts, or conspired with any other person*(s)* to aid or procure the commission of the said acts or committed, incited, instigated, commanded, advised, encouraged or procured any other person*(s)* to commit certain acts to wit:

1. During the early hours of the morning the house of the President of the State was attacked and the President was captured. An unsuccessful attempt was made to force the President to resign from his post.

2. During the early hours of the morning the houses of certain Cabinet Ministers of the State were attacked and they and their families were captured. The Ministers were coerced into signing resignation papers.

3. The command of the Molopo Military Base was taken over and the base was occupied. Movements in and out of the base were restricted.

4. Certain Ministers and military personnel of the State were captured and unlawfully detained at the military base.

5. The Bophuthatswana Broadcasting Centre was occupied. The announcers were coerced into broadcasting a communication concerning the overthrowing of the State. All further broadcasting was restricted to this communication.

6. The President, Ministers, Commissioner of Police, military personnel and personnel of other forces of the State were kept hostage inside the National Independence Stadium. They were guarded at gun point.



7. An attempt was made to remove the hostages from the National Independence Stadium to the Molopo Military Base, to frustrate the liberation of the said hostages by the South African Defence Force.

8. Garona Government Building was occupied. Public servants were refused entry at gun point and told to go home. 9. Meetings were held at the Molopo Military Base during which soldiers and officers were informed that the

Government had been overthrown by the Defence Force, that the President and all Cabinet Ministers had resigned their posts, that a new President had been sworn in and a new Cabinet appointed. The "new" President and a number of "new" Cabinet Ministers were introduced.

10. During the early hours of the morning the Commissioner of Police and other officers of various forces of the State were captured and unlawfully detained at the National Independence Stadium.

11. Attempts were made to force the Chief Justice of the State to swear in a new President.

12. The Molopo Military Airfield was occupied. Military personnel of the State were captured when reporting for duty, and unlawfully detained inside the airfield. They were later taken to the National Independence Stadium where they joined the other hostages.

Which acts were likely to have the following results:

*(a)* to hamper or to deter any person from assisting in the maintenance of law and order;

*(b)* to promote, by intimidation, the achievement of any object;

*(c)* to cause or promote general dislocation, disturbance or disorder;

*(d)* to cause, encourage or further an insurrection of forcible resistance to the Government;

*(e)* to further or encourage the achievement of any political aim, including the bringing about of any social or economic change, by violence or forcible means;

*(f)* to cause serious bodily injury to, or endanger the safety of, any person;

*(g)* to cause substantial financial loss to any person or the State;

*(h)* to cause, encourage or further feelings of hostility between inhabitants of the Republic;

(i) to damage, destroy, endanger, interrupt, render useless or unserviceable or put out of action the supply or distribution at any place of light, power, fuel, foodstuffs or water, or of sanitary, medical, fire extinguishing, postal, telephone or telegraph services or installations, or radio transmitting, broadcasting or receiving services or installations;

*(j)* to obstruct or endanger the free movement of any traffic on land or in the air;

*(k)* to embarrass the administration of the affairs of the State in the Republic or any portion thereof.

Second alternative count: That the accused are guilty of the offence of contravening s 45(2)*(a)* of the Internal Security Act 32 of 1979, in that on the date referred to in the main count, the said accused did wrongfully conspire with any other person*(s)* to aid or procure the commission of or to commit an offence, to wit high treason and or a contravention of s 22(1)*(a)* of Act 32 of 1979.

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Third alternative count: That the accused are guilty of the offence of contravening s 45(2)*(b)* of the Internal Security Act 32 of 1979, in that on the date referred to in the main count, the said accused did wrongfully incite, instigate, command, or procure any other person*(s)* to commit an offence, to wit high treason and or a contravention of s 22(1)*(a)* of Act 32 of 1979.'

With the exception of accused No 195 who will be dealt with later herein, the rest of the accused pleaded not guilty.

Save in the case of accused No 195 who filed a statement in terms of s 112 of the Criminal Procedure Act 51 of 1977, the remainder of the accused filed statements in terms of s 115 of the said Act. Substantially these statements are almost identical and contain the following:

*(a)* A *plea* of not guilty to all the charges.

*(b)* A referral to statements made by the accused to a magistrate, or peace officer, and statements made pursuant to a pointing out.

*(c)* *Admitting* their involvement and participation in the events referred to in the manner, and to the extent set out in the said statements.

*(d)* A *denial* that at any time they possessed the requisite *mens rea* or hostile intention, to commit the crime of high treason as alleged, or to commit any of the alternative charges with which they have been charged. A denial that the accused were at any time party to any plot, or conspiracy, to overthrow the Government of Bophuthatswana.

*(e)* At all material times they participated in and executed the acts referred to in their *statement*/s in their capacity as soldiers in the Bophuthatswana Defence Force (hereinafter referred to as the BDF), and as a member of the Bophuthatswana National Security Unit (hereinafter referred to as the BNSU), and acted in obedience to orders, and or instructions given to them by a person in authority over them.

*B: The law*

Before analysing the evidence, it is necessary and propitious to deal with the law relating to the following subjects:

*(a)* the crime of high treason, with particular reference to the element of hostile intent (*animus hostilis* );

*(b)* the defence by soldiers of obedience to orders given by a superior, as a ground of justification;

*(c)* the doctrine of common purpose;

*(d)* the admissibility of extra-curial statements;

*(e)* the Internal Security Act;

*(f)* the consequences of failure to report that there is a plan to commit high treason.

The legal principles relating to the aforegoing must be distilled because counsel for the State and the accused addressed the Court thereon.

Furthermore, they are relevant to the facts that have emerged from the evidence. In addition, they constitute central issues which fall to be determined by the Court.

*As to A*

*The crime of high treason with particular reference to the element of hostile intent (animus hostilis* )

'High treason consists of any overt act unlawfully committed by a person owing allegiance to a State possessing *majestas* who intends to impair that *majestas* by overthrowing or coercing the Government of that State.'

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Hunt *South African Criminal Law and Procedure* vol II by Milton at 14.

Snyman, in *Criminal Law* at 257, defines it as follows:

'High treason consists in any act committed either inside or outside the borders of the Republic by a person who owes allegiance to the Republic with the intention unlawfully to overthrow, coerce, impair or endanger the existence, independence or security of the Republic.

This formulation the learned author extracted from the definition in clause 2 of the draft bill 'to codify the law relating to the common law crimes of high treason, sedition and public violence' drawn up in 1976 by the South African Law Commission (RP 17/76). The bill was never submitted to Parliament and consequently there is no statutory definition of high treason which assists the Court.

It will be observed that the definition of high treason framed by Snyman is more extensive and comprehensive than that offered by *Hunt*, but the essential elements of the offence are embraced by both.

An analysis and comparison of both definitions reveal generally the following common elements or features:

(i) 'an overt act';

(ii) 'unlawfully committed';

(iii) 'by a person owing allegiance to the State';

(iv) 'the State must have *majestas* ';

(v) 'the intention accompanying the act (this is the hostile intent or *animus hostilis* ). This aspect has been described as the definitive element of high treason.'

I may mention in passing that in order to succeed on a charge of high treason, the State must prove each and every element of the offence that I have delineated in the preceding paragraph. This appears from the case law and authorities that I will refer to herein. I now propose to investigate, examine and evaluate the elements of the offence to which I referred.

(i) 'An overt act'

*(a)* It is unrealistic to attempt to describe or list categories of acts as prerequisites for treason. This is so because a characteristic of treason is not a certain category of acts, but the hostile intent accompanying such acts.

*(b)* 'An overt act' was described in *R v Leibbrandt* 1944 AD 253 at 284 as being 'any act manifesting the criminal intention and tending towards the accomplishment of the criminal object'.

*(c)* Any act therefore, if viewed objectively, which is seemingly and apparently to all appearances innocent, may establish treason if it is performed with a hostile intent. This aspect has received judicial pronouncement in cases where it was stated - 'an act, apparently innocent in itself, may clearly be an overt act of treason if proved to have been done with hostile intent to the injury of the State or the supreme government'. *R v Viljoen* 1923 AD 90 at 92; *R v Wenzel* 1940 WLD 269 at 275; *R v Adams and Others* 1959 (1) SA 646 (Spec Crim Ct) at 666; *S v Hogan* 1983 (2) SA 46 (W) at 57C; *R v Christian* 1924 AD 101; *R v Mardon* 1947 (2) SA 768 (Spec Crim Ct); *R v Strauss* 1948 (1) SA 934 (A).



Mr Smit, Mr *Kuny* and Mr *Chetty* submitted that this was the principle to be applied when considering the nature of the overt act, and there is substance in this contention.

Having regard to the aforegoing and the wide definition of the crime that has been referred to, not only an attempt, but also incitement and conspiracy to commit the offence, are acts of high treason. In *R v Leibbrandt* (*supra* at 273, 288, 289) it was held that the signing of a blood oath to overthrow the Government is in itself high treason; see *S v Hogan* (*supra* at 56C - D). For this reason, no distinction is made in high treason between the perpetrator of the act, the accomplice and accessory after the fact. The reason being that every person who with hostile intent, assists in the commission of the crime, whether before or after the event, conforms to the wide definition of the crime. *R v Adams* (*supra* at 660 - 1).

Equally important is to note that a mere discussion of the possibility of acts of treason, not resulting in any agreement, nor including any mutual incitement, does not amount to high treason.

(ii) *'Unlawfully committed'*

*Hunt* (*op cit* at 19) describes unlawfulness as,

'this element which prevents acts directed at the amendment of the constitution, the replacement of the government, or the head of the State or the adoption or abandonment of policies or legislation by *lawful constitutional means* from being treason'. (Emphasis added.) See *R v Vermaak* (1900) 21 NLR 204 at 221; *Snyman* (*op cit* at 260 - 1).

I respectfully agree with what has been stated by *Hunt* and *Snyman* in this connection.

Counsel for the State and the defence agreed on the nature of the unlawfulness that constitutes high treason.

Changes of government can only be lawfully effected by constitutional means. Conduct intended to overthrow a government other than by lawful constitutional means, constitutes

an intent to depose and impair the government, or to overpower the *State*. I have used the words government and State in the same context, because it has been held in *R v Leibbrandt* (*supra* at 280 - 1) that, for the objectives of high treason, the government is completely identified with the State. I respectfully agree that this must be so because the government represents and acts on behalf of the State, otherwise an incongruous position would obtain. As Schreiner J (as he then was) said in the Court *a quo* in *R v Leibbrandt* (*supra* ):

'(F)or the purposes of the law of treason the government is wholly identified with the State, the land and the people.'

(iii) *'By a person owing allegiance to the State'*

It was not disputed that the accused were soldiers in the Bophuthatswana Defence Force (the BDF). Mr *Smit* submitted on behalf of the State that all the accused represented by Mr *Kuny* admitted in their plea explanations in terms of s 115 of the Criminal Procedure Act that during the relevant times they acted as soldiers of the BDF.



All the accused represented by Mr *Chetty* admitted in terms of s 220 of the said Act that at all relevant times they were in the service of the BDF. In argument both Mr *Kuny* and Mr *Chetty conceded that this was in fact the position.*

Furthermore, the undisputed evidence by the State witnesses Phuduhudu (at 748 of the record), Boikanyo (at 842 - 3) and Makgai (at 1334), which will be dealt with later herein, is to the effect that, when joining the BDF, soldiers swear an oath of allegiance to the State, which is represented by the Government of the day.

The Court accepted, and it is indeed so, that the accused owed allegiance to the State, that is to the Government of the day.

(iv) *'The State must have majestas* '

I have already given judgment on this aspect and have found that the Republic of Bophuthatswana is a sovereign independent State, and consequently has majestas. Therefore high treason can be committed against its Government, and this Court therefore has jurisdiction to try cases of high treason.

(v)'Hostile intent (animus hostilis )'

*(a)* It is beyond question that this is the key definitive element of high treason. Hunt (*op cit* at 25), *R v Erasmus* 1923 AD 73 at 80.

*(b)* Counsel for the State and the accused submitted various definitions of hostile intent as defined by the Courts in South Africa, as well as by textbook writers.

*(c)* They can be summarised as follows. Schreiner J (as he then was) stated in his judgment in the Court *a quo* in *R v Leibbrandt* (*supra* at 281) that motive was irrelevant in the crime of high treason and I quote:

'Treason may be committed and the hostile intent be entertained with a view to achieving some further purpose. The ultimate goal may be the achievement of some social or economic advantage for a portion or even for the *whole* of the community. It may be the advancement of some political or ideological theory, or it may be the fulfilment of personal ambition or the wreaking of personal hatred. None of these ultimate motives is relevant to the inquiry whether treason has been committed or not. Whatever the facts are that induce a citizen to entertain an intention to help the enemy or to weaken the effort against the enemy, if he acts in order to carry out that intention he commits an act of treason.'

It is clear that in that case the learned Judge was dealing with a war-time situation, and it makes no difference whether one applies it in times of peace. The substantial issue is that motive is irrelevant in the commission of the said crime.

*(d)* According to *Hunt* (*op cit* vol II at 26):

'(3) Though an intent to overthrow the State, certainly does constitute a "hostile intent", "hostile intent" is not confined to this state of mind. Someone who intends "to coerce the governing authority" by force, but has no intent to overthrow it, has "hostile intent".'

*(e) In R v Viljoen* (*supra* at 49) Innes CJ defined hostile intent as 'intent to treat *the* (government) as an enemy'.

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In *R v Strauss* (*supra* at 940) Watermeyer CJ stated:

'The requirement in the definition of treason that the actions complained of must have been done with hostile intention against the State does not mean that an accused must have been animated by feelings of hatred or ill-will towards the State but merely that he was intentionally antagonistic towards it.'

It is interesting to observe, and I agree with *Hunt*, that Watermeyer CJ in *R v Leibbrandt* (*supra* at 280) did not repeat the qualification of force as stated by Schreiner J when he said in his judgment in the Court *a quo* in *Leibbrandt's* case, referring to hostile intent, as 'intent to overthrow the government or to coerce it by force'.

This definition by Schreiner J was, however, adopted by the Court *a quo* in *R v Mardon* (supra). *Hunt* is of the opinion, although not dogmatically so, that the words 'by force' may be omitted from the definition of 'hostile intent'. He bases his argument on what Innes CJ drew attention to in *R v Erasmus* (*supra* at 82), that:

'The whole structure of society might be shaken by the violent action of a body of men whose object was not to alter the constitution or change the government, but to compel the latter to obey their behests.'

*Hunt* states in vol II *op cit* at 27:

'It is treason to endeavour to coerce the governing authority by force because this amounts to an attempt to usurp the function of government - not *in toto* as where the government is sought to be overthrown, but *pro tanto*. But this is the case whether force or some other unlawful but passive means of coercion, such as an illegal strike or "passive resistance campaign" is employed. Moreover, to use Innes CJ's idiom, conduct of this kind might just as much as violence shake "the whole structure of society".'

*Hunt*, after an exhaustive review of the authorities defines 'hostile intent' as 'intent to impair the *majestas* of the State, by overthrowing or coercing the Government'.

(f) The intent required is, according to *Hunt* (*op cit* at 29), and I quote:

'(1) The intent required must on general principles, be investigated in terms of actual intent or *dolus eventualis* without regard to motive. X must foresee the possibility that his conduct may overthrow or coerce the Government, yet continue undeterred.

(2) Mere negligence is not enough. It is not enough that a reasonable man would have realised, for instance, that propaganda broadcasts might assist the enemy; himself must have foreseen this possibility. While the so-called "presumption" that a man intends the reasonable and probable consequences of his conduct is undoubtedly useful in making inferences about the accused's actual state of mind, it must not be allowed to degenerate into an objective test of mens rea.'

It has been held in the past that a *bona fide* mistake of law is no defence to a charge of high treason. This is now no longer the position because of the decision in *S v De Blom* 1977 (3) SA 513 (A) at 529H.

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From the aforegoing it is plain and I agree that 'hostile intent' is a subjective, and not an objective, element of the offence of high treason. In this connection Watermeyer CJ in *R v Leibbrandt* (*supra* at 284) stated:

'Now, clearly intention is something subjective, a state of mind which is incapable of direct proof by witnesses. It can only be proved by inference from the acts and expressions of the accused and from the surrounding circumstances.'

According to Joubert (ed) *Law of South Africa* vol VI para 171:

'Once it is proved that a person knew (whether by *dolus directus*, *indirectus* or *eventualis* ), that by striving to fulfil his aim he would impair or endanger the existence, independence or security of the government, the necessary hostile intent is established.'

A typical example occurred in *R v Mardon* 1948 (1) SA 942 (A) . In that case the accused thought that by fighting for Germany against Russia he would help South Africa. He was anti-communist and he feared that the spread of communism would have detrimental effects on South Africa. His motive was not regarded as a defence, because it was found that he knew by inference that his conduct would free Germans to fight against the Western Allies, including South Africa.

In *S v Sigwahla* 1967 (4) SA 566 (A) Holmes JA at 570E, in dealing with the question of subjective foresight, put it as follows, and I quote:

'Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so.'

*(g)* According to *Snyman* (*op cit* at 261) '*(a)*ll authorities agree that "hostile intent" is present if it is X's intention to overthrow the State itself'. This must also apply to the government because in high treason the State and the government are synonymous.

*(h)* The *hostile* intent to overthrow the State therefore means, at the very least, an intent to effect this object unlawfully.

(i) After examining the Roman-Dutch authorities, *Snyman* comes to the conclusion that, *apart* from *Voet* whose view of *animus hostilis* was regarded as being too narrow, *animus hostilis* had a broader meaning. It also embraced an intention to endanger the independence or security of the State. In this connection he quotes *Matthaeus* 48.2.2.9; *Moorman* 1.3.2, 18, 19; *Van der Linden* 2.4.2.

The broader meaning of the abovementioned authorities was accepted by the Appellate Division in *R v Erasmus* (*supra* ) and that of *Voet* was rejected. Voet adopted a restrictive meaning of *animus hostilis*, by narrowing it to only an intention to overthrow the State or government. I respectfully agree with what was decided in *Erasmus*' case.

Logically, practically and realistically hostile intent cannot be restricted and circumscribed to overthrowing the State, but must also include an intention to bring pressure to bear upon, or to coerce the government unlawfully.



This would also include according to *Snyman*, an intention to force the government to adopt or to refrain from adopting a certain line of action. The intention must nevertheless be unlawful. See *R v Erasmus* (*supra* at 82, 89); *R v Leibbrandt* (*supra* at 280); *R v Neumann* 1949 (3) SA 1238 (Spec Crim Ct) at 1263; *S v Zwane and Others* 1989 (3) SA 253 (W) .

*(j)* *Snyman* (*op cit* at 261) defines hostile intent as 'an intention unlawfully to overthrow, coerce, impair or endanger the existence, independence or security of the Government of the Republic'. In
his definition the reference to the word Republic relates to the position in South Africa. Hostile intent in treason must be distinguished from flawed intellectual judgment or expression. The hostile intention is the decisive element in treason.

I respectfully differ from the definition of hostile intent given by *Hunt*. I regard it as

somewhat narrow. Taking into consideration the exigencies of statehood in this era, the sophisticated methods used and the modern technology available to impinge on, or to impair the *majestas* of the State by unlawful *means*, I prefer and accept the more far-reaching and inclusive definition of hostile intent given by *Snyman*, and contained in clause 2 ss (1) of the bill proposed by the SA Law Commission (RP 17 - 1976).

In the said bill the hostile intent is defined as:

'With the intention of *(a)* unlawfully impairing, violating, threatening or endangering the existence, independence or security of the Republic; *(b)* unlawfully changing the constitutional structure of the Republic; *(c)* unlawfully overthrowing the Government of the Republic; or *(d)* unlawfully coercing by violence, the Government of the Republic into an action or into refraining from any action....'

Having analysed and considered the views of the authorities to whom I have referred on the elements of high treason, I accept that the excellent definition contained in the bill proposed by the said Law Commission is apposite and appropriate to the present era in which the hegemony of statehood is to be protected, without an infraction of the rights and liberties of individuals who act by lawful or constitutional means to achieve a change in government.

I accordingly define high treason as any overt act committed by a person, within or without the State, who, owing allegiance to the State, having *majestas*, with the intention of

(1) unlawfully impairing, violating, threatening or endangering the existence, independence or security of the State;

(2) unlawfully overthrowing the government of the State;

(3) unlawfully changing the constitutional structure of the State; or

(4) unlawfully coercing by violence the government of the State into any action or into refraining from any action.

*As to B*

Obedience to orders by a superior

It is generally accepted that an act performed by a subordinate, emanating from the instructions of his superior, may, albeit within certain limits, be justified by the defence of obedience to orders. See Burchell and Hunt South African Criminal Law and Procedure vol I 2nd ed at 354 - 5; De Wet and Swanepoel Strafreg at 101; Joubert (ed) Law of South Africa vol VI para 66; Snyman Criminal Law at 104.



In trials where this defence is raised, the accused invariably contends that as a soldier he is obliged to obey the orders of his superior officer, thereby evading personal responsibility, the contention being that whatever act he is alleged to have committed was done pursuant to an order, so that, if criminal liability arises at all, it is against the authority who issued the order.

Obedience to orders, although regarded as a separate defence, comprises the defence of necessity in the form of compulsion, in that the compulsion stems from a superior.

Relating to members of the armed forces, obedience to orders has been recognised by the Courts in many countries as a distinct defence. This distinct defence is based on public policy. As is pointed out by Gordon in The Criminal Law of Scotland 2nd ed at 390 - 1, since 'soldiers act as instruments of the State, the latter can hardly punish them for so acting'.

In this matter the accused were members of the BDF, and I will therefore consider this defence as it relates to soldiers. From the abundant authorities quoted by Mr Joubert who argued this aspect of the law on behalf of the State, and Mr *Chetty*, who argued on behalf of the accused, which I have read, as well as referring to others, the requirements of this defence are:

*(a)* The order must issue from a person in a position of lawful authority over the accused. It has been held that a prisoner of war who executes an order of a fellow prisoner, without any lawful authority over him, cannot rely on this defence. In *R v Werner* 1947 (2) SA 828 (A) at 834 an order to kill a fellow prisoner was not given by the South African who was in command of the prisoners,
but by a German officer who was secretly hiding in the camp. The defence failed. See also *R v Kumalo* 1952 (1) SA 381 (A) at 387; *R v Louw* (1904) 21 SC 36.

*(b)* There must be a duty on the accused to obey the order given.

*(c)* The accused must have done no more harm than was necessary to carry out the order. This needs no further amplification. See *R v Mayers* 1958 (3) SA 793 (SR).

I revert now to *(b)*, namely that there must be a duty on the accused to obey the order given, because this requirement presents the most difficulty and controversy.

Inherent in this essential is the proposition whether there exists an absolute duty by a subordinate to obey the orders of his superior. This proposition *inter alia* arose for decision in the important judgment by Solomon JP in *R v Smith* (1900) 17 SC 561 where he stated at 567 and I quote: '(I)t is monstrous to suppose that a soldier would be protected where the order is grossly illegal.' I will deal with this leading case later herein.

As I have already indicated, the defence of obedience to orders is subject to certain limitations. According to *Burchell and Hunt* (*supra* at 356) the learned authors state:

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'It is generally agreed that the defence of obedience to orders cannot be accepted without a limitation, and in this regard there are two possibilities: to describe the limits according to the nature of the crime committed, or alternatively, according to the nature of the order given.'

The learned authors point out, however, that where a member of the armed forces is involved, the possibility of describing the limits according to the nature of the crime committed, has not met with general approval. They cite the following cases: *R v Smith* (*supra* ); *R v Celliers* (1903) ORC 1; *R v Bekker* (1901) 18 SALJ 421. In a note at 356 they state the following:

'Thus the defence has been held to excuse heinous killings by soldiers: *R v Smith* (1900) 17 SC 561; *R v Celliers* (1903) ORC 1. In *Bekker* (*supra* ) the killing was not regarded as "heinous" (at 424).'

According to them, where a soldier is involved, the limits of this defence are defined in terms of the order given, and the defence is available only where the order is one which the accused has a duty to obey, and they cite the rule in the *Digest* 50.17.169.

'He is free from blame who is bound to obey.'

*Snyman* (*supra* at 104) considers this issue from a somewhat different perspective. He is of the view that a distinction must be drawn between an act committed in obedience to a lawful order, and one committed in obedience to an unlawful order. In the case of a lawful order, the act is justified on the basis that the subordinate is acting in an official capacity, or because he is merely 'a part or an extension of the body or authority which acts in an official capacity'. The learned author then proceeds to deal with the case of unlawful orders.

According to him there are two possible approaches to the subject of unlawful orders. In the one approach, which he refers to as the first, the subordinate has a 'duty of blind obedience' to the order of his superior. In other words, an absolute duty of obedience. If this view is adopted, an act performed in obedience to an order will always constitute a ground of justification. This way of thinking is unacceptable where serious crimes are involved.

No civilised legal system will exonerate a soldier who commits murder or rape on the orders of a superior, or war criminals like Eichmann and others who claimed that they committed mass murder merely because they acted on the orders of their superiors. It is inconceivable

and unthinkable that such a defence could succeed. There would be a loud cry of moral outrage against such a defence. The words of Smith JP, namely: 'I*(t)* is monstrous to suppose that a soldier would be protected where the order is grossly illegal' are apposite and appropriate in this instance. The law of civilised countries is uncompromising and inflexible on a total and final condemnation of this approach.

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The other approach, which is diametrically opposed, namely the fact that the subordinate obeyed an order, is not a ground of justification. Inherent in this approach is the implication that the subordinate must, before executing the order given to him in the first instance, decide for himself whether the order is lawful or unlawful. This would no doubt impinge on the principle of discipline in an army, and would be unlikely to inculcate sound discipline in the armed forces. *Snyman* therefore suggests that the best solution is to adopt a middle course, a compromise which satisfies the demands of morality, and which also accepts and recognises the necessity of discipline in an army. In other words, he suggests a felicitous balance between these conflicting and incompatible approaches.

He cites *R v Smith* (*supra* ) as the landmark authority in which a solution to the inconsistent and clashing notions was adumbrated. In *Smith's* case, these two opposite points of view arose crisply for decision.

The facts of that case may be briefly summarised as follows: X was a soldier and a member of a patrol whose commander was a Captain. The Captain ordered him to shoot a farm-hand if he did not hand over a bridle to the patrol which occupied the farm. X ordered the farm-hand to hand over the bridle. The farm-hand refused. X shot and killed him. The Court found him not guilty on a charge of murder, because he had merely obeyed the Captain's command.

In argument in *Smith's* case *supra* two extreme propositions were advanced. On the one side it was argued that 'absolute, implicit, and unquestioning obedience is required from a soldier in complying with the orders of a commanding officer' no matter how illegal those orders might be. The second proposition was that 'a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly legal'.

In accepting the defence, Solomon JP did not accept either of these propositions and accepted an intermediate approach by stating at 568 of the judgment, and I quote:

'I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer.'

The Court found that 'the order was not so plainly illegal that Smith (the accused) would have been justified under the circumstances in refusing to obey', and the accused was acquitted.

This rule was followed in *R v Celliers* (*supra* ). It was also referred to in *R v Werner* (*supra* ), but the decision by the Appellate Division related to the fact that the order did not issue from an authority that was lawful.

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In *R v Van Vuuren* 1944 OPD 35 at 38 De Beer AJP did not follow *Smith's* case and laid down the rule that a person is only under a duty to obey a lawful order, namely 'one not contrary to the ordinary civil law and justified by military law'. This view is supported by *De Wet and Swanepoel* (*op cit* at 86 - 7).

I respectfully have difficulty in accepting this formulation of the rule as laid down by De Beer AJP in that it places a too restrictive and highly onerous duty on a subordinate, and results in a serious infraction of the discipline of soldiers. Furthermore, the phrase 'one not contrary to the ordinary civil law' is extensive and nebulous, and any minor offence such as parking in a no parking area on the orders of a superior officer may result in a conviction.

Although the view of De Beer AJP may appear neat and tidy, its boundaries are general, and ill-defined.

*Smith's* case has also been referred to in *R v Mayers* (*supra* at 795), and in *S v Shepard* 1967 (4) SA 170 (W) at 177 -8, but was not applied in that in neither case was it germane to the decision.

Criticism of *Smith's* case *supra* has been directed to the fact that in the formulation of the rule by Solomon JP, there appears to be confusion between the issues of *mens rea* and justification. As *Burchell and Hunt* (*op cit* vol I at 357) state:

'References in the statement of the rule to the soldier's honest belief that he was doing his duty in obeying the commands and to whether he must have known (and hence, presumably did know) whether they were unlawful seem to show that obedience to an unlawful order does not justify the accused's act but that if he believes the order to be lawful he would escape liability on the ground of lack of *mens rea* in respect of the unlawfulness of his conduct. But this could only be the *ratio decidendi* in *Smith* if the accused's mistake of law was admitted as a good excuse contrary to the general rule of that time, and apart from the fact that Solomon JP did not consider this point. In *Werner Watermeyer CJ expressed the view that the judgment in Smith* would have to be qualified insofar as it suggested that ignorance of law was an excuse. On the other hand, Solomon JP's statement that even if the orders are unlawful, a soldier would be protected "if the orders are not so manifestly illegal that he... ought to have known that they were unlawful", points to justification rather than absence of *mens rea* as the ground for exemption from liability.' (Emphasis added.) According to *Snyman* (*op cit* at 105 - 6):

'Despite criticism of the case the rule formulated in it can, in my opinion, be accepted in principle. One must consider the content of the order and circumstances in which it was given, and then ask oneself whether a reasonable soldier in the position of X would have regarded the order as lawful or unlawful.'



On this aspect, in dealing with the rule formulated in *Smith's* case *supra*, the learned author's comment in *Law of South Africa* vol VI para 66 is as follows:

'This statement emphasises the subordinate's perception of the lawfulness or otherwise of the order and thus fails to distinguish between the issues of *mens rea* and objective unlawfulness.'

There are two other cases in which this defence was considered. In *R v Arlow and Another* 1960 (2) SA 449 (T) was a case where two policemen killed a person. Ludorf J, at 452E - G, set out the position as follows:

'Daar is geen plig om te skiet nie en indien hy skiet en dood dan doen hy dit op eie risiko, nl dat as die Staat nie sy verduideliking aanvaar nie hy die taak sal moet aanvaar om hom in die Hof te kwyt van die bewyslas wat ek so ewe genoem het. In die geval van Nr 2 kan hy nie skuil agter die bevel wat Nr 1 hom opgedra het indien die Staat daarin slaag om te bewys dat die bevel onwettig was. Hy is alleen verplig om wettige bevele te gehoorsaam.'

In *S v Andreas P en 'n Ander* 1989 (1) PH H38 (SWA) Levy J stated as follows:

'In elk geval op die beginsels neergelê in *Smith* se saak *supra*, dit wil sê, dat waar die bevel wat die soldaat moes uitvoer so duidelik onwettig is dat die soldaat moes geweet het dat die daad onwettig was, moes die beskuldigde in hierdie geval geweet het dat so 'n bevel duidelik onwettig was en moes hy geweier het om dit uit te voer. Ek het geen twyfel dat, sou 'n soldaat wat in die SWA/Namibia gebiedsmag diens doen, so 'n bevel wat in hierdie saak gegee is, gekry het sou hy dit nie uitgevoer het nie. Hy sou geweier het en sou hy nie geweier het nie, sou hy skuldig aan 'n misdaad gewees het.'

Once an accused has raised this defence the *onus* of disproving the defence - as in the case

with defences founded on grounds of justification - rests on the State. See *Snyman* (*op cit* at 106), *Burchell and Hunt op cit* vol I at 359. Both Mr *Joubert* and Mr *Chetty accepted that this was the position.*

Glanville Williams Text Book of Criminal Law 2nd ed at 455, in dealing with the law on this topic in England, states as follows:

'Superior orders are not generally a defence to a charge of crime, but it has been suggested that a limited exception should be recognised for members of the armed forces. A soldier, sailor or airman is bound by military law to obey lawful commands without question; but he may not find it easy to decide on the spur of the moment whether a particular command is lawful or not. The Manual of Military Law adopts the harsh view that, whatever his dilemma, the serviceman has no defence to a criminal charge if the order is in fact unlawful.



On the other hand, the enlightened model penal code of the American Law Institute allows a defence of unlawful military orders if the defendant did not know the order to be unlawful.

The authorities are sparse and in conflict. In the old case of Thomas, a naval sentinel, who, being ordered to keep off all boats, fired at a boat and killed a man in it, was convicted of murder, notwithstanding that the jury found that he fired under a mistaken impression that it was his duty. A contrary view was taken by the Supreme Court of the Cape of Good Hope in Smith which is widely approved by commentators....'

Mr *Joubert*, after citing numerous authorities, submitted that conduct is unlawful if it is in conflict with the *boni mores* or the legal convictions of society. In other words, the criterion is objective. He submitted that this was an *ex post facto* test which must be applied in the light of all the circumstances. This is clearly a strict and objective way of determining whether conduct is unlawful or not.

According to him, therefore, the test of unlawfulness is completely objective and the accused's view of the situation is not decisive. In support of this proposition he submitted therefore that a putative defence of self-defence can never be self-defence.

He further submitted that the accused must be aware of the unlawfulness of his act before he can be found guilty and quoted Kannemeyer J in *S v Hlomza* 1983 (4) SA 142 (E) where the learned Judge stated at 145:

'In my view there must be some *nexus* between the appreciation of the accused that what he is doing is or might be illegal and the charge he is facing.'

Mr *Joubert*, after analysing South African, English and American cases and authorities, concluded therefore that the test to be applied is the objective reasonableness test, and not how a reasonable man or soldier in the same position as an accused would have acted. This test, according to him, is clear cut, has a unity, and cannot result in a disharmonious approach.

Therefore, if the objective test is to be applied to the topic under consideration, then, if the order is lawful, there exists lawful authority for the act of the accused and consequently it is justified. If the order is unlawful, there is an absence of lawful authority and the conduct of the accused is consequently unlawful. As *Burchell and Hunt* vol I *supra* point out at 358:

'But, apart from any other consideration, if obedience only to orders which are in fact lawful can justify, the defence would have hardly any application since by this standard almost all orders to commit crime are unlawful. In the result, soldiers would be hesitant to obey doubtful orders which would be subversive of military discipline.'

A difficulty with the so-called objective test, as submitted by Mr *Joubert*, is that when applied to soldiers it is inflexible, rigid and exacting. That is not to say that soldiers are above the law, and must act as mere automatons in carrying out any order given to them by a superior.

An answer must be sought that does not violate the law of the land; that is, which is not contrary to the basic ideas of law and justice and which will determine the position of the soldiers who act as instruments of the State, who are taught automatic obedience to orders and discipline. As *Gordon* puts it *supra* : 'To punish him for acting in the way the State has trained him to act.' Therefore, the position of the soldier in regard to obeying the orders of a superior must be to some extent ameliorated, otherwise a subversion of military discipline would eventuate.

Mr *Chetty*, on the other hand, accepted the views advanced by Solomon JP and *Burchell and Hunt* and *Law of South Africa* that I have already referred to, namely applying the test of a reasonable man in the position of the accused. In other words, 'obedience to an unlawful order would excuse the accused provided a reasonable man in his position would have felt himself bound as a soldier to carry out the order despite its illegality'.

From the cases that I have referred to, the Courts in South Africa seem to accept that obedience to an unlawful order or command which is not manifestly ('klaarblyklik') or obviously illegal, is a ground of defence to a criminal charge.

There has been criticism of this approach by the authors of *General Principles of Criminal Law through the Cases* P J Visser and J P Vorster at 182 and *De Wet and Swanepoel* (*op cit* at 96 - 7). The approach of the South African Courts is not fully accepted by *Burchell and Hunt* vol I *supra* at 358 and they formulate the defence of obedience to superior orders as follows:

'Obedience to an unlawful order would excuse the accused provided a reasonable man in his position would have felt himself bound as a soldier to carry out the order despite its illegality.'

According to *Snyman* (*op cit* at 105 - 6):

'One must consider the content of the order and the circumstances in which it was given, and then ask oneself whether a reasonable soldier in the position of X would have regarded the order as lawful or unlawful.'

I do not accept the test of a reasonable soldier as formulated by the learned author. The 'reasonable soldier' test tends to indicate or suggest that there exists a difference between a reasonable man and a reasonable soldier.

This cannot be sound in principle, in that the distinction presupposes that soldiers should be treated as far as *mens rea* is concerned, differently to civilians. Furthermore, there is also the implication in the 'reasonable soldier' test that the law of the land might not be applicable to members of the armed forces. This distinction is not valid and cannot be sustained. It is also contrary to the vast majority of the authorities that I have consulted.



It appears to me therefore that in considering *mens rea* in the defence of obedience to superior orders, the reasonable man test is more logical, sound and practical, and accords with the general principles of criminal law. Mr *Joubert* is correct therefore in not accepting the test of a 'reasonable soldier'.

Although I am not bound by decisions of the Courts in South Africa, I nevertheless regard their decisions as weighty persuasive authority, because the principles of the common law applied in this country are also founded on the same sources as those of the South African common law.

I am respectfully of the opinion that the decision of the South African Courts, in applying the rule formulated in *Smith's* case *supra*, have merit in bridging the gap between the polarisation of the opposing concepts with which I have dealt. Put another way, a balance must be sought between total immunity or total liability.

In this country, to the best of my knowledge, there has not yet been judicial pronouncement on this defence. Therefore, decisions of the old authorities, overseas Courts and views of academic authorities on this subject are instructive. I now propose to deal with the important decisions and views relating thereto.

*(a)* In *D* 47.10.17.7 the following is stated:

'A slave should not obey his master in all things.'

*Voet* 47.10.3 (*Gane's* translation) states as follows:

'There is this exception that in the case of a somewhat slight wrong of this type such as does not involve a heinousness of villainy (as also in the case of other slighter wrong doings) which a slave or a son of a household has inflicted at the bidding of the master or father, the mandator alone is held liable in the action or wrongs, but the mandatory is released by his need for obedience from the action and penalty for this type of wrong.'

Grotius *De Jure Belli* 2.26.2 and 3:

'That a father or master is not to be obeyed if he command a crime, as treason, the murder of his mother, false sentence and the like is asserted by *Gellius*, *Quintilian*, *Seneca*, *Sopater*. Even the Civil Law which is facile in giving pardon to excusable offences, is favourable to those who are under the necessity of obeying, but not to all. It excepts cases of great atrocity, crimes which are naturally abominable, not condemned by the opinion of lawyers only, but by natural feeling.'

The above authorities seem to draw a distinction between serious crimes which do not act as a ground for justification, and minor crimes which exonerate a subordinate. In minor crimes the asperities of illegality are softened.

Consequently one can observe the germination of a concept which draws a distinction between illegal and manifestly or palpably illegal orders. In what follows, the distinction is terse and crisp. Yet within limits, the distinction is not incompatible, and it is part of my enquiry to examine how and where.



*(b)* Stephen in *History of Criminal Law of England* vol I at 205 - 6, states the following:

'By the ordinary principles of the common law, they are, speaking generally, justified only in using such force as is reasonably necessary for the suppression of a riot. By the Mutiny Act and the Articles of War they are bound to execute any lawful order which they may receive from their military superior, and an order to fire upon a mob is lawful if such an act is reasonably necessary. An order to do more than might be reasonably necessary for the dispersion of rioters would not be a lawful order. The hardship upon soldiers is that, if a soldier kills a man in obedience to his officer's orders, the question whether what was done was more than was reasonably necessary has to be decided by a jury, probably upon a trial for murder; whereas, if he disobeys his officer's orders to fire because he regards them as unlawful, the question whether they were unlawful as having commanded something not reasonably necessary would have to be decided by a court-martial upon the trial of the soldier of disobeying orders, and for obvious reasons the jury and the court-martial are likely to take different views as to the reasonable necessity and therefore as to the lawfulness of such an order....

The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the Colonel by the orders of the Captain, or in desertion to the enemy on the field of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace, or in the exercise of inhuman cruelties such as the slaughter of women and children during a rebellion.'

Dicey *The Law of the Constitution* 8th ed (1915) at 298 - 9, 302 states as follows:

'When a soldier is put on trial on a charge of crime, *obedience to superior orders* is not of

itself a defence.... A soldier is bound to obey any *lawful order* which he receives from his military superior. But *a soldier cannot anymore than a civilian avoid responsibility* for breach of the law *by pleading* that he broke the law in *bona fide* obedience to the orders... . (His) is in theory and maybe in practice a difficult one, he may... be liable to be shot by a Court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.... The hardship of a soldier's position resulting from this inconvenience is much diminished by the power of the crown to nullify the effect of an unjust conviction by means of a pardon.

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While, however, a soldier runs no substantial risk of punishment for obedience to *orders which a man of common sense may honestly believe to involve no breach of law*, he... cannot avoid liability on the ground of obedience to superior orders for any act *which a man of ordinary sense must have known to be a crime*.' (Emphasis added by myself.) According to Wharton *Criminal Law and Procedure* at 257 - 8, s (118) 1957 ed (emphasis added):

'(W)here a person relies on a command of legal authority as a defence, it is essential that the command be a lawful one, which he was required to obey.... An order which is illegal in itself and not justified by the rules and usages of war (here applied as much to the operations of the National Guard or armed forces in the case of internal disturbance as to war in the international sense) or which is, in substance, *clearly illegal*, so that *a man of ordinary sense and understanding would know* as soon as he heard the order read or given *that it was illegal*, will afford no protection for a homicide.... Moreover, if it is not part of the soldier's military duty to kill the particular victim, his act in so doing is criminal as though he were a private citizen. When an act committed by a soldier is a crime, even when done pursuant to military orders, the fact that he was ordered to commit the crime by his military superior, is not a defence.'

L C Green, in *Essays on the Modern Law of War* at 48, says, and I quote:

'As to the possibility of conflict between the two systems of jurisprudence, "*(r)*ecognition of the peculiar necessity of discipline in the military service and of the position in which a subordinate may find himself through no fault of his own, in the event that commands of his superiors clash with the civil authority, has led Courts in well-considered cases to regard obedience to a military order as a justification for conduct which would otherwise give rise to civil or criminal liability, unless the order is *so palpably unlawful that a reasonable man in the position of the person obeying it would perceive its unlawful quality* ".' (Emphasis added.)

*(c)* In the Indian National Army Trials, the Advocate-General of India argued, in reply to the defence's argument that the acts of the accused were legal within the terms of the 'Indian National Army Act' and consequently excepted from the Indian Penal Code and the Indian Army Act, that:

'(A)n act of treason cannot give any sort of rights nor can it exempt a person from criminal responsibility for the subsequent acts. Even if an act is done under a command, where the command is traitorous, obedience to that command is also traitorous. It is submitted that the accused cannot in law seek to justify what they did as having been done under the authority of the INA Act. No authority purporting to be given under that
Act can be recognised by this Court or indeed any Court of this country.

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The assumption of any such authority was illegal from the beginning. Any tribunal or authority purporting to be established under that Act would be in repudiation of the allegiance which is inherent in a Court of the country. Those who instituted or took part in the proceedings were themselves likely to be punished for offences against the State. All orders under the INA Act or by any tribunal or authority purporting to be established by it are without sanction. They cannot protect the persons who made such orders or acted

upon them.'

According to *Green* (*op cit* ) the reasoning by the said Advocate-General of India was derived from *Axtell's* Case (1660) Kel 13 (84 ER 1060). In this case, the accused was the guard commander at the execution who 'justified that all he did was as a soldier, by the command of his superior officer, whom he must obey or die. It was resolved that was no excuse, for his superior was a traitor, and all that joined him in that act were traitors, and did by that approve the treason; and where the command is traitorous, there the obedience to that command is also traitorous'.

There the Court took the line that even a common soldier must have known that it was an act of treason to participate in any way in the execution of one's king.

According to *Green* (*op cit* at 55), *Smith's* case is normally cited as being the point of departure for any analysis of the defence of superior orders.

The question of acting on orders of a superior officer became of major significance during the war crimes trials that followed the First World War. By art 228 of the Treaty of Versailles, Germany recognised the right of Allied Powers to try alleged war criminals by military tribunals and undertook to hand over such persons to stand trial, while by art 229 it was provided that trials would be held by the power against whose nationals the crimes were alleged to have been committed.

*(d)* An important case that followed was that of *Llandovery Castle* [1920] P 119 (2 Ann Dig 436). The facts of this case were that the accused in this ship were alleged to have opened fire on the orders of the U-boat commander on the survivors of a torpedoed hospital ship, which resulted in great loss of life. They pleaded the orders of the U-boat commander. The Reichsgericht (the German Court) said:

'(N)o importance is to be attached to the statements put forward by the defence, that the enemies of Germany were making improper use of hospital ships for military purposes, and that they had repeatedly fired on German lifeboats and shipwrecked people.... Whether this belief was founded on fact or not, is of less importance as affecting the case before the Court, than the established fact that the *Llandovery Castle* at the time was not carrying any cargo or troops prohibited under the Hague Convention on Naval Warfare (Convention X).



The killing of the survivors was homicide under the German Penal Code, and was also an offence against the law of nations.... Any violation of the law of nations in warfare is... a punishable offence, so far as, in general, a penalty is attached to the deed. The killing of enemies in war is in accordance with the will of the State that makes war (whose laws as to the legality or illegality on the question of killing are decisive), only insofar as such killing is in accordance with the conditions and limitations imposed by the law of nations. The fact that his deed is a violation of International Law must be *well-known* to the doer.... The rule of International Law, which is here involved, is *simple and universally known*. No possible doubt can exist with regard to the question of its applicability.... (The) order does not free the accused from guilt.... (A)ccording to par 47 of the Military Penal Code... the subordinate obeying (an) order (involving a violation of the law) is liable to punishment, if it was *known* to him that the order of the superior involved the infringement of civil or military law.... It is certainly to be urged in favour of the military subordinates that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is *universally known to everybody, including also the accused*, to be *without any doubt whatsoever* against the law. As naval officers by profession (the accused) were *well aware*... that one is not legally authorised to kill defenceless people. They well knew that this was the case here.... They should, therefore, have refused to obey. As they did not do so, they must be punished.' (Emphasis added.) There are numerous other cases relating to the topic which took place between the two world wars. I have, however, cited from the most important decisions.

The important cases relating thereto have been admirably summarised by *Green* (*op cit* at

44 -59).

*(e)* According to Clarkson and Keating in their book *Criminal Law Texts and Materials* (1984) at 268 -
70, English authority on the question of superior orders is scant, but tends to confirm the feeling that in neither civil nor military situations ought there to be a defence of superior orders. The authors point out, however, that the matter is not free from dispute in relation to military situations where, as they say, it may be argued that the claims of duty, particularly relating to wartime conditions, are so strong as to warrant some kind of defence of superior orders.

The common law of England does not seek to encourage blind, unthinking subservience to authority. The common law relating to rules of criminal law should generally take precedence over any contradictory orders given by a superior officer. According to two Australian writers O'Connor and Fairall, in their book *Criminal Defences* 2nd ed (1988) at 166, there are no clear English decisions as to the availability of superior orders as a substantive defence.



They cite what was stated by Will J in the early case of *Keighley v Bell* (1866) 4 F&F 763 (176 ER 781) that:

'The better opinion is that an officer or soldier acting under the orders of his superior, not being necessarily or manifestly illegal, would be justified by his orders.'

They also point out that in *Smith's* case *supra* Solomon JP adopted a similar rule.

On general principle, a person who commits what would otherwise be a crime cannot be heard to say in his defence that he was only carrying out his orders. According to the textbook writers, valid reasons exist for this rule. It is equally clear that the principles of common law do not seek to encourage blind and unthinking servility to authority.

*(f)* The question of superior orders was considered but not fully canvassed by the Nuremberg Tribunal because the Charter of the International Military Tribunal provided in art 8 thereof that:

'The fact that the defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.'

The defence of superior orders was rejected by the Tribunal in view of the clear terms of art 8. Notwithstanding the rejection, the following comments thereon were made in *United States v Goering*, the trial of the major war criminals before the International Military Tribunal vol XXII:

'Lieutenant Colonel Voltshov:

"Many of these men have made a mockery of the soldier's oath of obedience to military orders. When it suits their defence they say they had to obey; when confronted with Hitler's brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed. The truth is that they actively participated in all these duties, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know."

"The Charter recognises that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of State. These twin principles, working together, have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of State. Under the Charter, no defense based on either of these doctrines can be entertained. Modern civilisation puts unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility.... Of course, we do not argue that the circumstances under which one

commits an act should be disregarded in judging the legal effect.... The Charter implies common sense limits to liability, just as it places common sense limits upon immunity".'

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*(g)* Decisions of American Tribunals dealing with war crimes and particularly the defence of acting on superior orders are in point. A comprehensive pronouncement on this defence was given by the Tribunal in the *Einsatzgruppen* trial. In *In re Ohlendorf (1948) 15 Ann Dig 656 at 656, 665 - 8 (emphasis added):*

'(T)he obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond and is not expected to respond, like a piece of machinery. It is a fallacy of widespread consumption that a soldier is required to do everything his superior officer orders him to do (eg shoot a superior)....

(A)n order to require obedience must relate to military duty.... And what the superior officer may not militarily demand of his subordinate, the subordinate is not required to do. Even if the order refers to a military subject it must be one which the superior is authorised under the circumstances to give. The subordinate is bound to obey only the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his defence. If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may

not plead ignorance of the criminality of the order. If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse... if a subordinate, under orders, killed a person known to be innocent, because by not obeying it he himself would risk a few days of confinement. Nor if one acts under duress, may he, without culpability, commit the illegal act once the duress ceases....' (Emphasis added.) I may mention that the *Einsatzgruppen* were soldiers who were specifically ordered and designated to murder innocent civilians.

In *Muller's* case the Belgian Court of Cassation agreed that the defence would not lie when the order 'should be disobeyed in view of its *manifest violation of a superior principle of humanity*... (and its) *flagrantly illegal character... universally recognised* as being contrary to law'. See Auditeur-General pres la Cour Militaire v Muller (1949) 16 *Ann Dig* 400 at 402 (emphasis added).

*(h)* A defence where an accused insisted that what he did was in accordance with superior orders, was rejected in the trial of Adolf Eichmann, *Attorney-General, Israel v Eichmann* (1961/62) 36 *ILR* 5 (District Court); 277 (Supreme Court) at 257 - 8, 314 - 15, 318. Eichmann was accused of war crimes and tried for them, particularly the murder of millions of Jews. His defence was that everything he did was in accordance with superior orders. The District Court decided that for the defence to succeed, it was necessary to consider whether the orders were 'manifestly unlawful'. It held that whether this was in fact the case was a question of law to be decided by the Court by an objective test.

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In the District Court Judge Halevy, one of the members of the Court trying Eichmann, said:

'(T)he distinguishing mark of a "manifestly unlawful order" should fly like a black flag above the order given, as a warning saying "prohibited". Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only by the eyes of legal experts, is important here, but *a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart stony and corrupt* - that is the measure of "manifest unlawfulness" required to release a soldier from the duty of obedience upon him and make him

criminally responsible for his acts.' (Emphasis added.) On appeal the Supreme Court repeated that the orders that Eichmann received were *'manifestly unlawful... contrary to the basic ideas of law and justice'* (emphasis is mine). The Supreme Court further pointed out that Eichmann 'performed the order of extermination at all times *con amore*, with full zeal and devotion to the task'.

The Supreme Court defined a manifestly unlawful order *inter alia* as 'calling in aid the *feeling of lawfulness* which lies hidden deep within the conscience of every human as such, even if not conversant with the law books'. (Emphasis added.)

(i) In American law guiding rules in relation to this defence are to be found in the *Manual for* Courts *Martial* which provides as follows:

'(A) homicide committed in the proper performance of a legal duty is justifiable. Thus... killing to prevent the escape of a prisoner if no other apparent means are adequate, killing an enemy in battle and killing to prevent the commission of an offence attempted by force or surprise... are cases of justifiable homicide. The general rule is that the acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable. This justification does not exist, however, when those acts are manifestly beyond the scope of his authority, or the *order is such that a man of ordinary sense and understanding would know it to be illegal*, or the subordinate wilfully, or through negligence does acts endangering the lives of innocent parties in the discharge of his duty to prevent escape or effect an arrest.' (Emphasis added.) This is contained in para 197 of the said *Manual*. I may mention that the rules contained therein are not binding on the Courts in the United States of America but merely serve as guidelines.

Again, it is interesting to note in the decisions to which I have referred, that in *Smith's* case *supra*, a clear distinction is drawn between unlawful and manifestly unlawful or palpably unlawful orders.

These rules were considered in the case of *United States v Kinder* (1954) 14 CMR 742 at 763, 770, 773 - 5, 776, 781 (emphasis added). In that case, a subordinate was ordered to shoot a Korean civilian who was in custody, and was not resisting, or attempting to escape, or intending to commit any offence.



The evidence did not show that he was an enemy, saboteur or thief. The order to shoot was given to frighten off other locals from entering a prohibited territory in which the prisoner had been arrested. It was also submitted that the order was given to boost the morale of the troops. After the prisoner was killed, the officer made a false report of the factual position, as did the accused on the instructions of the officer concerned.

The Board of Review analysed and considered a number of military and civil precedents of United States law, and concluded:

'(N)o justification will lie if the homicide is the result of an order manifestly beyond the scope of the superior officer's authority and... *so obviously and palpably unlawful as to admit of no reasonable doubt on the part of a man of ordinary sense and understanding*.... (I)n the context of the evidence, the conclusion is inescapable that the accused was aware of the criminal nature of the order, not only from the palpably illegal nature of the order itself, but from the surreptitious circumstances under which it was necessary to execute it.... Of controlling significance... is the *manifest and unmistakable illegality* of the order.... Human life being regarded as sacred, moral, religious and civil law proscriptions against its taking throughout our society, we view the order as commanding an act so *obviously beyond the scope of authority* of the superior officer and *so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding*. The distance from the battle line and other circumstances... cannot be reasonably considered as furnishing any basis to *a man of ordinary sense and understanding* to assume that the laws and usages of war... would

justify the killing. In our view no rational being of the accused's age (20), formal education (grade 11), and military experience (two years) could have... considered the order lawful. Where one obeys an order to kill... for the apparent reason of making (the) death an example to others, the evidence must be strong indeed to raise a doubt that the slayer was not aware of the illegality of the order.... The inference of fact is compelling... that the accused complied with the palpably unlawful order fully aware of its unlawful character.... (As to the contention) that the accused was mistaken in law as to the legality of the order of his superior officer, the defense fails for a prerequisite of such defense is that the mistake of law was an honest and reasonable one and... the evidence... justifies the inference that the accused was aware of the illegality of the order.' (Emphasis added.) On behalf of the accused it was submitted that he mistakenly believed that all orders must be obeyed. The Board cited the *Einzatsgruppen* case *supra* to show '... that a soldier or airman is not an automaton but a "reasoning agent" who is under a duty to exercise judgment in obeying the orders of a superior officer to the extent that where such



orders are manifestly beyond the scope of the issuing officer's authority and are *so palpably illegal on their face that a man of ordinary sense and understanding would know them to be illegal*, then the fact of obedience to the order of a superior officer will not protect a soldier for acts committed pursuant to such illegal orders.... (Further) where an airman is fully aware of the existence of a conspiracy between his superior officer and another to accomplish an unlawful purpose and in compliance with a palpably illegal order, the unlawful nature of which he is aware, commits an overt act to effect the object of the conspiracy, the necessary criminal intent is present and he has become a co-conspirator and cannot claim obedience to orders of a superior officer to prevent his conviction of conspiracy....' (Emphasis added.)

There are other decisions of Courts in the United States - which I do not intend citing - illustrating the principle that a soldier is not obliged to obey a manifestly, palpably, or plainly illegal order. If he does, he is punishable according to law, and cannot invoke the defence of acting on the orders of a superior.

Considering these cases and others which I have cited, it is clear that a balance has been sought by the Courts and Tribunals between what has been referred to as total immunity and/or total liability.

*(j)* The most recent and decisive American authority on this aspect, is the case of *United States v Calley* 22 USMCA 534 (1973) (US Court of Military Appeals):

'Lieutenant Calley was a platoon leader engaged in sweeping out the enemy in part of Vietnam. He was charged with the premeditated murder of 22 infants, children, women and old men. His defence was that he was acting under the direct orders of his commanding officer; he had been told that under no circumstances were they to leave Vietnamese alive as they passed through the villages. He was to "waste them". (There was) ample evidence from which to find that Lieutenant Calley directed and personally participated in the intentional killing of men, women and children who were unarmed and in the custody of soldiers.... (The) uncontradicted evidence is that... they were offering no resistance. In his testimony, Calley admitted that he was aware of the requirement that prisoners be treated with respect... he knew that the normal practice was to interrogate villagers, release those who could satisfactorily account for themselves and evacuate the suspects among them for further examination....

We turn to the contention that the (trial) Judge erred in his submission of the defense of superior orders to the court (by framing the instructions thus):

"(I)f you find that Lieutenant Calley received an order directing him to kill unresisting Vietnamese within his control... that order (as a matter of law) would be an illegal order. A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it...

(such) acts of a subordinate... are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful...."

(Defence counsel urged that this was too high a standard for soldiers who may not be persons of
ordinary sense and understanding; they argued for a lower test of "commonest understanding"....) (W)hether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam or the most intelligent, he must be presumed to know that he could not kill the people involved here... (the order was) so palpably illegal that whatever conceptual difference there may be between a person of "commonest understanding" and a person of "common understanding" that difference could not have had any impact on a court.

Decision of the Court of Military Review affirmed.'

I am in respectful agreement with what was stated by Quinn J in that case as summarising the law relating to this defence.

It appears to me therefore that an equilibrium must be sought between the duty of obedience to orders and the *boni mores* of society, as expressed in the sacred concepts of justice and lawfulness. The resolution of the tension between the dichotomy of unqualified liability or unqualified immunity is a requirement, not as an obliteration of duty, but as a guideline to the discharge of the duty of obedience to orders by members of the armed forces.

This requirement must include a degree of concrete particularity for the general idea of justice, and the habit of right action. Therefore the correct formulation of the law relating to this subject is one which does not necessarily attain the ideal maximum of the elect few, but secures the indispensable minimum from the average many.

It is imperative, therefore, that it be expressed in a definite rule, poured into a specific mould, thereby exemplifying the parameters of this defence. Its total intent needs to be pragmatic and moral, and the duties imposed specific. The conduct of members of the armed forces should be rooted in definite prescribed rules, adhering to the law, and not in the mouthing of abstract principles. Otherwise, discontent and disorder may be the likely result.

A synthesis is therefore required, as well as a call to a soldier to remind himself what obedience to orders demands of him, and also what it means to act within well defined legal principles.

Therefore, the purely objective test of unlawfulness does not entirely resolve the issue. As already stated, if this test is applied, it results in an either/or situation, in which an order is either lawful or unlawful.

Because of the duty of obedience inculcated into soldiers, the notion of unlawfulness deserves further consideration. The cases and authorities that I have cited draw a clear distinction between unlawful, and manifestly and palpably unlawful orders. There is merit in the distinction and difference. It is realistic and essentially practical and logical, and is less open to critical objection.



The critical question of finding a harmonious compromise, between the polarities that I have been considering, is thereby satisfied by this differentiation.

I therefore come to the conclusion that in dealing with the issue of unlawfulness, as applied to members of the armed forces because of their special circumstances concerning the duty of obedience to orders, there must be a demarcation between obedience to

unlawful, and manifestly or palpably unlawful orders. In other words, a soldier is under no duty to obey a manifestly unlawful order, and is entitled to refuse to execute a manifestly and palpably unlawful order.

Mr *Joubert* has further submitted that the test to be applied in determining unlawfulness is the objective reasonableness test; in other words, the *boni mores* consideration. This criterion, he argues, eliminates the application of the test of the reasonable man in the circumstances. The inquiry by the Court is therefore of a purely objective investigation in considering the nature of the order given, and not how a reasonable man would act in the circumstances. I have already dealt with this objective test, and while it is sound on jurisprudential principles because of the special considerations that are applicable to members of the armed forces, it cannot be inflexibly applied to them. A distinction must be drawn between unlawful and manifestly unlawful orders.

As regards the question as to whether the soldier thought that the order was lawful or not, this is an issue of his *mens rea*. Furthermore, there must exist a connection between the appreciation by the accused that what he is doing is illegal, or might be so, and the crime with which he is charged.

It is necessary to find an acceptable formulation of the duty to obey the orders of a superior, one which does not violate the law of the land and the soldier's duty of obedience. Furthermore, it should be borne in mind that the Courts and authorities in the main seem prepared to grant exemption from liability in the cases of obedience to unlawful orders, provided they are not manifestly or palpably unlawful. Therefore, taking into account that the Courts have treated this defence as separate and distinct from that of authority, I would formulate the defence of obedience to superior orders as follows:

A soldier must obey orders issued by a lawful authority, and is under a duty to obey all lawful orders, and, in doing so,
must do no more harm than is necessary to execute the order. Where, however, orders are manifestly beyond the scope of the authority of the officer issuing them, and are so manifestly and palpably ('klaarblyklik') illegal that a reasonable man in the circumstances of the soldier would know them to be manifestly and palpably illegal, he is justified in refusing to obey such orders. The defence of obedience to orders of a superior officer will not protect a soldier for acts committed pursuant to such manifestly and palpably illegal orders.

*As to C*

Common purpose



Mr Smit has submitted that the State has proved beyond a reasonable doubt that there was a conspiracy between members of the Bophuthatswana National Security Unit (BNSU) to overthrow the Government, and that a large number of accused as a group had a common purpose in achieving this object.

Mr Kuny contended that in the absence of proof of a conspiracy, or common purpose, between the various accused, the Court must look at the individual acts of each and every accused. Therefore each accused he argued, cannot be held responsible for the acts and offences committed by other persons prior to his individual act and/or independently of him. Both he and Mr Chetty also dealt with the position of those accused who associated themselves with the overthrow of the Government, believing that the Government had in fact been overthrown. Their argument was to the effect that treason is not a continuous crime. Once treason has been committed, and the Government overthrown, treason is complete, and subsequent conduct by persons who in fact believed that the Government was overthrown could not have led or contributed to the overthrow of the Government. Therefore these acts were not carried out with a hostile intent, which is a necessary element of treason. The argument is founded on the premise that when the overt act was committed, to the knowledge of the actor, the overthrow of the Government was a fait accompli.

I shall return to this argument presented by Mr Kuny and Mr Chetty when I consider the position of each and every accused. At this stage the law relating to the complex and controversial subject of common purpose must first be considered.

For decades it has been accepted that there is in fact a doctrine of common purpose. The concept common purpose was introduced into South Africa from English law, through the Native Territories Penal Code (Cape Act 24 of 1886).

Simplistically construed, the doctrine provides that, if two or more persons decide to embark on a joint unlawful activity, the acts of one are imputed to the other*(s)* which fall within their common purpose. See Du Toit and Others *Commentary on the Criminal Procedure Act* para 22-10; *R v Duma and Another* 1945 AD 410 at 415; *R v Shezi and Others* 1948 (2) SA 119 (A) at 128.

In *R v Kahn* 1955 (3) SA 177 (A) at 184 Centlivres CJ said:

'The words "common purpose" are well known in the criminal law and connote that there is a purpose shared by two or more persons who act in concert to do something. There may be an express agreement between such persons to achieve some object or there may be an implied agreement to the same end.'

See further *S v Shaik and Others* 1983 (4) SA 57 (A) at 64H - 65B.

This concept has been relied on by the Courts of this country and particularly by the Appellate Division in South Africa, and over a lengthy period has been qualified, clarified and redefined.



It has been particularly applied to cases of murder, in respect of an accused who has a common purpose with others to commit an offence, despite the absence of proof that he inflicted the fatal injury on the deceased. The Courts have taken the view that he may be found guilty of murder, provided he had the necessary intention in respect of the death of the deceased.

The principle of this doctrine, and particularly the question of causation in cases of common purpose were extensively considered and analysed by Botha JA in the case of *S v Safatsa and Others* 1988 (1) SA 868 (A) at 895C -900G. It is unnecessary to add to the lucid analysis of Botha JA.

Commenting on the findings of the Court *a quo* the learned Judge of Appeal had this to say at 893G - H, and I quote:

'It found further that all these accused had actively associated themselves with the conduct of the mob, which was directed at the killing of the deceased. On the evidence neither of these findings can be faulted. In the case of each of these accused, the conduct described above plainly proclaimed an active association with the purpose which the mob sought to and did achieve, viz the killing of the deceased. And from the conduct of each of these accused, assessed in the light of the surrounding circumstances, the inference is inescapable that the *mens rea* requisite for murder was present.'

Further at 894C - E he stated:

'It is more usual and, in my view, with respect, more appropriate to deal with the liability of these accused for murder on
the basis of what is called in our practice "common purposes", and it is on that basis that I proceed to discuss the matter. It is implicit in the findings of the trial Court, I think, but in any event quite clear on the evidence, that each of these accused shared a common purpose to kill the deceased with the mob as a whole, the members of which were intent upon killing the deceased and in fact succeeded in doing so. And, as I have pointed out, all these accused by their conduct actively associated themselves with the achievement of the common purpose and each of them had the requisite *mens rea* for murder.'

In referring to the manner in which Courts have dealt with the doctrine of common purpose in recent times, the learned Judge of Appeal had this to say at 899 after referring to *Burchell and Hunt* (*op cit* 2nd ed at 430 - 5):

'The learned authors have retained the "no magic" statement referred to above, which is perhaps unfortunate, since it tends to suggest that a question mark should be placed against the manner in which the Courts have dealt with cases of common purpose in recent times, which I think is unwarranted. I should add that I myself see "no magic" in the practice of the Courts - but I do see a lot of common sense and expediency in it.'

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He then dealt with his view of the principle on which common purpose is founded at 900C - H and I quote:

'In *S v Daniëls en 'n Ander* 1983 (3) SA 275 (A) the problems of causation discussed in three of the judgments (those of Jansen JA, Trengove JA and Van Winsen AJA) in respect of accused No 1 in that case arose because of a finding by the learned Judges that a common purpose between the two accused in that case had not been proved. These problems are accordingly not relevant in the present case. In the judgment of Nicholas AJA the matter was dealt with on the footing that the conviction of accused No 1 in that case could not be sustained on a consideration of the problems relating to causation but, significantly, he upheld the conviction on the ground that a common purpose between the accused to rob and kill the deceased had been proved (see at 320F, 340D - H). In my judgment I found that a common purpose between the accused to rob the deceased had been proved. At 323E - F I said the following:

"Volgens my beskouing is die geldende regsposisie dat, waar een van die deelgenote tot 'n gemeenskaplike oogmerk die handeling verrig wat die dood van die oorledene veroorsaak, en daar by die ander deelgenote die nodige *mens rea* aanwesig is, die handeling van die een wat die dood veroorsaak, as 'n kwessie van regsbeleid, beskou word as die handeling van al die deelgenote...."

I adhere to that view because it seems to me that it is borne out by the cases decided in this Court as discussed above. I would add this observation: the approach reflected in the passage just quoted has been applied, in effect, in many cases of common purpose decided in the Provincial and Local Divisions which in recent years have come, and are currently coming, on appeal before this Court, without the validity of the approach being questioned, but which never reach the Law Reports.

That being the existing state of the law relating to common purpose, it would constitute a drastic departure from a firmly established practice to hold now that a party to a common purpose cannot be convicted of murder unless a causal connection is proved between his conduct and the death of the deceased. I can see no good reason for warranting such a departure.'

This case, which became known as the case of the 'Sharpeville Six', has been the subject-matter of controversy by lawyers and politicians, both in South Africa and abroad.

In an article entitled 'Professional Privilege and the Proof of Innocence' (1988) 105 *SALJ* at 291, David Unterhalter, although not specifically dealing with the issue of common purpose, but with the question of legal professional privilege, had this to say at 291 and I quote:

'As a result, the Appellate Division has suffered some withering criticism, most especially on account of its commitment to the principle that imputing the act of killing by one person to another in virtue of their common purpose is a justifiable basis for holding an accused to be murderous.'

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From the passages that I have quoted by Botha JA, it does not appear that the conclusion

drawn by Mr *Unterhalter* is correct. A careful reading of the judgment by Botha JA does not suggest that imputing the act of killing by one person to another in virtue of their common purpose is a justifiable basis for holding an accused to be murderous. In fact, the learned Judge is at pains to point out that an additional factor is required, namely a participation or association, and of course the necessary *mens rea* before an accused can be convicted on the grounds of common purpose.

*Safatsa's* case unfortunately may have conveyed the impression on a mere cursory reading that in cases of murder, a causal connection between the acts of each participant in causing the death of the deceased need not be proved. Therefore it was imperative that certain additional criteria were necessary to prescribe and qualify the vexed issue of liability without proof of a causal connection between each participant resulting in the death of the deceased. Botha JA no doubt also felt constrained to do so in order to remove the perceived uncertainties, and the likelihood of misinterpretation.

This was done in *S v Mgedezi and Others* 1989 (1) SA 687 (A) where the Appellate Division in South Africa qualified and expanded on the decision in *Safatsa's* case *supra*.

Botha JA who delivered the judgment of the Court, amplified and circumscribed and refined the decision in *Safatsa's*
case *supra* as follows and I quote from the headnote. See at 688:

'In the absence of proof of a prior agreement, an accused who was not shown to have contributed causally to the killing or wounding of the victims (*in casu*, group violence on a number of victims) can be held liable for those events on the basis of the decision in *S v Safatsa and Others* 1988 (1) SA 868 (A) only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the victims. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, the requisite *mens rea* ; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.

Inherent in the concept of imputing to an accused the act of another on the basis of common purpose is the indispensable notion of an acting in concert. From the point of view of the accused, the common purpose must be one that he shares consciously with the other person.

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A "common" purpose which is merely coincidentally and independently the same in the case of the perpetrator of the deed and the accused is not sufficient to render the latter liable for the act of the former.'

Clearly therefore, and with respect, the judgment by Botha JA in this case, elucidates the doctrine of common purpose as applied to murder cases, with greater clarity and precision, more particularly relating to an accused against whom there is no proof that he contributed 'causally to the killing or wounding of the victims'.

This setting out of the legal position is not only correct in principle, but is pragmatic, and establishes the proper *nexus* in imputing the act of one accused to that of another in cases of murder on the basis of common purpose as formulated in *Safatsa's* case *supra* and qualified by *Mgedezi's* case *supra*.

In the most recent case of *S v Jama and Others* 1989 (3) SA 427 (A) the Appellate Division of the Supreme Court of South Africa, in dealing with a case of murder where persons had been killed as a result of violence by a group of people, and where it was sought to hold persons liable for the murder of the deceased on the basis of common purpose, applied the decision in *Safatsa's* case taken together with the principles formulated in *Mgedezi's* case *supra*.

Vivier JA, in delivering the judgment of the Court, said at 436:

'The requirements for holding an accused liable for the acts of a crowd on the basis of a common purpose shared with the crowd were fully dealt with in two recent decisions of this Court. See *S v Safatsa and Others* 1988 (1) SA 868 (A) at 893 - 901 and *S v Mgedezi and Others* 1989 (1) SA 687 (A).'

I respectfully agree with this amplification of the law relating to common purpose, in murder cases.

The principles of common purpose have been applied in isolated instances to cases other than murder, such as *inter alia* public violence, incitement and conspiracy.

There exists no reason why the concept of common purpose cannot be applied in the instant case, provided of course that the requirements enunciated in *Safatsa's* case *supra*, and formulated with greater precision in *Mgedezi's* case *supra* and confirmed in *Jama's* case *supra*, must be proved beyond a reasonable doubt in the case of each accused.

Mr *Smit* relied on the decision in *Safatsa's* case *supra* and also submitted that *Safatsa's* case must be read with the prerequisites laid down in *Mgedezi's* case *supra*. Mr *Kuny* submitted that, even if a common purpose was proved, this does not relieve the State of the burden of ultimately proving the complicity of each and every accused. Furthermore, he contended that the *onus* on the State in respect of each accused is no different or lighter than the normal *onus* to prove its case against any individual accused, where no conspiracy or common purpose exists.



He further contended referring to *S v Mgedezi* (*supra* ) that this case emphasises the necessity for the Court to look carefully at the scope of the 'common purpose' and at each individual's participation therein. He reiterated that the existence of a common purpose according to *Mgedezi's* case *supra* does not relieve the Court of its task of deciding the criminal responsibility of each accused separately.

There appears to be no difference in principle between the contentions of Mr *Smit* and Mr *Kuny* save that they each emphasise a different essential of the principle of common purpose.

As I have already indicated, even if the State does prove a common purpose between the accused or certain of them, then nevertheless it is the Court's duty to evaluate the evidence against each accused separately and to ascertain whether the principle of common purpose can be applied to each and every accused.

The term common purpose must not be regarded as a magical incantation, nor as a panacea for determining guilt. It is a convenient and useful descriptive appellation of a concept, that, if one or more persons agree or conspire to achieve a collective unlawful purpose, the acts of each one of them in execution of this purpose are attributed to the others.

The essential requirement is that the parties thereto must have and did in fact have the same purpose - that is a common purpose.

'The basis of this doctrine is the idea that each member of the plot or conspiracy gave the other an implied mandate to execute the unlawful criminal act.' (*Snyman* (*op cit* at 212).)

There need not necessarily be a conspiracy. On principle, it is sufficient if collaboration or association commenced without premeditation and spontaneously as in the so-called 'join-in' cases.

The Courts have held 'that association in the common design makes the act of the principal offender the act of all'. Furthermore, the association need not be express, but may also be implied and inferred from conduct.

I need not for the purposes of this case concern myself with the controversy surrounding the issue of causality, nor analyse the conflicting judgments relating thereto.
Although this doctrine has been criticised by *Snyman*, and *Rabie* who is critical of an

approach that does not take into account the causal contribution of each participant in a common purpose, I nevertheless believe that the doctrine of common purpose is a useful and practical method of determining liability or innocence where more than one person is involved in a joint unlawful activity pursuant to their common design and objective, subject, however, to certain stringent conditions. An accused cannot be found guilty of sharing a common purpose with other accused by a process of osmosis.

In the absence of a prior agreement or conspiracy, the doctrine of common purpose may not be used as a method or technique to subsume the guilt of all the accused without anything more.

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It cannot operate as a dragnet operation systematically to draw in all the accused. Association by way of participation, and the *mens rea* of each accused involved, are necessary and essential prerequisites.

In the instant matter, in order for an accused to be found guilty of treason, for the acts of the BNSU, on the basis of a common purpose shared with members of the BNSU, in the absence of a prior agreement, or conspiracy, the following prerequisites must be satisfied.

*(a)* He must have been present at and associated himself by participation in any of the incidents referred to in the indictment, ie his overt act.

*(b)* He must have been aware of the nature and purpose of the conduct resulting in the said incidents.

*(c)* He must have intended to make common cause with those who were the actual perpetrators of the incidents.

*(d)* He must have manifested his participation and association with the conduct of the members of the BNSU.

*(e)* He must have had the necessary hostile intent to overthrow the Government.

Mr *Smit* has submitted that the doctrine of common purpose has been proved by the State against many of the accused as members of the BNSU, by their individual participation, and may accordingly be invoked by the Court to establish their guilt.

This is indeed the position, on the basis of the prerequisites that I have formulated above, and on which an *onus* rests on the State to prove.

The State has proved that a common purpose existed between the accused who were addressed by No 195 at the grass verge, and who subsequently went to the residence of the President and the houses of the Ministers. Furthermore, that it made no difference to their criminal liability if they entered the houses or remained outside as guards or lookouts, or to prevent the occupants from escaping. This aspect was correctly conceded by Mr *Chetty* in that a common purpose had been proved against the accused who went to arrest the Ministers.

Notwithstanding the aforegoing, it still behoves the Court to determine the guilt or innocence of the accused on an individual basis, weighing the testimony which may or may not implicate the individual accused, and assessing the issue of his liability on his own admissions, and the evidence adduced against him. The Court must perform this duty as a matter of abundant caution to ensure that justice is done in the case of each accused.

*As to D*

*Admissibility of extra-curial statements*

With the exception of No 195, the other accused made one or more extra-curial statements. In the vast majority of cases these were made to magistrates, and some were also made to senior police officers.

It is common cause between the State and the accused that these statements were freely

and voluntarily made, and were handed up as exhibits and received by the Court.

In these statements the accused referred to their own conduct, as well as to the conduct of other accused. None of the accused gave evidence.

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The crisp issue that arises for decision is, assuming that a conspiracy or common purpose has been proved by the State, are the said statements, wherein reference is made to co-accused by the authors thereof, admissible against the co-accused?

Both Mr *Smit* and Mr *Kuny* referred the Court to numerous authorities on this aspect and contended that, in view of the multiplicity of statements and reciprocal references by the accused, a decision on this subject must be given. I agree. Mr *Smit* submitted that, even if the State proved a conspiracy or common purpose, which he contends it did, the statements would be admissible only against the accused who made them, dealing with their own participation, and not against the other accused.

In support of his contention he referred the Court to s 219 of the Criminal Procedure Act 51 of 1977 which provides 'no confession made by any person shall be admissible as evidence against another person'.

Mr *Smit* cited the cases of: *R v Miller and Another* 1939 AD 106; *R v Mayet* 1957 (1) SA 492 (A) ; *R v Heyne and Others* 1955 (2) SA 539 (W) ; *R v Matthews and Others* 1960 (1) SA 752 (A) ; *R v Baartman and Others* 1960 (3) SA 535 (A) ; *S v ffrench-Beytagh* 1972 (3) SA 430 (A) ; *S v Cooper and Others* 1976 (2) SA 875 (T) .

Mr *Smit* correctly submitted that it makes no difference at which stage of the proceedings the common purpose or conspiracy is proved, but proved it must be.

In all the cases cited, the accused or co-accused gave evidence and, if in doing so they implicated their co-accused, their evidence would be admissible against the co-accused, on the basis of the English rule adopted by our Courts, that a statement made by A is admissible against B, if A and B were associated in the commission of a crime, and the statement was made in furtherance of a common purpose.

He drew attention to the fact that, in certain of the cases referred to, reference is made to executive statements and statements in pursuance of a common purpose. See Du Toit and Others *Commentary on the Criminal Procedure Act* at 24-60 - 24-71. Regarding executive statements he referred to Hoffmann and Zeffertt *The South African Law of Evidence* 4th ed at 90. He further drew a distinction between 'executive statements' and 'narrative statements'.

He contended that the statements of the accused were narrative and not executive, and were therefore inadmissible against the other accused. On this premise he argued that these statements were admissible only against the accused who made them and not against other accused. This is correct.

He further argued that the evidence by certain State witnesses, such as Mhitsane and Magashula, relating to meetings held and the contents thereof are admissible against the accused who attended them, because they gave direct evidence and what they said was not contained in 'narrative statements'.

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A further submission made by him was to the effect that the statements were admissible not to prove the truth of the contents thereof, but as an additional factor to take into account in assessing the question whether there was a common purpose or not. In this connection he referred to the case of *Mawaz Khan v R* [1967] 1 AC 454 (PC) ([1967] 1 All ER 80) which was considered in *S v Mongalo* 1978 (1) SA 414 (O) at 414. This case was also referred to in *Hoffmann and Zeffertt* (*op cit* at 625).

Mr *Kuny* agreed that an extra-curial statement made by one accused is not evidence against

another accused. In addition to the cases cited by Mr *Smit*, Mr *Kuny* referred the Court to certain additional authorities for this proposition. They are: *R v Matsitwane and Another* 1942 AD 213 at 218 - 20; *R v Kefasi* 1966 (1) SA 364 (RA) at 365 -366B; *S v Serobe* 1968 (4) SA 420 (A) at 425F - H; Lansdown and Campbell *South African Criminal Law and Procedure* vol V at 859.

He further argued that these statements merely contained evidence of admissions by the accused making the statement.

These statements cannot be tendered by the State for the purpose of establishing the truth of the contents (that is the facts 'contained therein objectively') but merely as containing admissions 'by and against the accused who made them'.

Therefore he concluded on this aspect that an extra-curial statement made by one accused is not evidence against any of the other accused, and it cannot be used for any purpose whatsoever, let alone to provide corroboration for, or to strengthen the credibility of other evidence implicating such accused. To illustrate this contention he argued
that, in order to establish what accused No 195 is alleged to have said at any particular meeting, the State may only rely on oral evidence given by witnesses in Court. The State cannot, in deciding what a particular accused may have heard at such a meeting, rely upon what any other accused may have said in his extra-curial statement. This notwithstanding the fact that it may have emerged either from evidence in Court and/or from their own statements that they both attended the same meeting.

As far as 'executive statements' are concerned, he acknowledged that the State has fairly and properly conceded that, insofar as any such executive statements have been referred to in any of the extra-curial statements made by the accused, they are not admissible as executive statements or otherwise against any of the other accused.

Mr *Smit* and Mr *Kuny* appear in principle to be in agreement on this issue, except that Mr *Smit* submits that the extra-curial statements, although not admissible against an accused other than the maker thereof, may be used for a limited purpose, namely to establish whether a common purpose existed or not.

Notwithstanding a *consensus* between counsel on the basic principle, it is indispensable for the just decision of this case that the Court give a decision on this issue.



This is so because of the plethora and profusion of incriminating references, and the embroiling of other accused by the authors of these extra-curial statements. Unless the Court resolves this matter, there is the possibility that an accused may be prejudiced by the extra-curial statement of a co-accused, or that a jaundiced view of an accused may be taken if reference is made to him in an extra-curial statement. Therefore the statements must be strictly and legally construed. It is essential to do this and is particularly crucial and of substance, because the evidence against each accused must be evaluated separately and individually, and thereafter the evidence against him must be considered and determined.

In *R v Miller and Another* (*supra* ), the accused were charged with fraud on the customs authorities. The writings of one of the *socii criminis* were tendered in evidence against the accused, even though the accused was not a party to these writings. Watermeyer JA who delivered the judgment of the Court said at 115, and I quote:

'There is a well-recognised rule that the acts and declarations of one conspirator are admissible in evidence against another, provided that they are acts performed and declarations made in furtherance of the common purpose - *R v Levy* 1929 AD 312; *R v Cilliers* 1937 AD 285. Under this rule admissions made by a co-conspirator after the purpose had been completed, consisting of a relation or narrative of some part of the transaction, have been held to be inadmissible.... (At 117.) There is... authority... for the statement in Phipson *Evidence* at 98, viz: "On charges of conspiracy the acts and declarations of each conspirator in furtherance of the common object are admissible against the rest, and it is immaterial whether the existence of the conspiracy or the participation of

the defendants be proved first though either element is nugatory without the other. The same rule applies where the charge is not directly for the conspiracy but for the act resulting therefrom. The above rule holds though the acts and declarations proceeded from conspirators not charged...." The admission of (at 118) the acts and declarations of one conspirator as evidence on a charge against another must be referable to some other principle (ie *socius* or complicity) and not *only* to the principle of agency.' (Full Bench concurred; and emphasis added.)

The case of *R v Mayet* (*supra* ) is relevant on this aspect. In that case the evidence of two persons approached by a person engaged by the accused with a view to their carrying out the murder of the deceased on behalf of the accused was held admissible.

Schreiner JA in *R v Matthews and Others* (*supra*), a case of gang warfare, said:

'The evidence of acts and executive statements by various persons, whether accused or not, may properly be considered in order to ascertain whether after correlation they tend to support the conclusion that there was the concerted action alleged.'



A foundation must be laid by proof, sufficient in the opinion of the Court, to establish *prima facie* the fact of conspiracy between the accused, and then every act and declaration of each member of the conspiracy in pursuance of the original concerted plan, and with reference to the common object is, in contemplation of the law, the act and declaration of them all and is original evidence against each of them. *R v Heyne and Others* (*supra* ).

It does not matter whether the evidence is admitted before a conspiracy is proved, provided, however, that a conspiracy is eventually proved.

In *R v Levy* 1929 AD 312, certain schedules and other records kept by one accused were admitted before the proof of a conspiracy. Curlewis JA, at 326 - 8, said:

'... (S)ometimes for the sake of convenience, the acts or declarations of one are admitted in evidence before proof is given of the conspiracy, the prosecutor undertaking to furnish such proof in a subsequent stage of the case. But such mode of proceeding rests in the discretion of the Judge... The schedules were, therefore, in my opinion, properly admitted... as being acts done in the course of the acting in concert and as a step in the proof of a common purpose. Of course, if it were found at the conclusion of the case for the prosecution that a common purpose had not been established, then the schedules would have to be rejected and could not be regarded as evidence against the accused.'

In English law the same position obtains for as according to Phipson *On Evidence* 12th ed para 261 at 107:

'Where two persons are engaged in a common enterprise, the acts and declaration of one in pursuance of that common purpose are admissible against the other. This rule applies in both civil and criminal cases and in the latter whether there is a charge of conspiracy or not, provided that the crime charged was committed in pursuance of a conspiracy, ie is an agreement of two or more persons to commit it... . Moreover, apart from authority, it is self-evident and accepted almost daily in the courts without question, that if, eg two men rob a warehouse, one acting as the look-out, and the other inside the warehouse, holding up the night watchman out of sight and hearing of the look-out, the acts and declarations of the man inside the warehouse are equally admissible against the look-out, whether the charge be conspiracy to rob or robbery or both. It is immaterial whether the existence of the common purpose or the participation of the person therein be proved first although either element is nugatory without the other.'

In the cases cited to the Court it is beyond question that direct evidence was tendered of the acts and declarations of members of a conspiracy, or in furtherance of a common purpose,

and the Court did not rely on the extra-curial statements of the accused. Statements by the accused in extra-curial statements about other accused are clearly hearsay. The effect of this is according to *Hoffmann and Zeffertt* (*op cit* at 625):



'One effect of the hearsay rule is that a statement made by an accused person before the trial is ordinarily inadmissible against another person charged with the same offence. Although the statement can usually be proved against its maker as an admission or confession, it is hearsay against anyone else. But this rule applies only when the statement is tendered to prove the truth of its contents. In *R v Mawaz Khan* two men were charged with murder. The prosecution adduced evidence that each had given an identical false alibi to the police. The Privy Council held that the statement of each was admissible against the other; not, of course, to prove that it was true, but "as tending to show that the makers were acting in concert and that such action indicated a common guilt".'

To the best of my knowledge the case of *Mawaz Khan* has not been followed by the Courts in this country or in South Africa, although there is a reference to it in *S v Mongalo* (*supra* ). There the Court declined to make a finding whether this case and the principle enunciated in it should be applied in South African law. It is unnecessary for me to make any further comment in this regard.

The case of *R v Baartman and Others* (*supra* ) is instructive on this point. One of five accused persons who were charged with murder, namely H, made a confession implicating the others. The evidence revealed that the accused were in each other's company prior to the murder and after the murder. The evidence did not establish that any of them had participated in the murder. The trial Court, in considering the confession made by H, excluded the inculpatory statements by H, but because of their association with H who was proved to have committed the murder, they were convicted. Schreiner JA said at 542D:

'It follows that Baartman and Kock were convicted because the trial Court found on his confession that Honey was one of the murderers and that they had been in his company not long before and not long after the murder. In so convicting Baartman and Kock the trial Court excluded from its consideration a statement in Honey's confession which directly implicated them, but it used the confession to establish an essential part of the chain of inference leading to their conviction, namely, that Honey had taken part in the murder. This was clearly wrong.'

This case illustrates the proposition that an extra-curial statement by an accused implicating a co-accused, is inadmissible against a co-accused, but is admissible against the accused making the statement.

Acts and declarations in furtherance of a common purpose are receivable when they are relevant. They are regarded as relevant when they are 'executive statements' but are inadmissible when they constitute an account or admission of events past, and not made in furtherance of a common purpose, that is 'narrative statements'. As *Hoffmann and Zeffertt* (*op cit* ) point out at 190:



'2. Acts and declarations in furtherance of a common purpose.

There is some uncertainty as to whether this topic should be treated as an exception to the rule that admissions are not vicariously admissible. Some say that it should; but the better view, it is submitted, is that the reception of the declarations of persons engaged in a common purpose stands on the same footing as acts done; in other words, they are received when they are relevant acts. They are relevant, as will be seen below, when they are "executive" statements; they are inadmissible when they are ''narrative", that is to say, when they are not made in furtherance of a common purpose but as an account or

admission of past events. An admission contained in narrative is inadmissible precisely because admissions are not, in general, vicariously admissible; but they may, of course, be received against the persons making them.'

See also *R v Miller* (*supra* at 115); *R v Mayet* (*supra* at 494F); *S v ffrench-Beytagh* (*supra* at 455E - 456A); *S v Bondi* 1962 (4) SA 671 (A) at 676G - 677G; *R v Leibbrandt* (*supra* ); *S v Cooper and Others* (*supra* at 880D - E).

From the authorities that I have cited in the aforegoing paragraph, the result is that, if a witness or an accused
were to testify in Court as to an 'executive' statement made by a co-conspirator, that is a statement made in furtherance of the common purpose, such statement would be admissible in evidence against any other person who is party to such a common purpose. As far as such 'executive' statement may be contained in an extra-curial statement, made by one of the accused, such 'executive' statement is not admissible against any of the other co-accused, because the extra-curial statement is hearsay and therefore is inadmissible against any accused other than its maker, notwithstanding that the accused may be found to have a common purpose with the person who made the extra-curial statement. See *S v Zwane and Others (3)* 1989 (3) SA 253 (W) .

An authoritative guide on this subject is contained in s 219 of the Criminal Procedure Act which provides that 'no confession made by any person shall be admissible as evidence against another person'. In other words, a confession made by A is not admissible directly or indirectly against B. The section clearly provides that no confession shall be admissible against any person except its maker. The same must also apply in regard to admissions.

It is true that there are exceptions to this principle in what has been termed vicarious admissions, but it is unnecessary to consider them in the instant case, since they have no application.

The Court has also read the statements of the accused and it is beyond question that the statements are 'narrative' statements and not 'executive' statements. Hence, apart from other considerations, they are inadmissible against the co-accused, but are receivable and admissible against the accused who made them.

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*As to E*

*The Internal Security Act*

The relevant provisions of this Act under which the accused are charged relate to s 22(1), alternatively s 45(2)*(a)*, alternatively s 45(2)*(b)*.

The aforegoing sections of the Internal Security Act 32 of 1979 (B) read as follows: '22(1)

Subject to the provisions of ss (4), any person who -

*(a)* with intent to endanger the maintenance of law and order in the Republic or any portion thereof, in the Republic or elsewhere commits any act or attempts to commit, or conspires with any other person to aid or procure the commission of or to commit, or incites, instigates, commands, aids, advises, encourages or procures any other person to commit, any act likely to have any of the results referred to in ss (2) in the Republic or any portion thereof; or

*(b)* ...

*(c)* ...

*(d)* ... shall be guilty of the offence of participation in terrorist activities and liable on conviction to the penalties provided for by law for the offence of treason.

(2) If in any prosecution for an offence contemplated in ss (1)*(a)* it is proved that the accused has committed or attempted to commit, or conspired with any other person to

aid or procure the commission of or to commit, or incited, instigated, commanded, aided, advised, encouraged or procured any other person to commit the act alleged in the charge, and that the commission of such act, had or was likely to have had any of the following results in the Republic or any portion thereof, namely -

*(a)* to hamper or to deter any person from assisting in the maintenance of law and order;

*(b)* to promote, by intimidation, the achievement of any object;

*(c)* to cause or promote general dislocation disturbance or disorder;

*(d)* to cripple or prejudice any industry or undertaking or industries or undertakings generally or the production or distribution of commodities or foodstuffs at any place;

*(e)* to cause, encourage or further an insurrection or forcible resistance to the government;

*(f)* to further or encourage the achievement of any political aim, including the bringing about of any social or economic change, by violence or forcible means or by the intervention of or in accordance with the direction or under the guidance of or in co-operation with or with the assistance of any foreign government or any foreign or international body or institution;

*(g)* to cause serious bodily injury to or endanger the safety of any person; *(h)* to cause substantial financial loss to any person or the State;

(i) to cause, encourage or further feelings of hostility between inhabitants of the Republic;

*(j)* to damage, destroy, endanger, interrupt, render useless or unserviceable or put out of action the supply or distribution at any place of light, power, fuel, foodstuffs or water, or of sanitary, medical, fire extinguishing, postal, telephone or telegraph services or installations, or radio transmitting, broadcasting or receiving services or installations;



*(k)* to obstruct or endanger the free movement of any traffic on land, at sea or in the air;

*(l)* to embarrass the administration of the affairs of the State, the accused shall be presumed to have committed or attempted to commit, or conspired with such other person to aid or procure the commission of or to commit, or incited, instigated, commanded, aided, advised, encouraged or procured such other person to commit, such act with intent to
endanger the maintenance of law and order in the Republic, unless it is proved that he did not intend any of the results aforesaid.'

Section 22(1)*(a)* of this Act is almost identical in its terms to the old s 2(2) of the South African Terrorism Act 83 of 1967. The *onus* resting upon the accused in terms of the Bophuthatswana Act differs from the old South African Act in that, once it is proved that an accused committed any of the acts referred to in s 22(2), the presumption contained therein comes into operation, and the *onus* is then on the accused to prove that he did not intend any of the results mentioned in the said section. The *onus* of proof therefore resting on an accused in these circumstances is on a balance of probabilities. In other words, he has to discharge the *onus* of proof resting on him not on the basis of proof beyond a reasonable doubt that he did not intend any of the results aforesaid, but only on a balance of probabilities.

Mr *Smit* has submitted that, when the State proves that the accused committed an act which had or was likely to have the consequences described in s 22(2)*(a)* - *(l)*, there is a presumption that the accused committed the acts with the intention of endangering the maintenance of law and order in the Republic of Bophuthatswana or any portion thereof, and, unless the accused proves on a balance of probabilities that he did not commit such act with intent to endanger the maintenance of law and order in the Republic, he is then guilty of the offence described in s 22(1)*(a)*.

Moreover, the acts charged against the accused within the parameters of s 22(1)*(a)* are the same as those specified in the main charge. Therefore Mr *Smit* argues that each one of these acts had or was likely to have had any of the results referred to in s 22(2)*(a)* - *(l)*.

Consequently, as I understand him, even if the State only proved that the accused committed the acts referred to in incidents 1 and 2 of the indictment, an inference must be drawn that any of the consequences referred to in the said s 22(2)*(a)* - *(l)* did or could have resulted and consequently the presumption comes into operation.

Mr *Kuny* contended that the Court must determine whether the acts of the accused proved by the evidence brought them within the ambit of the presumption in s 22(2), thereby casting upon them the *onus* referred to in that section.

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In this regard, he referred the Court to the two well known cases of *S v ffrench-Beytagh* (*supra* at 457E - H) and *S v Essack and Another* 1974 (1) SA 1 (A) at 18B - D. In the *ffrench-Beytagh* case it was held that, in order to convict an accused of participation in terrorist activities in contravention of s 2(1)*(a)* of the Terrorism Act 83 of 1967, it is incumbent upon the State to establish (with or without the aid of the presumption contained in s 2(2) of that Act) that such acts 'within the meaning of s 2(1)*(a)* mentioned in the indictment as the accused is proved to have committed or attempted, or to have conspired to commit or attempt, were so committed etc "with intent to endanger the maintenance of law and order in the Republic" '.

The Court also considered when the presumption in s 2(2) applies and its effect upon the *onus* of proof. In this case Ogilvie Thompson CJ said at 457F - 458B that

'(i)t is, for instance, not difficult to conceive of the commission of an act which, although entirely divorced from terroristic activities, is "likely to have had" as its result the causing of "serious bodily injury to" or endangering "the safety of any person" within the literal meaning of those words occurring in s 2(2)*(g)*. Yet it can hardly have been the intention of the Legislature to include such an act within the ambit of the section. Inasmuch as this section radically alters the general rule relating to the *onus* of proof in a criminal case, it accordingly should, in my view, be interpreted with strict regard to the context to which it relates, namely the participation in terroristic activities referred to in s 2(1)*(a)* of the Act. Whether or not any particular "act" proved to have been committed "had" (ie actually occasioned) any of the results mentioned in the section is a question of fact to be decided on the evidence of the particular case. The section is, however, not restricted to results which have actually occurred. Certain acts no doubt have inherent in them the quality of impairing the maintenance of law and order or of endangering the State - an apt illustration mentioned during the argument was the abortive activity of Guy Fawkes. It is, however, to be observed that the words of the statute are not "could have had" but "likely to have had". Accordingly, mere possibilities or remote contingencies are not, in my view, embraced by the section. In the present context the expression "likely to have had", in my opinion, connotes probability; the concept perhaps emerges more clearly from the Afrikaans text "waarskynlik kon gehad het". Consequently, for the section to apply, it must be shown either that the "act" proved to have been committed or attempted, etc, in fact had one of the results listed *(a)* - *(l)* in the section or that it probably would have had one of those results (cf *R v Nkomo* 1964 (4) SA 452 (SRAD) at 454, and *R v Ngwenya* 1965 (1) SA 243 (SRAD) at 245).

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The Court must, on the evidence before it, assess what the probabilities were of the proved "act" producing the particular notional "result" contended for.'

In *Essack's* case Muller JA said as follows at 18B - D:

'In my view, it could never have been the intention of the Legislature that, in a charge of the nature preferred in the
present case - the handling of envelopes containing subversive literature with a particular intent - proof of the mere performance of the physical act, under circumstances which could be entirely consistent with complete innocence on the part of the person

performing the act, should bring the presumption in question into operation. Indeed, if that had been the intention, the commission of many acts entirely unassociated with any intent relative to terroristic activities, would place on the accused the burden of proving beyond a reasonable doubt that he did not intend any of the results enumerated in the subsection - eg the posting of letters by a messenger; the posting by a casual bystander of letters inadvertently dropped by a stranger outside a pillar box, and, indeed, even the handling of letters by a post office official. (See in this regard the remarks of Ogilvie Thompson CJ in the *ffrench-Beytagh* case *supra* at 457E - H.)

It follows from what has been stated above that a conviction on the alternative charge under the Terrorism Act would not, in the circumstances, have been competent.'

From the aforegoing cases the State must establish, with or without the aid of the presumption, that such acts within the meaning of s 22(2) mentioned in the indictment as the accused is proved to have committed, or attempted to commit, or conspired to commit, were so committed with intent to endanger the maintenance of law and order in the Republic. Put another way, it means that the State must prove that the acts committed by the accused, and which are specified in the indictment, were in the nature of 'terrorism' or 'terroristic activities'. Once the State succeeds in proving this, the presumption referred to in s 22(2) comes into operation.

Subsection (2) of s 22 radically alters the incidence of the *onus* of proof in a criminal case and consequently must be strictly interpreted in the framework to which it has reference, namely acts of 'terrorism' or 'terroristic activities'.

The fact that this must be the position is strengthened by the definition of 'terrorist' in the definition clause of chap II of said Act which reads as follows:

'"Terrorist" means any person who has committed an offence under s 22 or an act which had or was likely to have had any of the results referred to in s 22(2).'

In fact, s 22 itself is the section dealing with terrorism.

Therefore the acts of the accused upon which the State relies to prove the incidents in the indictment must be inconsistent with innocence on the part of the accused performing the acts. The said acts must therefore be proved by the State to be associated with 'terrorism' or 'terroristic activities', beyond a reasonable doubt.

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*As to F*

*The consequences or failure to report that there is a plan to commit high treason*

Does the failure to report high treason to the authorities constitute high treason?

According to certain old authorities such as *Van der Linden* 2.4.2; *Voet* 48.4.11; Huber *Heedensdaegse Rechtsgeleertheyt* 6.15.3.14, the overt can materialise without an act of performance: it is treason to fail to report treason committed by others. *Hunt* (*op cit* vol II at 6).

Therefore, according to the authorities on Roman-Dutch law, the failure to report acts of treason was regarded as treasonable. *Snyman* (*op cit* at 259) states:

'Even an omission to act which is accompanied by the requisite hostile intent constitutes high treason. Every person who owes allegiance to the State and who hears or otherwise becomes aware of the fact that high treason is being committed or that there is a plan to commit it has a duty to communicate this fact to the authorities as soon as possible. Failure to do so constitutes high treason.'

In *Hunt's* view *supra* at 17 anyone (not just someone occupying an official or quasi-official position) who has knowledge that an act of treason *is being committed or is to be committed*, and who fails to inform the authorities of this, commits treason. In addition, the person in possession of the said information must act unlawfully, and must have 'hostile

intent'. This is an exception to the rule concerning the commission of an overt act of treason accompanied by the hostile intent.

In *R v Wenzel* (*supra* at 272) Ramsbottom J (as he then was), after quoting Van der Linden *Institutes* 2.4.2, stated: 'Anyone who is appraised of an act of high treason is bound to disclose it or is otherwise subject to punishment.'

In *R v Labuschagne* 1941 TPD 271, Greenberg J (as he then was) said at 275:

'I shall assume that the failure to report may be high treason itself, but in the view I take of the matter, it is unnecessary to decide whether the failure to report must be failure to report an intention to commit high treason on the part of other persons or to report treasonable acts which have already been committed. It can be assumed that failure to report past conduct which is treasonable is also treason.'

There are several cases where it has been held that an omission results in criminal liability only where there is a legal duty on an accused to act. There is a distinction between a legal duty to act and a moral one to do so. Failure to act as a moral duty will not result in criminal liability.

Basically the lawfulness or unlawfulness of an omission, according to *Burchell and Hunt* (*op cit* vol I at 112),

'depends upon whether the legal convictions of the community ("die regsoortuiging van die gemeenskap") expect the omission to be regarded as criminal'.



See *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597B; *S v Gaba* *1981 (3) SA 745 (O) ; S v Rosenthal* 1980 (1) SA 65 (A) .According to the authorities that I have cited the crime of treason provides an exception to the rule as to mere non-disclosure. It seems clear that anyone who, knowing of the commission of this crime, refrains from giving information to the authorities must by reason of this mere non-disclosure be regarded as having taken part in the treasonable conduct. Even bare knowledge of its attempt or commencement without disclosure of the same to the authorities may render a person liable, even though the person has in no way taken part in the plans of the principal offender.

The aforegoing must apply with greater force to a member of the armed forces, who has sworn an oath of allegiance to the State. [The learned Judge then set out the facts relating to the formation of the Bophuthatswana National Security Unit, analysed the evidence, and continued as follows.]

*C: Facts found to be proved by the State*

From the undisputed evidence, accepted by the Court as credible and reliable, save where otherwise indicated, the Court finds the following facts proved by the State beyond a reasonable doubt.

(i) The BNSU which was founded in 1986, was a unit to be employed in guard duty, which consisted primarily in the guarding of Government buildings and installations. They were not given combat training and were not to be deployed in combat duty. At times they were used to assist the army and police at road blocks. Certain members thereof did have grievances relating to equipment and renumeration but these were in the main redressed, and the outstanding issue of the disparity in allowances between the BNSU and regular soldiers of the BDF was attended to, and was to become operative in the first quarter of 1988. The BNSU was a unit in the BDF, attached to it and under its jurisdiction. In cross-examination it was suggested that they were also dissatisfied with the fact that spares and vehicles were buried, and that vehicles of an unserviceable and defective nature were purchased and that they were not fit for the purposes for which they were bought. Furthermore, members of the BNSU or BDF were used by senior officers to do work on their farms. These suggestions were emphatically denied both by Major-General Turner and H F Riekert and in any event no evidence was led relating thereto by the defence. The relevance of this relates to the motive of the accused, and as indicated herein, motive is irrelevant in considering the charge of treason.

(ii) During their basic training, the men who joined the BNSU were taught the difference between lawful and unlawful orders. According to the State witness A Makgai, he delivered lectures to them consisting of 30 periods, each of 40 minutes duration, on the Defence Act of Bophuthatswana and the Standing Orders of the BDF, which I have already dealt with, and questions were permitted.



There were also discussions on the subject. The witness Makgai satisfied himself that they knew the difference between lawful and unlawful orders. No evidence was led by any of the accused to disprove the evidence of the said State witness, or that they were unaware of the difference between lawful and unlawful orders.

(iii) At all material times, and on the dates in question, namely 8 - 10 February 1988, all the accused were members of the BDF, and were acting in this capacity.

(iv) On joining the BDF soldiers take an oath of allegiance, *inter alia*, to be loyal to the State, represented by the Government of the day. This was not put in issue, and was admitted by counsel acting on behalf of the accused. The President in terms of the Constitution, is the Commander-in-Chief of the armed forces.

(v) Accused No 195, Sergeant-Major Phiri, was the Sergeant-Major of the BNSU. He was in charge of, and the undisputed leader of the members of the BNSU who were alleged to have participated in the abortive *coup*.

(vi) The progression and escalation of the episodes that occurred between 8 - 10 February 1988, and referred to as the incidents in the indictment are as follows:

*(a)* On 8 February 1988, according to the State witness C Mhitsane, accused Nos 48, 62, 85, 150 and 152 in discussions with him indicated that a *coup* was hovering in the air and was imminent. Mr *Kuny submitted that this State witness was an accomplice. This is correct. He was accordingly warned in terms of s 204 of the Criminal Procedure Act. The Court also took into account, in evaluating the evidence of this witness, the cautionary rule as it applies to accomplices, and as formulated by Holmes*
*JA in S v Hlapezula and Others* 1965 (4) SA 439 (A) at 440D - H, where the learned Judge of Appeal stated as follows:

'It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit. Accordingly... there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular R v Ncanana 1948 (4) SA 399 (A) at 405 - 6; R v Gumede 1949 (3) SA 749 (A) at 758; R v Ngamtweni and Another 1959 (1) SA 894 (A) at 897G - 898D.



Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned.'

(b) The Court is and was aware of the dangers inherent in the evidence of this witness as an accomplice. This witness' evidence on vital and important aspects was corroborated by the independent evidence of S M Magashula, a State witness, and other

witnesses. The Court was impressed by the fact that although this witness hid away at the Broadcast Centre when the SADF arrived on 10 February 1988, and later escaped on 12 February 1988, he nevertheless voluntarily handed himself over to the police on 11 July 1988. This is obviously a case where a witness, who was in hiding for approximately six months, decided without any urging or inducement to make a full disclosure of what had occurred. It was a case of his coming to terms with his conscience. There were a few examples of *minor* contradictions in his evidence, but the overriding thrust of his evidence was credible. This person had substantial merits as a witness and, bearing in mind that the accused implicated by him gave no testimony, the Court had no hesitation in accepting the veracity of his testimony, notwithstanding the fact that he was an accomplice. Furthermore, he answered questions satisfactorily, was not evasive, and where he was uncertain, he stated so without any demur or hesitation. Neither in his demeanour, nor testimony did he display any hostility or malice towards the accused.

(vii) On the evening of 9 February 1988, at about 7 pm, accused No 195 alone, visited one S M Magashula, a State witness who was a corporal in the SP Guard, which performed guard duties at Lowe. Accused No 195 informed the witness that he was the adjudant on duty that day and made certain inquiries relating to the *modus operandi* of the telephone in the guard room. It was clear from the response that only external calls could be received on this telephone, notwithstanding the fact that there was no outside line. The telephone was for internal use only. Accused No 195 wanted to know whether the President's wife was in attendance at the residence, and the witness replied that he was uncertain. He was then told by accused No 195 that if a woman telephones and says she is Mrs Phiri, he should then drop the telephone. The witness saw No 195 going to check the telephone. From this evidence the Court concluded that No 195, as the driving force and leader of the BNSU at the relevant times, had embarked on a stratagem to mislead the SP guard and to reconnoitre and scrutinise the situation at Lowe.

(viii) During the night of 9 February 1988, according to Mhitsane, three separate meetings were held which he attended. The Court relies only on the evidence of a State witness, and not the statements by the accused, to establish the fact that meetings were held.



This is so because, as the Court has already found, the extra-curial statements of the accused are admissible against the makers only, and cannot be used to establish objective facts implicating other accused, neither can evidence be extracted therefrom to constitute facts except insofar as they are admissible against the authors of these extra-curial statements.

These meetings were held clandestinely, and surreptitiously at the ablution block, although there was a BDF hall available for meetings at the Molopo Base. It is significant that, when No 195 and others thought that the *coup* had succeeded, a meeting was held in the main hall. The unusual venue selected was a manifestation, and a portent, that a cabal and conspiracy were in operation.

(ix) The witness Mhitsane and his three companions, returning from guard duty at Garona, were directed to the ablution block by accused Nos 20 and 73, both corporals in the BNSU.

(x) At the first meeting, accused No 195 and other members of the BNSU, approximately 150, were present. This meeting took place between 21:00 and 22:00 pm on the said night. The witness Mhitsane identified accused Nos 15, 20, 48, 52, 73, 82, 85, 150, 152 and 172 as being present at the first meeting. Nothing of consequence was said at this meeting by No 195. He merely said that he had a 'civil' or 'personal' problem to resolve. The meeting then terminated and the witness returned to his tent. In his tent he spoke to No 85. After inquiring from No 85 what was taking place, No 85 told him that the day that No 195 had spoken about was this day.

(xi) Between 23:00 and 24:00 pm on the same night they were again told to go to the ablution block by Nos 20 and 73. According to this witness approximately the same number of persons were present at the first and second meetings. He was of the view that the persons whom he had previously identified as being present at the first meeting

were there. He did not, however, pay any attention to where they were sitting.

(xii) At this meeting No 195 said they had a problem with a 'stupid man'. He said he wanted to go and see if the President was in attendance, presumably at Lowe. Accused No 81 replied that he was present and that he had seen him personally entering the Parliamentary buildings. In addition, No 81 had heard that the President's wife was not at home, but was somewhere overseas. Notwithstanding the information given by No 81, No 195 said he was going to establish personally if the President was at his home. The meeting terminated and they returned to their tents.

(xiii) After a short while No 195 returned and the witness and others were again instructed to go to the ablution block by Nos 20 and 73.

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In response to a question, Mhitsane stated that approximately the same number of members of the BNSU attended as was the case with the previous meetings, but he did not pay attention to the accused whom he had pointed out, and who had attended the first meeting. He assumed that they were present at the third meeting, because the same number of BNSU members who had attended the previous two meetings were at the third meeting.

(xiv) At this meeting (the third meeting), according to Mhitsane, No 195 said *inter alia (a)* that the President was there and he had personally spoken to him; *(b)* that when a certain Kalmanowitz was arrested his bail was paid in the sum of R1,8 million; *(c)* there was an unnamed White woman who also spent the Government's money like Kalmanowitz; *(d)* he said the President must be arrested. (The emphasis is mine.) Upon hearing this, the members of the BNSU gathered there did not become unruly or visibly upset. They appeared to be satisfied; *(e)* that the sergeant and the officer on duty and the military police must be arrested. He then organised three groups, each of 10 BNSU members. He sent them to effect the arrests and No 195 accompanied them.

(xv) These groups returned with No 195 and two TUV bakkies, one of which had firearms. Mhitsane saw the weapons being taken out of the windows of the bakkie. After the weapons were taken, No 195 said he was going to the magazine to fetch ammunition. He returned with boxes of blank cartridges. Upon discovering this he returned to the magazine to fetch 'live' ammunition. He returned with the 'live' ammunition and this was placed in the ablution block. He saw No 10 with No 195 when No 195 returned with the 'live' ammunition. The 'live' ammunition was then distributed to members of the BNSU present there, and it was loaded into the magazines of their weapons. The weapons they received were R4 rifles.

(xvi) In the interim, the officer on duty and the military police were arrested by members of the BNSU and held captive in the cells at the Molopo Base. Except for cross-examination regarding his identification of accused No 10 at the time when the ammunition was distributed, this witness was not really challenged on his other evidence. It was in fact common cause that the officer on duty and members of the military police were arrested and were detained in the cells.

(xvii) From the aforegoing it is abundantly clear that only members of the BNSU were involved in these meetings. Accused No 195 instructed them that the President was to be arrested. No questions were asked and it appears that no opposition to this statement was ventured by members of the BNSU who heard it. The main entrance to the base was secured by guards of the BNSU who were armed, with instructions not to let anyone into or out of the base.

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The two-way radio was rendered inoperable, and telephonic communication externally could only be established with permission of the BNSU or not at all. This was part of the strategy by No 195 to render the army base inoperable, except for the BNSU. The army base fell under the control of the BNSU, and was indeed captured and seized by them as a vital strategic operation in furtherance of the coup.

(xviii) Members of the BNSU armed with weapons (mainly R4's) and ammunition, were loaded onto a large truck and two bakkies and were conveyed to Garona. When they arrived there, No 195 said he did not want a lot of talking as they were going to the Parliament.

(xix) From Garona they walked to the Parliament. They entered through the northern gate, that is the gate adjacent to the stadium, where No 195 told them to lie on their stomachs, not in a haphazard manner, but in a line with their weapons at the ready. Accused No 195 then divided them into groups and told them that these groups would go to the Ministers' houses to seize, capture or take the Ministers prisoner ('vang').

(xx) After the members were divided into groups, Nos 195 and 17 returned with certain SP guards who were also allocated to the groups. Thereafter No 195 told No 17 that he must hide behind a tree and, when he gave a signal by way of blowing a whistle, these groups must enter the houses of the Ministers and remove the Ministers and all the people present in their houses.

The witness Magashula's evidence on this aspect is significant. He stated that No 195 employing a deception, and by means of a ruse, lured this witness and other members of the SP guard out of the guard house. He woke up others who were off-duty and informed them that the colonel wanted to see them. When the witness Magashula emerged outside, that is beyond the gate at the front of Lowe, he asked No 195 where the colonel was. Accused No 195 told him to keep quiet. At that stage No 17 was with No 195 and he was armed with a pistol whereas No 195 had a walkie-talkie.

(xxi) He then went with them to the northern gate, where he found members of the BNSU lying on their stomachs in a line facing Parliament, with their firearms in front of them in a shooting position. Accused No 195 told the SP guards to sit down. He then said (that is No 195), talking to all of them, that is the BNSU and the SP guards, *that he is overthrowing the Government*. From the evidence of this witness it is clear that when No 195 said this he was facing the members of the BNSU and the SP guard, and the witness is of the opinion that all could hear what No 195 said.



*Upon hearing this, the witness asked No 195 whether he, No 195, was overthrowing the Government by himself with the rank that he had or whether any others were present, because the witness had only seen the members of the BNSU. Accused No 195 responded that he had locked up the sergeant on duty, the officer on duty, the military police and that he would also lock the witness up*. After that No 195 divided the SP guard into the groups. He then sent the different groups to the Ministers' houses and told No 20, who was armed with a pistol, to accompany the witness to prevent him from speaking to the guard that he had left posted at the gate of Lowe.

(xxii) Later that morning and at the guard room, Magashula again encountered No 195 and a number of BNSU members who accompanied him. The members of the BNSU shouted that he, Magashula, was not interested and he should be shot. They were very aggressive and kept on shouting and repeating that he should be shot. Apparently this was due to the reluctance of the witness to join with the members of the BNSU.

(xxiii) Upon hearing the pre-arranged signal, members of the various groups started shooting at the doors of the President's house and that of the Ministers. Many shots were fired and, as appears from the evidence, the shooting was wild and indiscriminate and, in consequence thereof, two females were killed in the complex as a result of gunshot wounds which penetrated the doors, having been fired from the exterior of the premises. The groups then removed the President and certain Cabinet Ministers and their families and other persons, escorted them at gunpoint and at times with force, and took them to No 195 at the northern gate who was in possession of pre-typed letters of resignation, attached to a clip board.

(xxiv) There is no evidence *aliunde* of No 195 having instructed the groups sent by him to the
Ministers' houses to shoot at the doors.

*(b)* I admit that I gave instructions and orders to various members of my Unit and to other members of the BDF on 9 - 10 February 1988 to:

The extra-curial statements made by the accused to the effect that accused No 195 gave these instructions are not admissible against No 195 for the reasons given. Accused No 195, in his s 112 explanation states, and I quote:

'2. ...

(i) detain the State President and various Cabinet Ministers;

(ii) occupy the Broadcasting Centre and to procure the broadcast of the communication announcing the overthrow of the Government (a copy whereof has been annexed to the reply to the request for further particulars to the indictment);

(iii) occupy government buildings;

(iv) occupy the Molopo military airfield;

(v) detain and hold the Commissioner of Police and various other officers of the State;

(vi) procure the resignation of the State President and other Cabinet Ministers in order to make way for a new State President and Government.'



Accused No 195 was in overall command of the insurrection, and on his own admissions, supported by the evidence, he gave all the orders, commands and instructions. Even if instructions were given by other members of the BNSU, it was evident that they emanated from, or could only be issued with the authority of, No 195.

It is significant that the *modus operandi* of the groups who were sent to the houses was identical. On hearing the whistle, they shot at the doors.

This was neither accidental nor coincidental. It was too well organised and systematic for it to be purely a matter of chance or contingency.

The forcible entry into the houses was planned. It involved the element of surprise, shock, and was designed to forestall and crush any resistance. The said attack was planned with military precision in its conception and execution.

As emerged from the evidence, and No 195's own admissions, he was the person who issued the orders, instructions and commands. It is a reasonable inference that he also gave these instructions, and planned this aspect of the operation, and indeed the whole operation.

The crux of the matter is: is it the only reasonable inference that No 195 gave these orders as well?

Bearing in mind the nature and extent of No 105's personal participation and conduct during the period 8 - 10 February, and his presence at the various incidents described in the indictment, there can be no doubt that he was in absolute command, attended to the minutest detail personally, like waking up troops, speaking to them individually, addressing meetings, breaking into the magazine, obtaining weapons and ammunition, and distributing them *inter alia*, and that he gave these instructions to shoot at the houses.

The Court is therefore satisfied that the only reasonable inference to be drawn is that No 195 issued these deplorable instructions.

I may mention that No 195's activities and peregrinations, on 9 and 10 February, were astounding and astonishing. He was present at or had visited all the areas where operations were conducted by the BNSU. He participated, gave orders, introduced Metsing, and drove around in vehicles. Nothing was left to the charge of any member of the BNSU. Accused No 195 was in charge, absolutely and consummately. He must have been equipped with

rockets to move at such speed in a so short a period of time.

(xxv) Despite being assaulted, bullied, pushed and pulled, threatened and generally intimidated, the President remained steadfast in his refusal to sign a letter of resignation, notwithstanding that his life may well have been in jeopardy having regard to the aggressive conduct of certain members of the BNSU. Ministers who were taken to No 195 signed the letters of resignation at gun point and were subjected to extreme duress which caused them to sign.

(xxvi) The President and Ministers were removed to the stadium under escort, some of them being prodded with rifles in their backs, and the President's daughter and the wives and children of Ministers, as well as others, were detained under guard in the guard room at Lowe.

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their backs, were hustled and jeered at, and treated in an aggressive and contemptuous fashion. In certain cases shots were fired in close proximity to the persons taken, in order to coerce them into obeying orders given by members of the BNSU.

(xxix) At the Molopo Military Base, H F Riekert, the then Minister of Defence, Sergeant-Majors Phuduhudu and Boikanyo were seized and escorted by members of the BNSU, again at gun point, and were held captive in the cells at the said base. Although not detained, Lieutenant Maine's movements were restricted and he was also treated with scant respect. All the above events related to incidents 1, 2, 3 and 4 of the indictment.

(xxx) Accused No 195 and members of the BNSU went to the Broadcast Centre where the news reader was instructed by No 195 to read out a prepared statement to the effect that the Government of the country had been taken over by the BDF and that the President and Cabinet Ministers had resigned (incident 5). This news item was repeated frequently during the course of the day.

(xxxi) At the stadium the President, Ministers, Head of the Army and Head of the Police and senior officers of the BDF were kept prisoner at gun point. I have already dealt with what led to the guards being disarmed, and the acts of bravery performed by the President, Major-General Turner, Major-General Seleke, Colonel Van Rensburg and Colonel Swart, *inter alia*. After the guards were disarmed the President and other hostages were taken to a room which was regarded as safe from attack, which was also in the interior of the stadium (incident 6).

(xxxii)The said Malebane-Metsing, in the company of armed soldiers, arrived at the residence of the Chief Justice. Despite gross intimidation and threats to swear in Metsing as State President, the learned Chief Justice was courageous and adamant in his refusal to swear him in.

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From the facts found proved, the Court drew the following as the only reasonable inferences:

*(a)* That although mention of a *coup* was made on 8 February, and an attempt to execute it on 9 and 10 February failed, meticulous and careful planning was done.

*(b)* The overall strategy was:

(1) To seize and capture the President and his Cabinet and to force them to sign letters of resignation.

(2) To take control of the Molopo Military Base and Airfield. This was done by arresting key members of the BDF at the military base and airfield and securing the main entrance of the military base and of the airfield by members of the BNSU who were armed.

(3) To immobilise the military base except for use by members of the BNSU.

(4) Once high-ranking officers of the BDF and police appeared on the scene to arrest them and other officers at the base and airfield, and as such to put them out of action so

that a counter-attack could not be launched or planned.

(5) To capture control of the broadcasting and television services in order that the prepared statement could be repeated at frequent intervals, so as to bring the public at large under the impression that the Government was overthrown.

(6) To have Malebane-Metsing sworn in as the 'new' President.

(7) To paralyse the administration of the Government at Garona by stationing BNSU armed guards there who refused access to public servants.

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(8) The aforegoing was carried out by certain members of the BNSU with enthusiasm ('fluks') and others behaved in a bombastic, arrogant and bellicose manner, which at times degenerated into sheer brutality as regards the President, namely the assault on him. Major-General Turner and Major-General Seleke were threatened with firearms and in fact firearms were pointed at their bodies and Colonels Van Rensburg and Swart and Captain Schickerling were severely threatened and intimidated. All of them were escorted by armed guards, often prodding them with rifles and telling them to move at double pace. H F Riekert and Sergeant-Majors Phuduhudu and Boikanyo and Lieutenant Maine were treated in an arrogant and contemptuous manner, notwithstanding the rank and position they occupied. Accused No 195, although he treated the witnesses Magashula and Holele in an arrogant manner, was more respectful to Lieutenant-Colonel Swart and Major Erasmus. He told Major Erasmus that he did not want to see bloodshed and that he must behave himself. He told Colonel Swart not to be afraid in regard to what they had done; he would see his friends inside and as yet blood had not flowed. He was not aggressive towards him.

(9) On the other hand No 195 told Major-General Turner, who was concerned as to the safety of the President and as to his whereabouts, and after telling him (No 195) that what they were doing was high treason, that they had taken over the Government because they were not happy with it. Accused No 195 informed him that they were in touch with the SA Embassy and that South Africa should not get involved. He further told the said Turner that he must resign and go on pension. Accused No 195 added that Turner no longer had a say.

(10) In the stadium itself, the guards guarding the 'prisoners', were initially morose and aggressive. Later, as a result of the singing and praying initiated by the President, the tension abated and Major-General Turner, Colonel Van Rensburg and Colonel Swart engaged in conversation with the guards. Later Major-General Turner, Major-General Seleke and Colonel Van Rensburg succeeded in disarming the guards of their R4 rifles, began firing and cleared the immediate precincts of guards. These persons performed acts of bravery in a dangerous and explosive situation and notwithstanding certain suggestions about 'White officers' which were put in cross-examination, it is clear that these officers, together with Major-General Seleke and others, were intent on protecting the President and the other hostages. Eventually, and as a result of a joint effort between Colonel Swart, Captain Schickerling and Major Viviers and certain others, they managed to leave the room where they were kept and moved to another room where they barricaded themselves in what they regarded as a safe locality and secured this locality against the possibility of a counter-attack. In addition they established contact with the SA Embassy and SADF to inform them of the situation. This no doubt, contributed in a large measure to the successful operation by the SADF in securing the release of the hostages in the stadium.

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(11) Officers in the BDF, such as Sergeant-Majors Phuduhudu, Boikanyo and Lieutenant Maine, also displayed commendable conduct. Lieutenant Maine who led the support platoon showed restraint in not attacking members of the BNSU at the stadium which he could easily have done, being restrained by the fact that, if his men commenced shooting outside the place where the hostages were kept, it may have resulted in the President and the other hostages being killed. He was at that time engaged in a plan to release the hostages, but then the timely intervention of the SADF occurred. Moreover, in order to avert

the possibility of bloodshed, he ordered his men to place their weapons on the ground and to put their hands up in the air so that the SADF could see that they were not party to the abortive coup. It is also clear that a rescue operation was being mounted by members of the BDF who remained loyal to the Government.

(12) The members of the BDF generally did not associate themselves with the operations of the BNSU. The conduct of the BNSU represented the activities of an irredentist group. There were isolated instances where a few of the BDF members may well have joined in or were present at the scene of some of the incidents. The overwhelming majority, however, remained steadfast in their loyalty to the Government. The difficulty facing the members of the BDF was that the gates at the Molopo Base were guarded, and exit therefrom was prevented by armed BNSU guards, and their senior officers were held captive.

(13) The SADF intervened with speed, efficiency and restraint, and consequently violence and the loss of life was reduced to an absolute minimum.

(14) The statements by No 195 at the third meeting on 9 February, namely (a) the President must be arrested at the Parliamentary complex and the groups must go to the Ministers' houses to seize and capture or 'take them prisoner' ('vang') and (b) that he was overthrowing the Government, were clearly traitorous acts and consequently treasonable conduct.

(15) The statements by No 195 were aimed at taking into custody the leaders of the Government, detaining them and thus attempting to bring about the fall of the Government. Accused No 195 clearly stated that he was overthrowing the Government. Nothing could be plainer.

(16) In law it is clear, objectively viewed, that what is referred to in 14 above are traitorous suggestions or orders and, on the authorities that I have referred to dealing with this aspect, not only are No 195's
statements traitorous and treasonable, but those who executed his instructions or orders also acted treasonably. Those present at the third meeting, when he stated that the President must be arrested, must have heard and in fact, did hear this statement, and then with the full knowledge thereof proceeded to Garona and from there to the Parliament building, armed as they were, had the necessary hostile intent to execute what Phiri had told them to do.

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The mere fact that they took up arms against the leadership of the Government indicates, not only that they were going to give effect to what Phiri had stated, but is also evidence of the hostile intent concerning their conduct in the absence of any explanation by the accused.

(17) Even if it could be argued, as Mr Kuny did, that certain of the accused went to the Parliament not knowing or realising what was afoot, the further development at the Parliament negatives his argument. There No 195 addressed them all, and told them he was overthrowing the Government.

(18) At the Parliament and while they were lying in the grass, Phiri, after dividing them into groups of six or eight, then told the groups to go to the Ministers' houses and seize them. The groups then did so, and after a pre-arranged signal started firing at the doors of the houses, and removed Ministers and their families and other persons.

(19) It is inconceivable that these groups went to the Ministers' houses to present their calling cards, or to pick flowers or engage in a social tête-à-tête. They went there deliberately and knowingly with the intention of seizing them and, to do this, affected a forcible entry into the premises. They executed the instructions or orders of No 195.

(20) The argument that they must have gone to the Ministers' houses to effect arrests, or because one of them thought there may have been a bomb in one of the houses, or terrorists, is without foundation. Firstly, members of the BNSU have no power to arrest civilians. Secondly, an arrest is not effected against civilians by shooting down the doors of their houses. Thirdly, there was no state of war in the country and the President and Cabinet

Ministers could by no stretch of the imagination be regarded as the 'enemy'. Fourthly, and most important, it is an act of treason for soldiers to go and arrest the very people to whom they have sworn allegiance, namely the Government of the State, and the President who is the Commander in Chief of the Army.

(21) The manner in which the people were evicted from their homes; the conduct of certain members of the BNSU in the houses, the unceremonious way in which the President was taken from his residence, the pushing of Ministers, the incarceration of their wives and children, the enthusiastic manner and the zeal with which certain members of the groups performed their tasks, their aggressive and abusive conduct towards the Army officers seized by them, can lead to only one reasonable inference, namely that they knew what was being done and actively, and with the necessary hostile intent, performed the overt acts of treason relied on by the State, thereby participating and associating themselves with the operation.

(22) Mr Smit has submitted that orders were not given by No 195, but rather he attempted to gain the co-operation of his men. According to the statement by No 195, which I have referred to, it would appear that they were orders in the nature of commands, stating what should be done.

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An order is a command, or a bid, and prescribes a thing to be done. The Court does not have to go as far as finding that No 195's strategy was to enlist the support of his troops for his treasonable plan. C This may or may not be so. What the Court has found is that those members of the BNSU who were at the third meeting on 9 February, and who then went to the Parliament, heard the further remarks made by No 195 and went to seize the President and the Ministers, knowing precisely what they were doing, and thereby carried out what No 195 prescribed they were to do, and actively participated in the events at the Parliamentary complex.

(23) Statements by members of the BNSU like 'your gun will not work tonight, but ours will', 'that we will now get more money', 'that you have resigned and have nothing to add'; their general demeanour and offensive conduct, leads the Court to the only reasonable inference, namely that their conduct was consistent with the hostile intent of overthrowing the Government.

(24) The Court therefore finds a common purpose between the accused who went to the President's house and the Ministers' houses. There is no evidence before the Court of a general conspiracy between members of the BNSU prior to 9 February. It is beyond question that the incidents of the 9th and 10th were planned, and ordered by No 195. The Court finds as a fact that certain members of the BNSU
joined in on the night of 9 and 10 February in attempting to overthrow the Government as a result of their conduct and participation.

(25) The State has therefore proved beyond a reasonable doubt that there was a common purpose between certain members of the BNSU to try and overthrow the Government in the respect that, although there was no prior conspiracy, they joined in the attack on the President and Ministers by carrying out the orders of No 195.

(26) Conduct and participation in the acts referred to in incidents 1, 2, 3, 4, 5, 6, 8, 10, 11 or 12, together with the necessary hostile intent, would be sufficient to establish the crime of treason. If an accused participated in more than one of the incidents referred to, with the necessary hostile intent, the cumulative effect is overwhelming.

(27) Although the Court has found that a common purpose did exist between certain members of the BNSU, this in itself is not decisive in establishing the guilt of the accused. The Court must investigate and evaluate the conduct and participation, if any, of each and every accused separately and must determine whether the intention of each and every accused was consistent, beyond a reasonable doubt, with a hostile intent, before the State can prove that an accused is guilty of treason, or indulged in any 'terroristic' activities so as to bring about the results mentioned in s 22 of the Internal Security Act.

(28) The aforegoing is a primary premise, and the methodology is a matter of reasoning by inference and deduction, according to well tried and proven principles. It is uncompromisingly derived from fundamental axioms of justice and fair play. The inferences to be drawn cannot be arbitrary, but must be consistent with the proven facts, and the only reasonable inference to be drawn from them. This is an integral function of the duty that rests on the Court to determine the guilt or innocence of an accused, and secures the indispensable minimum to ensure that justice is done.

(29) Objectively viewed, the coup aborted. Although the functioning of the Government had been disrupted in certain respects, the Government of the State was not taken over by the BNSU or the BDF. On the undisputed evidence before the Court, the President, the Head of the Army and certain senior officers took decisions and gave instructions, notwithstanding the fact that they were illegally detained as hostages in the stadium. A new President was not sworn in, nor did any mention of Metsing as the 'new' President have any legal effect.

*D: The evidence against each accused*

*Introduction*

For the purposes of convenience, and in order to avoid unnecessary repetition the Court has approached the statements made by the accused on the following basis:

*(*a) Each accused, with the exception of No 195, made at least one or more statements. These statements were admitted in evidence by consent and they have been freely and voluntarily made. The statements fall into three categories as follows:

(i) The so-called extra-curial 'confessions'. These are clearly not confessions, but the appellation has been used for the purposes of convenience. These will be referred to as A. The so-called 'warning' statements, extra-curially made, will be referred to as B, and the extra-curial 'pointing out' statements, will be referred to as C. The numbers of the accused have been allocated to their A, B and C statements.

(ii) According to the principles that I have found are applicable to the admissibility of the extra-curial statements, the Court must perform a 'judicial separation' between those parts of the statement admissible as against the maker, and the rest which are not admissible against the persons mentioned therein. In other words, the matters that are admissible must be severed from those that are inadmissible. Statements and admissions by the accused as to what he heard from other co-accused are admissible against him, in that they have relevance regarding his state of mind, his knowledge, how he reacted to what he had heard and, if instructions or orders were given to him, whether he performed them or not. They are in no way admissible against co-accused who are referred to in the statement, as having made certain declarations or statements. The statements made by the accused may not be used for any purposes whatsoever other than those that I have designated, neither to corroborate, nor to draw any inference from which objective facts can be established as against other accused.



(iii) If part of a statement has been proved against an accused as an admission, he is entitled to have the rest of it heard as well. It makes no difference that the other parts of the statement do not qualify, exculpate, explain or in any way relate to the portion used as an admission, provided that they all comprise a single statement they become admissible. See *R v Valachia* 1945 AD 826 at 837. The statement must be taken together as an entity and constitutes evidence for the accused, as well as against him. The Court, however, is at liberty to believe one part of it and not another. The Court may, however, attach very little weight to those parts of the statement favourable to an accused, particularly where he has given no evidence.

(iv) Where it is sought to rely on the evidence of an accomplice, the cautionary rule as I have already discussed herein has been applied by the Court. The Court also considered the dangers inherent in the testimony of accomplices, and also enquired into the existence

of some safeguard reducing the risk of a wrong conviction.

(v) Section 209 of the Criminal Procedure Act 1977 provides:

'An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.'

Mr Smit has submitted that this applies also in regard to extra-curial admissions. There is substance in this submission.

Even where the provisions of s 209 are satisfied, it still may not be safe to convict. The Court has to be satisfied beyond reasonable doubt that the accused is guilty. This presupposes the finding as to whether the confession or extra-curial statement is admissible and this may be determined from the contents of the statement itself or from the surrounding circumstances. According to Hoffmann and Zeffertt (op cit at 570):

'When confirmation of a confession is sought in terms of s 209, what falls to be considered is that the "confirmatory value" of the evidence of the words or conduct of an accused who has made a confession must be determined with regard to the circumstances of each case.'

(vi) An order, instruction or directive to arrest the State President and Cabinet Ministers given to the members of the Armed Forces is traitorous and is a treasonable act. The order, instruction or directive being treasonable, obedience to it is also treasonable.

(vii) The same considerations as in (vi) apply in the circumstances of the instant case to the orders given by No 195 to arrest officers of the army and the police, as being an integral part of the strategy to depose the Government of Bophuthatswana by immobilising the army and air force.

(viii) An order to commit treason is so obviously manifestly ('klaarblyklik') and palpably unlawful that a reasonable person in the position of the accused would have regarded the order as manifestly unlawful.

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(ix) The Court applied the doctrine of common purpose in the cases of those accused who went to the President's residence and Ministers' houses, and did not enter the premises, but stood outside as part of the operation of seizing the President and the Ministers. Apart from the aforegoing the evidence against each accused was considered separately in order to determine whether he committed an overt act aimed at deposing the Government, with the necessary hostile intent or not.

(x) With the exception of the two witnesses mentioned, the Court has accepted the evidence of the remaining State witnesses as trustworthy and reliable, and has placed reliance on their testimony. As far as the witness C Mhitsane is concerned, he was warned in terms of s 204 of the Criminal Procedure Act. The Court found that he G answered the questions put to him in an honest and frank manner. He was a truthful witness. C Mhitsane is accordingly discharged from prosecution in terms of the provisions of s 204 of the said Act.

(xi) Relating to the alternative counts, the Court only relied on acts of 'terrorism' proved by the State beyond a reasonable doubt before considering the operation of the presumption contained in s 22(2) of the said Internal Security Act. [The remainder of the judgment is not relevant to this report.]

**Appearances**

*DA Kuny, SC and D Chetty* - Advocate/s for the Accused

*JJ Smit , SC (Attorney-General) and D Joubert* - Advocate/s for the State

*Motala, Roopa and Partners and Soman, Kamdar and Legodi* - Attorney/s for the Accused

# REX v LEIBBRANDT AND OTHERS 1944 AD 253

## Appellate Division 1943. December 18.

WATERMEYER, C.J., TINDALL, J.A., CENTLIVRES, J.A., FEETHAM, J.A., and GREENBERG, J.A.

### Flynote

*Criminal law. --- Treason --- Evidence. --- Number of witnesses. --- Proof of hostile intent. --- Proof of overt acts not alleged in indictment. --- When admissible. --- Inference of hostile intent. --- When drawn. --- Essential features of the crime. --- Proviso to section 284 of Act 31 of 1917 and section 302 of Act. --- Effect of.*

### Headnote

Upon a charge of high treason arising out of one overt act the law only requires the act, so far as it is overt, to be proved by two witnesses; the state of mind which accompanies the act, which is incapable of direct proof by witnesses is left to be inferred from the surrounding circumstances:

Section 302 of Act 31 of 1917 which provides that, on the trial of a person charged with treason, evidence cannot be admitted of any overt act not alleged in the indictment unless relevant to prove some other overt act alleged therein does not mean that evidence of overt acts not charged can only be admitted if the evidence was relevant to prove the commission of the act alleged. Such evidence is admissible if it is relevant to show the purpose of the accused in committing the act alleged in the indictment.

Where it appeared that two accused had joined an organisation under the leadership of a third accused whose orders they bound themselves to obey even at the risk of their lives; that the organisation was to function against the Government and was to seek to change South Africa into a National Socialist State; and that its goal was not to be achieved by the formation of a political party but by secret and unconstitutional methods in which loss of life might be suffered.

*Held,* on appeal upon certain questions of law reserved, that a trial Court could reasonably find, as it had done, that the facts disclosed a treasonable

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conspiracy; that under all the circumstances the accused had acted with hostile intent in forming and joining the organisation and that they had been guilty of treason.

The circumstances under which, upon a charge of treason the inference of hostile intent may properly be drawn from civil disturbance or anti-governmental activity in peace time and in time of war considered. I

The essential features of the crime of High Treason explained.

The cases of *Rex v Erasmus* 1923 AD 73; *Rex v Viljoen* 1923 AD 90; *Rex v Christian* 1924 AD 101, applied.

The effect of the proviso to section 284 of Act 31 of 1917 in so far as it requires the evidence of two witnesses where one overt act of treason is charged and the effect of section 302 of the Act excluding in general on a charge of treason evidence of overt acts not alleged in the indictment discussed and explained *per* SCHREINER, J., in the Court *a quo.*

### Case Information

Appeals from convictions by a Special Criminal Court (SCHREINER, J., presiding) constituted in terms of sec. 215 of Act 31 of 1917.

The facts appear from the judgment of WATERMEYER, C.J.

In finding the three appellants guilty of high treason, SCHREINER, J., dealt with the effect of the proviso to section 284 of Act 31 of 1917 and of sec. 302 of the Act as follows:

It will be convenient before dealing with the evidence to consider two legal questions that have to be decided in relation to that evidence.

The first point relates to the effect of the proviso to sec. 284 of Act 31 of 1917 which reads:

"Provided that it shall not be competent for any court or jury ---

"(2) to convict any person of treason except upon the evidence of two witnesses where one overt act is charged in the indictment, or where two or more such overt acts are so charged, upon the evidence of one witness to each such overt act."

This provision was interpreted by the Appellate Division in *Rex v Hennig,* decided on the 20th November, 1942. In delivering the judgment of the Court the learned CHIEF JUSTICE says, in relation to the proviso, "Itis meaning, however, seems to be clear, viz., that, when one overt act is charged in the indictment, each essential part of that
overt act must be proved by the evidence of two witnesses. It follows that in the present case, in which the Crown is relying on the evidence of only two witnesses to prove the whole overt act, the evidence of each of these witnesses must be such that standing alone it would, if believed, be adequate to establish the fact that the accused committed the overt act of treason with which she is charged."

*Hennig's* case was not one involving proof by circumstantial evidence and it was therefore not necessary for the Court to refer to the application of the proviso to cases in which the Crown relies in whole or in part upon such evidence.

Mr. *Ludorf,* who appeared for Nos. 1 and 6 accused, submitted that the proviso excluded proof by circumstantial evidence or by admissions, oral or documentary. He contended that direct evidence by at least two eye (or ear)

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witnesses to every essential part of the overt act, where one only is charged, is necessary. It may be remarked in the first place that the proviso does not in terms refer to direct or circumstantial evidence and it would be remarkable if circumstantial evidence, which is so often far more cogent than direct evidence, were, without express language to that effect, to be excluded from consideration in treason cases. In the second place it must be remembered that a large part of what is generally referred to as direct evidence involves some measure of inference. A well-known illustration of this is the case of a witness who says that he saw A shoot B, when all that he can strictly be said to have observed was the raising and pointing of the weapon by A, the sound of the shot and B's falling to the ground. Again a witness who says that he saw A sign a document may mean no more than that he saw A sit with the document before him and go through the ordinary motions of signature, the document being shown, perhaps, at a later state to bear A's name. The witness would perhaps not be able to say that he saw A's pen travelling over the paper, yet the inference is so inevitable and immediate that the evidence would ordinarily be spoken of as direct. Circumstantial evidence must be proved by the evidence of witnesses and it differs from direct evidence only in the extent to which inference is applied to the facts observed. In the same way oral admissions or documents have to be proved by witnesses. It seems to us that the proviso permits proof to be established by circumstantial evidence, oral admissions and documents, as well as by direct evidence. What is really required is double proof. If there is one credible eye-witness and also a chain of circumstances proved by one or more witnesses which would lead to the inevitable inference of guilt the proviso is satisfied. Again, even if there be no direct evidence the circumstantial evidence may be so abundant that it may be possible to establish two chains each sufficient in itself to leave no doubt as to the accused's guilt. This, too, would in our view fulfil the requirements of the proviso. Where, however, the circumstantial evidence does not suffice to provide two adequate chains the circumstances from which guilt is to be inferred must in all essential parts be proved by at least two witnesses. Statements by the accused, oral or documentary, may be used alone or in conjunction with proved circumstances to set up a

chain. An extrajudicial confession, if proved by two witnesses, would by itself satisfy the section, while if proved by one witness only it would provide one of the chains of proof. A confession made in Court is not subject to the requirements of double proof --- see (Taylor on *Evidence,* vol. 1, para. 866, quoted in *Rex v Kumalo,* 1930 AD 193 at p. 206) --- and an admission in the evidence of an accused person, even though it does not amount to a full confession, must equally dispense with the requirement in respect of the matter admitted. If an accused makes a statement in his evidence in open Court there is no need to call two witnesses to say that he said it.

I turn now to the effect to be given to sec. 302 of Act 31 of 1917 which was referred to in a judgment given in the course of the trial on the 14th December, 1942.

The section reads:

"On the trial of a person charged with treason, evidence cannot be admitted of any overt act not alleged in the indictment unless relevant to prove some other overt act alleged therein."

The English section (7 William III, ch. 3, sec. 8) reads:

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"No evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever."

In England this section has been held merely to state the common law rule that the proof must correspond with the allegations and be confined to the point in issue. (Taylor on *Evidence,* vol. I, p. 607, sec. 957). Thus in *Rex v Vaughan* (1696), 15 *Howell State Trials* 499, in which Vaughan was indicted for adhering to the King's enemies, and the overt act laid was his cruising on the King's subjects in the "Loyal Clancarty", the Court rejected evidence of his cruising in another vessel, as, if it were true, it would be no sort of proof of the act for which he was then to answer. But the section has been read as being subject to the implied qualification or proviso that if the proof tendered amounts to a direct proof of any of the overt acts which are laid in the indictment, it may be given in evidence of such overt acts. This is simply the ordinary rule that facts which directly go to prove the fact alleged may be proved in evidence. Foster *Crown Cases* (3rd ed., p. 245) after quoting the section says

" The sense of this clause I take to be that no overt act amounting to a distinct independent charge though falling under the same head of treason shall be given in evidence unless it be expressly laid in the indictment, but still if it amounteth to a direct proof of any of the overt acts which are laid it may be given in evidence of such overt acts."

He gives as his first example the case of *Rookwood* ((1896), 13 How. State Trials, 213). Rookwood was indicted for compassing the death of the King, two overt acts *inter alia* being laid, viz. " that he and others met and consulted the proper means for waylaying the King and attacking him in his coach; and also that they agreed to provide forty men for that purpose."

Evidence was tendered on behalf of the Crown "that the prisoner produced to one of the conspirators a list of the names of a smalll party which was to join in the attempt and of which he was to have the command with his own name at the head of the list as their commander". This evidence was objected to on the ground that it was evidence of another overt act of treason not charged in the indictment, but the evidence was admitted on the ground that " this circumstance, if proved, amounted to a direct proof of the overt acts which were laid, viz., the meeting and consulting how to kill the King and their agreeing to provide forty men for that purpose, and falling under the same species of treason, was very proper to be given in evidence." Foster *(loc cit.)* East, *Pleas of the Crown* ((1803) pp. 121 and 122) is to the same effect.

This rule, namely, that evidence of an overt act not laid may be given if it amounts to a direct proof of any of the overt acts which are laid was applied in the cases of *Layer, Deacon* and *Wedderburn.* In *Layer's* case (16 *How. State Trials 94)* Layer was charged with conspiring to depose the King and to put the Pretender on the throne. The overt acts charged were --- I

quote from the words of the Lord CHIEF JUSTICE at page 223 --- "meeting, consulting, advising and agreeing to raise a rebellion; publishing a traitorous libel in which rewards are promised to those who would assist in this rebellion; the engaging and enlisting men for the service of the Pretender; a designing to depose the King and to set up the Pretender on the throne." Evidence was tendered that the prisoner had been to Rome and had communicated with the Pretender, an act which was by statute a distinct act of treason. This evidence was objected to on the ground that it was evidence of an overt act of treason not laid in the indictment but it was admitted on the ground that it directly tended to prove one overt act which

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was laid, viz., his conspiring to depose the King and to place the Pretender on the throne.

In *Deacon's* case- ((1746) *Foster Crown Cases* 9; 18 flow. State Trials 367) one of the overt acts laid was "assembling and marching *modo querino* in order to depose the King and set the Pretender on the throne." It was proved that the prisoner with the rest of the rebel army was at Manchester and appeared in a hostile manner there. Evidence was tendered to the effect that the prisoner had caused a printer to print the Pretender's proclamation at Manchester and had published the manifesto while the rebel army was in the town. This evidence was objected to on the ground that it was evidence of an overt act not laid in the indictment. The evidence was admitted on the ground that " an overt act not laid may be given in evidence if it be a direct proof of any of the overt acts that are laid." The evidence was held to be "direct proof of an overt act laid" because the overt act charged was assembling and marching *modo querino* in order to depose the King and set the Pretender on the throne. To prove the overt act the Crown had to prove not only the assembling and marching but also the purpose of those acts, and in relation thereto Foster, who sat in the case and concurred in the ruling, in his report says "Now what stronger proof can there be that the prisoner joined this army for the purpose mentioned in the indictment than his causing to be printed and dispersed among the people the Pretender's manifesto? It never was doubted, that he being present with the rebels and joining in proclaiming the Pretender might be given in evidence on such an indictment as this; and yet that circumstance was never expressly laid in any indictment. But it is sufficient that it proves *quo animo* the rebel army was raised and *quo animo* the prisoner joined it." For the same reasons evidence of overt acts not laid was admitted in *Wedderburn's* case, *Foster Grown Cases* 22.

*Wipmore* (vol. 1, sec. 369) regards these cases as illustrations of the rule that where it is necessary to show that an act was done with a certain intent, evidence is admissible of acts done by the accused which are relevant to prove such intent even though such acts constitute offences. Referring to the English section, he says "But this latter doctrine was one of pleading only; and it did not prohibit the use of other overt acts as evidential of intent under the present principle."

It is clear from these authorities that evidence is admitted --- despite the wording of the section --- of overt acts not charged if the evidence tendered amounts to a direct proof of any of the overt acts which are laid in the indictment and that it is admitted as direct proof of the act charged if it goes to prove either the commission of the act alleged itself, as in *Rookwood's* case, or of the intent or purpose with which it was committed as in *Deacon's* case.

When our Legislature adopted the English section it expressed what in England had been implied. Mr. *Ludorf* has argued that the express exception in sec. 302 is narrower in its scope than the exception to sec. 8 of the Act of William III., which has been implied by the English Courts. The argument was that in England there are two exceptions; that the evidence is not admissible unless it is relevant to prove either some overt act alleged in the indictment or the intention with which it was committed.

It was argued that our Legislature had expressly adopted one of these exceptions and had excluded the other, and that consequently evidence of other overt acts could only be admitted under our sec. 302 if the evidence was relevant to prove that the accused had committed the act alleged and could not be admitted

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to show his purpose in doing it. The error in this argument is that the English Courts have not allowed two exceptions but only one --- evidence of an overt act not charged is admissible only if it is direct proof of an overt act which is charged. But an overt act contains two, elements, a physical and a mental element --- the act alleged to have been done and the purpose with which it was done and evidence of an overt act not charged is direct proof of any overt acts which are laid in the indictment if it goes directly to prove either that the accused performed the act alleged or the purpose with which he performed it. So under sec. 302 evidence of an overt act not charged is admissible if it is relevant to prove some other overt act alleged in the indictment, and it will be relevant to prove an overt act charged if it is relevant to prove either that the accused committed the act alleged or the purpose with
which he is alleged to have committed it.

Appellant Leibbrandt in person.

*J.F. Ludorf* (with him *P. Cillie*), for the appellant le Roux High treason is committed by a person who, with hostile intent (with respect to an internal or external enemy of the State) makes himself guilty of an overt act which violates the independence of the State. See *Rex v Erasmus* 1923 AD 73; *Rex v Tsayitsheni* 1918 TPD 23; *Rex v O'Brien* 1914 TPD 287; *Rex v Wilken and Others* 1941 TPD 276 at p. 296) As to high treason in comparison with sedition see article by Prof. L.J. Coertze in. *Tydskrif van Hedendaagse Romeins Hollandse Reg* (vol. 1, p. 274); Hunter, *Roman Law* (p. 1065); Gardiner & Lansdown's S.A. *Criminal Law (p.* 873); *Mattheus* (48.2.3); *Voet* (48.4.3); Huber, *Hedendaagse Rechtsgeleertheyt* (bk. 6, chap. 15); Moorman, *Misdaden* (1.3.1, 2, 3 et seq.); van Dale, *Woordeboek,* s.v. "vyandelijk" en "vyandig"; van der Linden, *Koopmans Handboek* (2.4.2.1; 2.4.3); *Rex v Viljoen* 1923 AD 90; *State v Phillips and Others* 1896 OR 301; *Rex v Cilliers* 1881 IK 237; *Rex v de Wet* 1915 OPD 157; *Rex v Wentzel* 1940 WLD 269; *Rex v Roux* 1936 AD 271 at p. 280).

As to the location of *majestas* see *Gardiner & Lansdown* (*ibid.,* p. 872); *Rex v Roux (supra); Rex v Gomas* 1936 CPD 225 at p. 231); D. (18.48.4); van Leeuwen, *Censura Forensis* (5.2.).

A conviction for sedition is not competent in this case on the charge of high treason because in this case there was not a gathering of people as required for sedition. See *Rex v Viljoen (supra);* sec. 242 of Act 31 of 1917 (as amended).

If any other reasonable inference is capable of being drawn from the facts which does not make the accused guilty of high treason, then such inference should be drawn. See *Rex v Difford* 1937 AD 370; *Rex v Tshabangu* 1934 AD 514 at p. 519).

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Circumstantial evidence may not be used as one of the witnesses to the overt act of high treason. See sec. 284 of Act 31 of 1917; *Rex v Castlermaine* (1680, 7 St. Tr. 1111); *Rex v Rajah* 1936 AD 45 at p. 49); *Rex v Hennig* 1943 AD 172.

Evidence of one overt act is not admissible to prove another overt act in high treason. See *Gardiner,4 Lansdown (ibid., pp.* 877-8 and 410); *Rex v Wentzel* 1940 WLD 269; *Rex v Labuschagne* 1941 TPD 271; *Rex v Bauer* 1929 TPD 788; */ Rex v Viligazi* 1929 TPD 295.

The only exception to the above rule is the general criminal law exception which makes other acts, which have not been alleged in the indictment, admissible under certain circumstances. This applies to the use of one overt act to prove another overt act, and also the use of a non-charged overt act to prove a charged overt act. See sec. 302 of Act 31 of 1917; *Rex v Bond* (1906, 2 KB 389); *Rex v Zawels* 1937 AD 342; *Makin v Attorney-General of N.S.W.* 1894 AC 57; Phipson, *Evidence* (8th ed., pp. 159, 160-171); *Rex v Ellis* (1910, 2 KB 746); Wigmore, *Evidence* (2nd ed., sec. 302); Taylor, *Evidence* (4th ed., pp. 823-6).

Sec. 302 must be read in such a way as to exclude something and not so as to be in the Act without any purpose. See *Curtis v Storm* (22 QBD 513); Maxwell, *Interpretation of Statutes* (8th ed., p. 208); *Rex v Putter* 1910 TPD 1051 at p. 1053); *Rex v Boers* (1900, 21 NLR 116);

*Wigmore* (sec. 369 and notes to that section; sec. 218); *Rex v Vaughan* (91 ER 535); *Gardiner & Lansdown* (p. 426); *Rex v Paluszat* 1938 TPD 427; *Rex v Davis* 1925 AD 30; Taylor, *Evidence (pp.* 333 *et seq,* 514, 515 and 517); Phipson, *Evidence (pp.* 51, 52, 55, 154); Roscoe, *Criminal Evidence* (14th ed., pp. 101-4); *Rex v Morrison and Auret* 1930 TPD 419 at pp. 425-6).

Even though the evidence in respect of the service of No. 1 in the forces of the enemy is technically admissible, the Court ought to inquire whether the prejudice of the evidence did not obscure it's probative value. See article by Julius Stone in *Harvard Law Review* (vol. 46, 1932/3, pp. 954 at 983-4); *Rex v Christie* 1914 AC 545; *Rex v Shellaker* (1914, 1 KB 414); *Rex v Ball* 1911 AC 47.

*F.E. Lutge* (with him *L.C. Barrett),* for the Crown: For definition of treason see *Rex v Erasmus (supra); Rex v Wentzel (supra); Gardiner & Lansdown* (vol. II, 4th ed., p. 871).

For instances of treason see Mommsen, *Romisches Strafrecht* (p. 548, par. 4); Moorman, *Verhandelinge over de Misdaden;*

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van der Linden, *Regtsgeleerde Handboek* (p. 220); *Voet* (48.4.3); Oppenheim, *International Law (p.* 74, par. 58).

*Majestas is* correctly laid in "His Majesty in his Government". His Majesty is symbolic of *Majestas.* See sec. 7(1) of Act 31 of 1917; *Rex v Gomas* (*supra* at p. 233).

The evidence must be applied to the proof of overt acts and not to the proof of the principal treason. See Archbold's *Criminal Pleading* (29th ed., p. 1075); *Rex v Hennig (supra);* East's *Pleas of the Crown* (p. 129).

In treason mere intention *(voluntas)* is a crime. See *Queen v Kaplan (10 S.C.* 259 at p. 264); Foster's *Crown Cases (p.* 194); *Rex v Wentzel (supra).*

The purpose of the agreement (i.e. the treason) is a matter for inference from proved overt acts. See Wills on *Circumstantial Evidence* (p. 64); *Rex v Erasmus (supra* at p. 81); *Rex v Wentzel (supra* at p. 273).
The admission by accused Nos. 2 and 3 in evidence that they signed the blood oath is equivalent to a witness in terms of sec. 284(2). See *Rex v Lakatula and Others* 1919 AD 362 at p. 364); secs. 264 and 318 of Act 31 of 1917; *Rex v Kumalo* 1930 AD 193 at p. 206).

An Appeal Court will not readily reject facts found by the trial Court. See *Bitcon v Rosenberg* 1936 AD 395; *Rex v Kriel* (1939 CPD 122 at p. 124). The verdict is not so unreasonable that the trial Court cannot be considered to have discharged its duty judicially. See *Rex v Shein* 1925 AD 6; *Rex v Difford (supra* at p. 317); *Rex v Tshabangu (supra); Rex v Cilliers* 1937 AD 278 at p. 288).

The evidence of the German parachutist was not led to prove a separate and distinct charge but to prove intent. See *Rex v Hennig (supra* at p. 181); *Rex v Boxer and Another* 1943 AD 243 at p. 253); *Reg v McCafferty* (1867, 10 Cog 603, at pp. 615, 617); *Reg v Boers* (*supra* at p. 122); Wigmore, *Evidence* (vol. 1, 2nd ed., p. 683, par. 369); Foster's *Crown Cases (p.* 194); Taylor on *Evidence* (par. 369); Phipson on *Evidence* (7th ed., par. 369); *Rex v Pharenque* 1927 AD 57 at p. 60).

Where intent is a material and necessary element in the commission of a crime, it must be averred and proved. See *Rex v Myburgh* (1922 AD 249).

The Crown must allege and prove an overt act. An overt act consists of a physical act plus mental state. See *Rex v Wentzel*

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(*supra,* at p. 275); Halsbury's *Laws of England* (vol. 9, p. 10, par. 3); Foster's *Crown Cases* (p. 203); *Rex v Casement* (Knott's Account of Trial, p. 183); *Rex v Rookwood* (13 State Tr. 213); *Rex v Deacon* (18 State Tr. 367).

Sec. 302 of Act 31 of 1917 merely expresses what English Courts have implied. See *Gardiner Lansdown (ibid, vol.* 2, 4th ed., p. 878); *cf.* sec. 30 of Ordinance 11 of 1902 (O.R.C.) and Statute of Western Australia (p. 209).

An Appeal Court will not readily interfere with a sentence. See *Rex v Ford* 1939 AD 559; *Rex v Fleischman* 1939 AD 629.

*Cur. adv. vult.*

*Fostea* (December 18th).

**Judgment**

WATERMEYER, C.J.: The three accused were convicted of high treason before a Special Criminal Court constituted in terms of sec. 215 of Act 31 of 1917. No. 1 accused was sentenced to death and the other two accused were sentenced to imprisonment with hard labour for five years. After sentence was passed certain questions of law, which will be referred to later, were reserved for the consideration of this Court.

The indictment alleged that the accused, "who during the whole period covered by this indictment, owed allegiance to His Majesty, King George VI and his Government of the Union of South Africa, are guilty of the crime of high treason. In that, whereas during the whole period covered by this indictment there existed a state of war between His Majesty the King in his aforesaid Government as by law established in the said Union, and the German Reich and the Italian Empire, the aforesaid accused persons, owing such allegiance as aforesaid, and in despite thereof, upon or about the dates, and at or near the places hereinafter mentioned, one or more or all of them did wrongfully, unlawfully and with hostile intent against His Majesty the King and against his said Government, to wit, thereby to disturb, injure or endanger the existence or security of the said Government and to assist the public enemies of His Majesty, did commit certain hostile acts and acts of war and rebellion, the particulars whereof are as follows: ---

"(a) Between the 12th day of June, 1941, and the 24th day of December, 1941, and at or near Pretoria in the district of Pretoria, Bloemfontein, in the district of Bloemfontein, Johannesburg, in the district of Johannesburg,

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and at divers other places to the prosecutor unknown within the said Union, the said accused did conspire, combine, confederate and agree together, and with the persons mentioned in the schedule annexed hereto, and with divers other persons to the prosecutor unknown, to disturb, injure or endanger the existence or security of the aforesaid Government; to subvert and to coerce the aforesaid Government; to overthrow the aforesaid Government; to levy and make war and rebellion against the aforesaid Government; and to hamper or hinder the aforesaid Government in its successful prosecution of the war aforesaid by acts of sabotage and incendiarism, and in pursuance and furtherance of the said conspiracy, combination, confederation and agreement, the said accused, one or more or all of them, owing such allegiance as aforesaid and with hostile intent aforesaid, did ;

(b) upon or about the 16th day of July, 1941, and at or near Pretoria in the district of Pretoria, with force and violence enter the dynamite and detonator magazines of the 'South. African Iron and Steel Industrial Corporation Limited' and did seize and remove 5 cases of dynamite, 1,600 electric detonators and 400 fuse detonators, the property of the said ' South African Iron and Steel Industrial Corporation Limited ' and a rifle, bayonet, 10 cartridges and a torch, the property or in the lawful custody of Daniel Philippus van Tonder, and a rifle, 10 cartridges and a bayonet, the property or in the lawful 'custody of Cornelis Hendrik Dreyer, guards there being;

(c) upon or about or between the period 1st September, 1941, and 31st October, 1941, and at or near Roodepoort
in the district of Waterberg, communiaate or attempt to communicate with the aforesaid enemies of His Majesty by means of a wireless transmitting set and a wireless receiving set ;

(d) upon or about or during the period 1st September, 1941, and 7th October, 1941, and at or near Ontmoet in the district of Zoutpansberg, communicate or attempt to communicate with the aforesaid enemies of His Majesty by means of a wireless transmitting set and a wireless receiving set;

(e) upon or about the 14th December, 1941, and at or near Denneboom Siding in the district of Pretoria, place an explosive charge on or under the railway line there being, with the intention of derailing a train travelling thereon, or damaging the said railway line, the property of the South African Railways and Harbours;

(f) during the period 12th June, 1941, to 24th December, 1941, and at or near the places in count ' a ' mentioned and described, having knowledge that acts of high a reason were being or about to be committed did omit to communicate such knowledge to the authorities."

It should be mentioned that paragraph (f) of the indictment which alleges an omission to communicate to the authorities knowledge of acts of high treason was not dealt with by the trial Court: consequently no further mention need be made in this judgment of that paragraph.

The following particulars were given about No. 1 accused by SCHREINER, J., who delivered the judgment of the trial Court: ---

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" No. 1 accused, a South African citizen, received his early education in Potchefstroom and then joined the South African Police. At the end of 1935 he transferred to the Railway Police, leaving the latter Force in February, 1937. He had been a very good boxer and had represented South Africa at the Olympic Games in Berlin in 1936. When he left the Railway Police he became a professional boxer and left for Europe in September, 1937."

No. 1 accused was still in Europe at the time when war was declared on Germany by the Union of South Africa.

During 1941 No. 2 accused was a lecturer in chemistry at the Potchefstroom University College and No. 3 accused was employed at Pretoria by the South African Iron and Steel Industrial Corporation Limited.

The following findings were made by the trial Court in respect of No. 1 accused: ---

(1) He made an arrangement with the German Government whereby he was released from the German army in which he was then serving in order to come to South Africa for purposes that were at least in part the purpose of that government.

(2) He arrived in a German submarine and landed on a lonely part of the Namaqualand coast shortly before June 11th, 1941.

(3) Vien he was searched on his arrival in Namaqualand by Engelbrecht, who was entrusted with the supervision of certain diamond-bearing farms, he was found to be in possession of a considerable sum, probably upwards of £300 in South African five pound notes, and he gave his name as Smit, a student of the Pretoria University. He stated that he was walking to Cape Town for the experience.

(4) He was driven in a motor car to Cape Town by Mostert, a farmer, who lives in Namaqualand, and from Cape Town he went to Bloemfontein where he got into touch with certain members of an organisation known as the Ossewa Brandwag (which is sometimes referred to in the evidence as the O.B.). The assistant commandant-general of this organisation arranged that one Erasmus should go with No. 1 accused to Namaqualand to fetch certain articles which the latter had concealed there when he arrived by submarine.

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(5) No. 1 accused and Erasmus went to Namaqualand and fetched the following things:---

(a) About 10,000 dollars in American currency.

(b) A transmitter for the purpose of sending wireless messages (Exh. 21).

(c) A code.

(6) After his return to Bloemfontein No. 1 accused got into touch with members of the Police Force.

(7) During July, 1941, No. 1 accused appeared in Potchefstroom where he met No. 2 accused, who had been an intimate friend for a considerable time. No. 1 accused also got into touch with Abrie, who was a telegraphist in the Department of Posts and Telegraphs.

(8) No. 1 accused started a military organisation of his own and required every person who joined it to take a certain oath and sign it in his own blood. (This oath, which was described as the "blood oath" will be set out later.)

(9) One of the members of the organisation formed by No. 1 accused was Abrie, who was recruited because of his knowledge of Morse.

(10) No. 1 accused obtained from No. 2 accused at the end of August a wireless, receiving set (Exh. 22).
(11) Two attempts were made to transmit messages to Germany one by Abrie in August, 1941, on the farm Roodepoort in the district of Waterbelg and another by No. 1 accuses during September, 1941, at Ontmoet in the district of Zoutpansberg, and in connection with these attempts Exhibits 21 and 22 were used.

(12) No. 1 accused wrote a number of letters which disclosed the military nature of his organisation.

(13) In November and December, 1941, No. 1 accused compiled for propaganda purposes a number of pamphlets which were reproduced in roneo form. I shall quote extracts from some of those pamphlets later.

(14) The following articles were found in the room of No. 1 accused after his arrest: ---

(a) A document, in the handwriting of No. 1 accused, showing an incendiary or explosive mixture formula and a time-bomb sketch.



(b) Material and apparatus to be used in the preparation of incendiary bombs.

(c) A steel tube closed at one end and with a screw cap at the other end, which the Court found to be a bomb casing to hold explosives.

(d) A loaded rifle.

(e) Hundreds of forms of the blood oath.

(f) A typewriter, a part of a Gestetner Roneo machine, two reams of typing paper and two boxes containing stencil paper.

The blood oath referred to above was in the following terms: ---

"DIE NASIONAALSOSIALISTIESE REBELLE.

"My strewe en stryd is vir die vryheid en onafhanklikheid van die Afrikanervolk in Suid-Afrika; en die opbou van 'n nasionaal sosialistiese staat met die idee van Adolf Hitler as grondslag aangepas by die karakter van die Afrikanervolk.

"Ek erken dat alleen 'n volk wie veg om sy reg, 'n reg het om te lewe, en dat die daad in die vorm van opoffering en bloed die ware wil en karakter van 'n volk, sowel as van die mens, as stempel dra. In hierdie sin en gees verklaar ek my bereid om vir my volk en vaderland te ly en indien nodig te sterwe.

'Ek tree op voor God en sweer hierdie heilige eed, dat ek as Afrikaner my Volk en Vaderland

met my ganse hart, liggaam, eiel en verstand getrou sal dien in die rigting wat my aangegee word deur die leier van die Nasionaalsosialistiese Rebelle in die persooj van Robey Leibbrandt en niemand anders nie, van nou af, tot in die dood.

"Onder die parool: 'n stryder kan sterwe, maar 'n verraaier moet sterwe sal ek immer en onder alle omstandighede handel en enige en elke bevel gehoorsaam en ten volle en geheel uitvoer. Elke en ieder geheim sal ek met my lewe bewaak en bewaar.

"Die diepte en erns waarmee ek my tot 'n Nasionaalsosialistiese Rebel erken vind sy uitdrukking in die bloed, waarmee ek my persoon deur middel van my handtekening vir ewig bind.

"Ek is niks, my volk is alles.

"God smet ons.

"Die Vierkleur Hoog!"

The interpretation put upon this oath by the trial Court will be referred to later.

One of the pamphlets referred to above (Exh. SS) is dated

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November 1st, 1941 and is addressed by No. 1 accused to "Die Nasionaalsosialistiese Rebelle". As regards this pamphlet, SCHREINER, J., in his judgment says that it was found in No. 1 accused's room and was perhaps intended for private circulation. There was nothing to show that it was shown to other persons. It contains, *inter alia,* the following passages: ---

"Wat ookal in die toekoms in hierdie albeheersende worsteling van lewe en dood gebeur, sal ons as fakkeldraers van die idee van Adolf Hitler, met wapperende vaandels voort marseer, in ritme van die edelnaam wat ons dra, tot eer van ons volk in Suid-Afrika! Ek het die eer om aan die Duitse Staat te verklaar, dat van die dapperste, trouste en karaktervolste mense wat die Afrikanervolk nog gelewer het, nasionaalsosialistiese rebelle is, en miskien ook was, dog onbewus. Die Afrikanervolk staan vandag voor die lewensvraag nou of nooit' en verwag dat elke rebel in ons geledere met 'n besliste en daadkragtige Nou antwoord sal gee, in 'n taal wat die wêreld sal verstaan, want op hierdie aarde is daar geen plek vir 'n lafhartige volk nie. Ek erken dat die Afrikanervolk vandag ontwapen is en dus geen beslissende slag kan lewer nie, maar dit wyk nog nie af van die feit dat ons 'n rotsvas wil tot vryheid besit en alleen die daad in die vorm van opoffering en bloed vertolk die ware wil van 'n volk in tyd van stryd. Ek, as Afrikaner
en soldaat van die idee van Adolf Hitler, is bereid om vir die bestaan, reg en vryheid van my volk te sterwe. Die oorlog is reeds gewen en snel sy einde met dawerende skrede tegemoet. Met alle ywer moet ons deeglik voorberei en voorsorgmaatreëls tref vir die SLAG wat kom. Sosiale gemak moet op die altaar van diens geoffer word, aan die heilige stryd wat ons voer. Elke uur van die dag stel nasionaalsosialistiese rebelle hul in gevaar om met onverskrokke moed en onbetembare waaghalsigheid werk te lewer, wat gedaan moet word. Aan die spitse van hierdie edelmoedige groep, staan ons dapper Hoof-generaal ( ) en sy adjutant.(). Wie nie waag het geen reg op sukses en alleenlik MANNE en nie niense, maak geskiedenis."

The blank spaces between the brackets in the penultimate sentence are the result of an excision by means of a sharp instrument such as a knife from the original exhibit. We were informed by counsel for the Crown that it was impossible to say whether this excision took place before or after the original exhibit was seized by the police.

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The trial Court's finding with reference to this document is as follows: ---

"The document as a whole is inconsistent with No. 1 accused's having had in mind constitutional action but it shows that his thoughts were running throughout on the use of force."

Another of these pamphlets, of which there are two copies, Exhibits "K.K." and "L.L.", was compiled by No. 1 accused in December, 1941, and was addressed to "Kamerade van die O.B." It Contains a violent attack on the leader of the Ossewa Brandwag and the following passages: ---

"Ek verklaar voor u en voor die almagtige God, dat ek byna 19 maanden skroomloos en onophoudend by die Duitse Staat gesmeek het om my tog toe te laat om na my vaderland te durf terugkeer, en my volk te verlos van die oorlogshel van verderf, waarin sy deur verraad gedompel is. Ek dank die Fuhrer, Adolf Hitler, dat by my the eer laat toekom het, om na Godswil my lewe in stryd vir die vryheid en toekoms van jong Suid-Afrika te durf opoffer. Die dolk wat Jan Smuts gaan tref, word gesmee in die diepte van die Afrikanerhart, so sterk in die S.A. Polisie vertegenwoordig. Kamerade, moeders, vrouens en dogters van die O.B.! Ons volk staan vandag voor die lewensvraag Nou of nooit', dus vind u self en vind mekaar, want die O.B durf nie ondergaan nie."

Another pamphlet, of which there are two copies, Exhibits "P." and "J.J.", is undated. It was compiled by No. 1 accused and addressed to "Kamerade van die S.A. Polisie." This pamphlet was widely distributed at different places throughout the country, including many police stations. It contains the following passage "Geen staatsman, van welke formaat ookal, is so aan sy God geheg soos daardie byna bo-menselike Fuhrer, veldheer en genie Adolf Hitler, en ek is innerlik vas oortuig, dat sy idee nie alleen my volk sal red van die galg, waaraan sy, deur lieg, bedrog en verraad gehang is, maar weer tot 'n nasie sal smee.Kamerade! 'U kan duá verstaan waarom ek as Afrikaner elkee moment bereid is, om as troue soldaat van sy idee te sterwe, wie wandag saam met sy soldate in die loopgrawe, tussen drek, modder en sneeu veg Adolf Hitler!"

SCHREINER, J., made the following remarks about the above two pamphlets (Exhibits "K.K." and P."):---

"These pamphlets are in our opinion strong evidence of the hostile intent entertained by No. 1 accused towards the Government



and they show too that his goal was not, in his view, to be achieved by constitutional means." The following passages occur in a letter (Exb. "H.H.") written on October 22nd, 1941, by No. 1 accused to Mr. and Mrs van der Walt: ---

"Vandag word 'n regeringstelsel ontmasker, wat uit die donkerste peskanale van die Talmud (Joodse bybel) saamgeval en vermom is, as sogenaamde demokrasie, wat die vernietiging van volke beoog en die gristen as offerande aan die Joodse God Jehova, as stempel dra. Agter hierdie Sionistiese dekmantel word ons volk uitgerot en aan Britse imperialistiese varke gevoer."

After referring to the occasion on October 7th, 1941, when an attempt was made to arrest him, he went on to say: ---

"Alhoewel ek 'n paar dae na my ontsnapping ronder kos was en selfs een nag buite in die veld pap nat gereent het moes ek tog lag as ek dink hoe ek 350 men uitoorlê het. 'Die Führer het die woord kapituleer vir ewig uit die nasionaal sosialistiese woordeboek geskrap, daarom weier ek voor my volk en voor God om ooit oor te gee en alleen my dooie liggaam sal in die hande van die regering val, maar ek as vryheidsregter --- NOOIT! . . . . Ek is bewus van die feit dat die polisieg opdrag gekry het om my te skiet, maar meer as een van hulle sal saam met my val. Ek het geen vrees vir die dood!"

As regards the association between Nos. 1 and 2 accused and

No. 1 accused's general outlook, SCHREINER, J., said: ---

"In the course of the year 1938 he (No. 1 accused) spent some time in London where he met No. 2 accused, who had been a friend of his at school and who was in 1938 studying in London. They renewed their friendship and according to No. 2 accused lived in the same lodging for about a month. No. 2 accused persuaded No. 1 accused to abondon boxing as a

career and to turn to physical culture. No. 1 accused was apparently grateful to No. 2 accused for befriending him at a difficult period and they became intimate friends. No. 1 accused left for the Continent and from there wrote a number of letters to No. 2 accused which were found in the latter's house at the time of his arrest early in 1942. The letters (Exhibit AAAA 1-10) show a degree of intimacy between the two. They also show
that No. 1 accused was very deeply imbued with Afrikaans nationalist sentiments, that he entertained strong anti-British views and that he hoped

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for a complete severing some day of the connection between South Africa and the British Commonwealth. The letters also show No. 1 accused to be a highly emotional person. There appear to have been several letters written by No. 2 accused in the course of this correspondence but they are not available. The letters come to an end early in 1939. No. 2 accused left for South Africa in August of that year and the following month war broke out between South Africa and Germany. So far as appears from the correspondence No. 1 accused was then still on the Continent and in all probability in Germany. According to No. 2 accused No. 1 accused was undergoing training in physical culture, but it seems probable that he underwent some training in politics as well. In the printed pamphlet (Exhibit LL --- middle of second column) he refers to himself as a 'deeglik opgeleide politieke student ' and there is nothing in the evidence to suggest that he had received any training in politics before be went to Germany in 1939. The language of the oath which he subsequently used in South Africa, of the pamphlets addressed to the South African Police (Exhibit JJ), to the Ossewa Brandwag (Exhibits LL and KK, which are identical) and to his followers (Exhibit SS) and of his correspondence, notably Exhibit HH, show that he had imbibed much national socialist doctrine. His almost religious reverence for Hitler, whom he refers to as 'daardie byna bo-menslike Führer, veldheer en genie' (Exhibit JJ), the violence of his anti-Semitic utterances (Exhibit JJ., page 1, paragraph 2, page 2, last paragraph, and Exhibit HH) and the fierceness of his attacks on democracy and on the Treaty of Versailles may all possibly be explained by his sojourn in Germany; but, taken in conjunction with the methods of organisation that he introduced as soon as he came to South Africa and his apparent acquaintance with the art of propaganda, they go to show that he had probably received some instruction in the political methods of National Socialism while he was in Germany. And this is in consonance with the evidence of Pauley and Beetge that No. 1 accused told them that he had studied politics in Germany.

"The Crown called a German prisoner-of-war who had been captured in North Africa on the 6th November, 1942, less than six weeks before he gave evidence. He stated that he had served in the same parachute company as No. 1 accused for a few

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months at the end of 1940 and the beginning of 1941. No. 1 accused was a lance-corporal, was transferred from the unit, which thereafter went to Crete. This witness was cross-examined on his reasons for identifying No. 1 accused, but we are quite satisfied that his evidence was true and that there is no room for error. According to the witnesses Sergeant van Jaarsveld and Welman, No. 1 accused stated that he had been in the German army, Welman saying further that he said he had been a parachutist. The German prisoner's evidence makes it clear that No. 1 accused then told the truth." No. 1 accused did not give evidence. SCHREINER, J., summarised the case against No. 1 accused as follows: ---

" He came from Germany by arrangement with the German Government, in order to do certain things that both he and that Government wanted done. They both wanted the same two things, namely, the overthrow of the South African Government and the victory of Germany in the war, but while the Germans wanted the overthrow of the South African Government so as to help them win the war, No. 1 accused wanted the Germans to win the war so that the overthrow of the South African Government might be achieved. Obviously the two purposes would interact --- the more Germany succeeded in the war the more dangerous would the position of the South African Government become, while the weaker the South African Government became the poorer would presumably be its war effort and the better the war prospects of Germany. So that there was no difficulty in the way of

No. 1 accused's working with the German Government.

" The plans they laid were presumably elastic. If it should prove possible for No. 1 to capture the Ossewa Brandwag, that would be done, and No. 1 accused would then lead it into the use of more forceful and forcible methods. The particular lines of action to be followed would depend on the needs of the moment, but the intention was to act unconstitutionally by the organisation of forces that, if weapons should become available, would be able to achieve substantial results. The idea that No. 1 accused wanted to build up an unofficial Police Force to preserve law and order in the anticipated times of disturbance was certainly never entertained by No. 1 accused. The forcible overthrow of the Government required disturbances of one kind or another to

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undermine its power. If Germany was moving on to victory in the war such disturbances could be fomented and a stage would probably be reached when a rebellion could be set on foot. In the meantime efforts could be directed towards encouraging the followers by sabotage and propaganda until circumstances became more favourable.

" It is very probable that both No. 1 accused and the German Government realised that the Ossewa Brandwag might not prove easy to capture and no doubt the alternative plan was laid which, in the result, had to be adopted. No. 1 accused set about building his separate organisation, the future of which would again depend on circumstances, including the fortunes of the great groups of belligerents in the war. No doubt if, despite No. 1 accused's initial failure to obtain control over the Ossewa Brandwag, he saw a better chance later on he would take it; but for the present he simply set about collecting his own chosen men, who were to be the nucleus of a greater body. In the persons of Kalie Theron and Hendrik Erasmus he obtained two men of the kind he was looking for, men who would act and not think; but the recruiting does not seem to have progressed favourably. He appears to have tried hard to undermine the loyalty of the Police, but although he succeeded in the case of some who were deceived by his emotional appeals, the great majority, to their credit, stood firm and refused to forsake their
paramount duty of helping to discharge what is perhaps the oldest and is certainly the most essential function of the State, the administration of justice. Some of No. 1 accused's followers died violent deaths, others, regaining their senses and realising more clearly where he was leading them to, abandoned his organisation. Eventually, when he was reduced to mere pamphleteering, he was arrested. His attempt had failed, but its failure does not alter its character. It was clearly a treasonable adventure from start to finish, and No. 1 accused is, therefore, found guilty of high treason."

Although a general verdict of high treason was returned against No. 1 accused it is clear from the reasons for judgment that the Court did not find that all the overt acts alleged in the indictment against No. 1 accused were proved. It found that it had not been proved that No. 1 accused was responsible for overt acts (b) and (e), but that he was guilty in respect of overt acts (a), (c) and (d).

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The findings in respect of No. 2 accused were summarised by SCHREINER, J., as follows: ---

"He has admitted and it has been proved by Welman and de Wet that he signed the oath form. We have found it proved that when he did so he knew that No. 1 accused had come from Germany with the leave of the German Government and that he had come by submarine. He knew from his acquaintance with No. 1 accused and from the letters that No. 1 accused was fanatical about what No. 2 accused called 'volkssentiment' and violently hostile to the existing Government of the Union. He knew that No. 1 accused was clamouring for action and regarded himself as a man of deeds. He knew that No. 1 accused regarded him as a kindred spirit. He knew that No. 1 accused was forming an organisation and that the organisation was to take action at the time to be appointed by No. 1 accused. Putting the case most favourably to No. 2 accused he knew that action would be taken when Germany was victorious and Great Britain and the Union of South Africa, her ally, were

defeated. He knew that then in the time of his country's dire need, No. 1 accused's organisation was to act --- it was to seize the Government and establish ' die vryheid en onafhanklikheid van die Afrikanervolk in Suid-Afrika' under a national socialist state. To this end he swore an oath of fealty and obedience to No. 1 accused, dedicating his life to the cause and accepting the watchword' 'n Stryder kan sterwe maar 'n verraaier moet sterwe'. Meanwhile national socialist propaganda was to be spread about and No. 2 accused was to instruct the students as to their duties. But more has been proved than that. We have found it proved that No. 2 accused knew, while he was a member of the organisation, that Abrie had been recruited because he could use the Morse code and we have found that No. 2 accused knew that it was the intention of No. 1 accused to use the radio as a means of communication, that is, for transmission or reception. The fact that No. 2 accused has lied about the date of the purchase of Exhibit No. 22 (the wireless receiver previously referred to) and that he purchased it only at the end of August leads very strongly to the view that No. 2 accused purchased the set for the purpose of its being used by No. 1 accused in his communications. But assuming that that was not the purpose for which No. 2 accused bought the set we have no doubt that when he gave possession of

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it to No. 1 accused No. 2 accused knew that No. 1 accused intended to use it for the purpose of communication. We have already found that No. 1 accused intended to communicate with Germany and that he attempted through Abrie and Theron to do so. In view of this finding and in view of the facts of which No. 2 accused had knowledge the only reasonable inference is that No. 2 accused knew that No. 1 accused intended to communicate with Germany. And it follows that when No. 2 accused put the receiving set into the possession of No. 1 accused and his associates he knew and intended that it would be used for that purpose.

"In view of our finding that Abrie may be untruthful when he says that No. 2 accused accompanied him to Warmbaths, we do not find it proved that No. 2 accused committed the overt act of attempting to communicate with Germany and we do not find it proved that No. 2 accused had knowledge of any intention to use bombs or to commit any other acts of sabotage. No. 2 accused has not been shown to have taken part in any of the other overt acts alleged in the indictment.

"The case against No. 2 accused is confined, therefore, to the first overt act, namely, conspiracy with hostile intent to overthrow the Government and it remains to consider whether the facts which we have proved establish the case against him and, if so, whether the case has been proved by the requisite number of witnesses. In our opinion the first question must be answered in the affirmative. As we have shown, signature of the oath is itself *prima facie* an overt act of treason. Signature by No. 2 accused in the state of his knowledge and in the circumstances outlined above is in our opinion clearly an act of treason done with hostile intent. The intention to which No. 2 accused was a party was to try to overthrow the Government when No. 1 accused should consider the moment to be ripe and to conspire for this purpose was to commit the act of treason charged. It is not alleged that the conspirators conspired to communicate with Germany; it is alleged that they attempted to do so in furtherance of the conspiracy. But the fact that No. 2 accused assisted in those attempts in the manner proved is additional evidence of his hostile intent.

"In our opinion, also, the case has been proved by the necessary number of witnesses. No. 2 accused's signature to the oath

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has been proved by De Wet and Welman and by his own admission. The application of sec. 284 to proof of hostile intent is not so easy as its application to the proof of physical acts. When the act itself shows hostile intent and is doubly proved the section is wholly satisfied. In our opinion the inference of hostile intent is to be drawn from the fact of signature alone, once No. 2 accused's attempt to provide an innocent explanation has been rejected. But in further proof of hostile intent there are various facts, some proved by two witnesses and some by one only, which have been referred to in the discussion of the evidence. As illustrations of the former are No. 2 accused's

knowledge of No. 1 accused's state of mind as proved by the letters (Exhibit 'AAAA') and No. 2 accused's own admission, and his knowledge that No. 1 accused had recently come from Germany as proved by Welman and De Wet. As illustrations of the latter are his knowledge that No. 1 accused had come in a submarine, as proved by De Wet, his knowledge that Abrie was recruited for his knowledge of Morse, as proved by De Wet and his provision of Exhibit No. 22 with knowledge that it was to be used in communicating with Germany, as proved by Marais and the other circumstances proved or admitted, relating to that exhibit. These facts, in our opinion, provide ample double proof of hostile intent additional to the proof provided by the signature of the oath itself. For these reasons we find No. 2 accused guilty of high treason.

"As regards No. 3 accused, a handwriting expert stated that the signature of F.J. Olwagen on a blood oath which was produced was that of No. 3 accused. This accused gave evidence and admitted his signature. The explanation given by the accused as to how he came to sign the oath was regarded by the trial Court as "so inherently improbable as to be beyond reasonable doubt false". The accused admitted having purchased a large quantity of paper, some thousands of sheets, which the trial Court found was suitable for use on a roneo machine. This paper (Exhibit "61") was found in a garage used by one Slabbert. The trial Courts was satisfied that the explanation given by the accused as to the reasons why he bought the paper was false and came to the conclusion that the paper was to be used for the production of pamphlets. But still more important documents were found in Slabbert's garage. Among those documents were: ---

(1) A document (dated 20th August, 1941, and in the handwriting



of No. 1 accused) stating that "Lt. Olwagen bevorder tot majoor en waarnemende generaal van Transvaal . This document (Exhibit "V.V. -R.") contains instructions of a military nature.

(2) A letter (dated 20th August, 1941, and in the handwriting of No. 1 accused) addressed to "Die Nasionaalsosialistiese Rebelle van Suid-Afrika". This letter (Exhibit "BBB") announced the promotion of No. 3 accused to the rank of Major and as such acting general of the Transvaal.

(3) A letter (dated 31st August, 1941) written by No. 1 accused to "Geagte Majoor Olwagen". This letter (Exhibit "22") instructed No. 3 accused to assist Capt. Theron, a member of No. 1's orlganisation.

(4) A letter (dated 2nd September, 1941) written by No. 1 accused, to "Geagte Majoor Olwagen". This letter (Exhibit "77") contains further instructions of a military nature.

(5) A blood oath signed by No. 3 accused (Exhibit "W").

(6) A note book (Exhibit "UU".) containing some writing of No. 3 accused.

As regards Exhibits V.V.-R., B.B.B., Y.Y., 22 and U.U., SCHREINER, J., said:

"The circumstances point in our opinion very strongly to No. 3 accused having been in possession of the documents. The search of No. 1 accused's room revealed no practice on his part of keeping copies of his letters and there is no indication that Exhibits 'YY', 'ZZ', 'BBB' and 'VV-R' are copies. When one takes into account the facts that Exhibit "UU" contains at least some writing of No. 3 accused, though he denies it, that just before his arrest he caused the folio paper, Exhibit No. 61, to be deposited in the garage and that the packet of documents was such as one might well expect to be in the custody of the Acting General of the Transvaal, we feel quite certain that the documents had been in No. 3 accused's possession shortly before they were put in the garage. But even if it were not proved that No. 3 accused ever received the letters addressed to him by No. 1 accused it seems to us that they are admissible against No. 3 accused as being the executive writings of a co-conspirator. That No. 1 accused was a co-conspirator with No. 3 accused is shown by No. 3 accused's signature to Exhibit

'W'. And in writing the exhibits found in the garage No. 1 accused was not writing a narrative or keeping a note for himself. We are disposed to hold that the ranks associated in No. 1 accused's writing with certain of the signatures to the oaths should be taken to be in the nature of notes made by No. 1 accused for his own purposes, but that view certainly does not hold in regard to Exhibits 'YY', 'ZZ', 'BBB', and 'VV-R'. They were clearly documents made for the purpose of carrying out the conspiracy and as such are admissible against No. 3 accused, to whom there is no doubt that they were addressed. *(Cf. Rex v Stone,* 6 TR 528). We were referred to the case *of Rex v Miller* 1939 AD 106 and it was argued that the four exhibits could not be used to prove or confirm the proof that No. 3 accused was a member of No. 1 accused's organisation. As we understand the position, once there is other evidence of the conspiracy and the parties thereto the acts and statements, executive as opposed to narrative, of one of the co-conspirators are admissible to confirm the scope of the conspiracy and the nature on the steps taken to carry it out, and there seems to be no reason why such evidence should not also be used to confirm the other evidence as to the parties who took part therein (see *per* TINDALL, J.A., at p. 126). The danger of arguing in a circle, to which reference is made in *Miller's* case, would seem to be present whether the matter in question is the scope of the conspiracy or the identity of the parties thereto. In either case there must be other evidence going far enough to warrant the use of the co-conspirator's statements but when the foundation exists it may itself be strengthened by the statements, provided that they are executive and not narrative." SCHREINER, J., concluded his remarks about No. 3 accused as follows: ---

"The evidence satisfies us that No. 3 accused was a fairly prominent member of No. 1 accused's organisation and there is no reason to doubt that he shared No. 1 accused's outlook and aims. He was admittedly a party to the oath and his explanations in regard thereto are rejected as false. As Acting General of the Transvaal he must have
understood the nature and scope of the movement, that it was anti-governmental and at the same time was based on non-political, extra-constitutional action. When No. 1 accused wrote to No. 3 accused that he wanted

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results he was not thinking in terms of votes and No. 3 accused knew it.

"Our verdict in respect of No. 3 accused, therefore, is also one of guilty of high treason."

The following questions of law were reserved for the consideration of this Court on behalf of No. 1 accused: ---

1. Whether there was legal or competent evidence to justify the finding of the Court that the accused was guilty of the crime of high treason.

2. Whether, in view of sec. 284(2) read with sec. 285 of Act 31 of 1917, there was evidence on which a verdict of guilty was competent.

3. Whether there was any evidence (on which a verdict of guilty was competent) of attempts to transmit as alleged in paragraphs (c) and (d) of the indictment more especially in view of secs. 284(2) and 285 of Act 31 of 1917.

4. Whether there was any evidence (on which a verdict of guilty was competent) of a conspiracy as alleged in paragraph (a) of the indictment, more especially in view of secs. 284(2) and 285 of Act 31 of 1917.

5. Whether in view of sec. 302 of Act 31 of 1917, the admission of evidence of an overt act (not charged in the indictment) of alleged waging of war by No. 1 accused against South Africa was not irregular and whether No. 1 accused was not irreparably prejudiced thereby.

6. Whether the punishment was not excessive.

Questions 1, 2, 4 and 5 were also reserved on behalf of Nos. 2 and 3 accused.

No. 1 accused was not represented by counsel in this Court. He had the assistance of Mr.

*Ludorf* until very shortly before the hearing, but then he decided to conduct his own case. He said nothing to us in support of the legal points which had been reserved on his behalf. In the remarks which he made to this Court he complained about the inaccuracy of the record, particularly in regard to the report of the remarks which he made after the verdict and before sentence was pronounced. He was allowed to produce a document which he said was a draft of those remarks and he pointed out certain discrepancies between that draft and his remarks as recorded. He also pointed, out two examples of what he alleged to be mistakes made by the shorthand writers in

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taking down the evidence. None of these alleged errors, however, had any bearing upon the points of law which were reserved. But though No. 1 accused said nothing in support of the points of law reserved on his behalf, this Court must consider them and decide upon them. Fortunately, four of the points reserved on his behalf were similar to those reserved on behalf of No. 2 and No. 3 accused and Mr. *Ludorf* argued these on behalf of No. 2 accused so that the Court has had the benefit of hearing from counsel what can be said in support of those points, and I shall address myself at once to the argument which was put before us.

I find it somewhat difficult to summarise Mr. *Ludorf's* argument because there are involved in it both questions as to the essential elements in the crime of treason and questions as to sufficiency and admissibility of evidence to prove those elements and the arguments dealing with these different questions sometimes overlap one another. It is possible, however, to divide the argument broadly into two parts, one of which deals with the essential elements of the crime of high treason and the other with the evidence by which the commission of the crime is proved. As to the first part, Mr. *Ludorf* contended that *crimen laesae majestatis* includes high treason, sedition and public violence, that acts which disturb the tranquillity of the State only amount to high treason if they are directed against the *independence* or *safety* of the State; if they are merely directed against the *authority* of the State they may be sedition or public violence, but they are not high treason. Putting the same argument in another way he contended that if the acts complained of are directed against the Government of the day they may be sedition or public violence but do not amount to treason unless such acts are intended to assist an external enemy. He agreed that such acts, if done with hostile intent, would amount to high treason but contended that the word "hostile" must be understood in the sense of (I shall make use of the Afrikaans words used by Mr. *Ludorf* in argument) *vyandelik* and not *vyandig,* and that the hostile state of mind must be directed against the State as a whole "intending to treat it as an enemy" (quoting the words of INNES, C.J., in the case of *Rex v Viljoen* 1923 AD 90 at p. 94)) and not merely against the executive Government. He contended further that if these propositions were accepted there was no evidence in the present case from which it could reasonably be inferred that any of the accused in acting as they

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did were animated by hostility to the State, and that the signing of the blood oath was not even sedition but merely preparation for something which never developed so far as to become an attempted crime.

Now I find some difficulty in appreciating exactly what the distinction is between "vyandig" and "vyandelik" and how the one state of mind becomes converted into the other. Does Mr. *Ludorf's* argument mean that there must be an already existing enemy of the State before a citizen or body of citizens of such State can commit high treason? If so, what is the position of such citizen or body of citizens if they are the first to become enemies of the State? Does it mean that such citizens who first become enemies of the State are not guilty of treason while all who subsequently
join them become guilty of treason? Or does it mean that high treason can only be committed when there is in existence an external enemy of the State in the shape of another sovereign power? Or does it mean that a state of mind which is "vyandig" becomes converted into one which is "vyandelik" if hostile acts are embarked upon? Whatever the real meaning of Mr. *Ludorf's* contention may be, it seems to me that the questions raised by him are all disposed of by the decisions of this Court in the cases of *Rex v Erasmus* 1923 AD

73; *Rex v Viljoen* 1923 AD 90 and *Rex v Christian* 1924 AD 101.

In *Erasmus's* case it was contended that unless there existed a definite intention to overthrow the Government by changing its personnel or altering the constitution, there could be no high treason but at most sedition, but this argument was definitely rejected by the Court and in the subsequent case of *Rex v Viljoen* it was laid down that a " hostile intent against the State " is the hall-mark of treason which distinguishes it from sedition and public violence. The State against which the hostile intent must exist is, of course, the people of the Union of South Africa organised as a State, of which the King, under the South Africa Act, is the head. The various powers of the people so organised (e.g. legislative, executive, judicial) are exercised on behalf of the State by the persons entrusted by the State under its constitutional laws with those functions. Under the Status Act, 69 of 1934, the Executive Government of the Union is vested in the King acting on the advice of his Ministers of State for the Union and may be administered by the Governor-General as his representative.

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Consequently, acts apparently directed against the Executive Government may very well be acts done with hostile intent against the State, and as was pointed out in *Erasmus's* case such intent need not go the length of an intention entirely to overthrow the Government, it being sufficient if there exists an intention to coerce the governing authority, and in this connection it is worth while to draw the attention, as was done in *Erasmvus's* case, to the remarks of *Boehmer* referred to by INNES, C.J., in the following terms: ---

"Deeds, he thinks, speak for themselves, and it will not avail an accused person who has set on foot a movement which necessarily tends to the subversion of the State, to set up the defence that he did not contemplate its overthrow; such acts he says amount to *perduellio* because they are pregnant with danger and cannot be undertaken without the idea of imperilling the State, whatever intention the accused may profess."

Those decisions are binding on us unless it can be shown that they are palpably wrong. See *Bloemfontein Town Council v Richter* 1938 AD 195 at p. 232); *Collett v Priest* 1931 AD 290; and *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 656.

Mr. *Ludorf* boldly asked us to say that they are wrong, but he has not produced any argument or authority which shows that they are wrong, consequently the law must be accepted as laid down in those cases.

Now the judgment of the Special Court shows that it accepted the law laid down in the case of *Rex v Erasmus* and then proceeded to consider whether the inference of hostile intent should be drawn. SCHREINER, J., on this subject made the following remarks with which I agree: ---

" In peace time it may be difficult to ascertain whether any particular form of civil disturbance or anti-governmental activity evidences hostile intent, for there is no general enemy whose purpose it is to overthrow or subdue the Government and the requisite element of force must come from within. In war time the existence of such an enemy, who in the nature of things has this purpose, makes it easier in many cases to decide whether the hostile intent is present or not. There may still, of course, be cases of disturbance that have to be considered without regard to the fact that the country is at war, but many acts fall to be.

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tested by reference to the intention with which they are done in relation to the country's war effort. The object of the enemy being to overthrow or subdue the Government of the country, any act aimed at helping the enemy carries with it by necessary implication the intent to bring about the overthrow or subjugation of the Government. In the same way any act designed to hinder the Government in the waging of the war by necessary implication aims at its overthrow or subjugation by the enemy. The typical act of treason, historically, may be the adherence to or the furnishing of aid to a foreign foe, so that in war time it may be

stated more directly that any act which is designed to assist the enemy either positively, by giving him help of any kind, or negatively, by obstructing or weakening the forces arrayed against him, is an act of high treason.

"For the purposes of the law of treason the Government is wholly identified with the State. Treason may be committed and the hostile intent be entertained with a view to achieving some further purpose. The ultimate goal may be the achievement of some social or economic advantage for a portion or even for the whole of the community.

"It may be the advancement of some political or ideological theory, or it may be the fulfilment of personal ambition or the wreaking of personal hatred. None of these ultimate motives is relevant to the enquiry whether treason has been committed or not. Whatever the factors are that induce a citizen to entertain an intention to help the enemy or to weaken the effort against the enemy, if he acts in order to carry out that intention he commits an act of treason. Where the effect is to help the enemy this may lead to the conclusion that the intention was to produce that effect. But not every act that helps the enemy, by increasing the Government's difficulties or otherwise, leads to the inference of hostile intent. Even behaviour that may lead to serious interferences, such as gross wastefulness, the promotion of strikes or talking about the movements of ships or armed forces, may be explainable on other lines. But certain kinds of behaviour provide in themselves strong evidence of the existence of hostile intent. Among the most important under present conditions are acts of sabotage, the furnishing of information to the enemy and anti-war propaganda. The effect of these is clearly to aid the enemy. Whether the
purpose is the same as

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the effect is a matter of inference but if the effect is obvious and no other reasonably possible explanation presents itself, the inference of hostile intent will be drawn. In this respect, too, the law of treason does not differ from the law relating to other crimes. Acts of sabotage --- the destruction of buildings or other works of man by fire, explosive or otherwise --- if not otherwise explainable, will, generally, in time of war, be held to be treasonable acts, for the inevitable inference is that they are designed to help the enemy.

"Communicating with the enemy may or may not provide evidence of hostile intent. A communication even with the enemy government itself might be explained consistently with innocence. It might, for instance, take the form of an enquiry in regard to a relative in the enemy country. But any communication of information that might assist the enemy would provide very strong evidence of hostile intent.

"One of the most powerful means of waging war to-day is propaganda designed to weaken the enemy's will to war by causing divisions of opinion and lack of confidence among the people in the Government. By such means recruiting for the armed forces may be discouraged and the output of factories be reduced. Before the days of so-called total war subversive propaganda might have little effect unless conducted among the armed forces themselves, but to-day any attempt to interfere with the activities of the civilian population in aid of the war effort may have as dangerous consequences as attempts to undermine the loyalty of the troops themselves. Particularly dangerous is propaganda directed towards the weakening of the loyalty and sense of duty of the police forces of the country. To say that antiwar propaganda designed to weaken the war effort is treasonable does not mean that all expressions of anti-war opinion necessarily disclose hostile intent against the State. A person may believe that it is right or politic for his country to make peace and if he urges this course it will not necessarily be a proper inference that he is seeking to weaken his country's efforts against the enemy. While he urges the conclusion of peace he may consistently support the most effective prosecution of the war, while it lasts. Naturally such a person is in danger of finding his purposes misunderstood but logically the dual attitude is maintainable and is consistent with loyalty to the State.

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"The building up of semi-military organisations outside the State Forces in time of war may

very easily lead to the inference that they are designed (as they are obviously likely) to weaken the Government in its fight against the foreign foe. If the activities of the organisation are veiled in secrecy the inference becomes appreciably stronger, for if they are innocent there is no reason why they should not be made public. In these days of rapid vehicular movement and powerful instruments of destruction a government at war must always be on its guard against the possibility that such organisations may, especially under the stimulus of enemy propaganda, turn to sabotage and terrorism. The precautions required are likely to lead to a dissipation of effort and a consequent weakening of the government's war-making power; and although the creation of such an organisation will not by itself and in all cases provide proof of hostile intent, it may require little additional evidence to show that the object is to hinder the government in its efforts to win the war and is, therefore, treasonable."

The Special Court then proceeded to consider whether the conspiracy charged against the accused as the first overt act in the indictment was proved and whether such conspiracy was entered into with hostile intent. The proof of this conspiracy consisted mainly of proof of the signing of the blood oath and as to this the Court said: ---

"In our opinion the oath, taken by itself, means that the signatories joined an organisation under the leadership of No. 1 accused, whose orders they bound themselves to obey even at the risk of their lives; that the organisation was to function against the Government and was to seek to change South Africa into a national socialist state; that its goal was not to be achieved by the formation of a political party but by secret and unconstitutional methods in which loss of life might be suffered.

"In its natural sense the oath, in our view, discloses a treasonable conspiracy. Whether any particular signatory entertained a hostile intent when he signed it will depend on the circumstances known to him and on his evidence in explanation of how he came to sign."

The Special Court then examined the evidence in detail and came to the conclusion that No. 1 accused, in forming his organisation,

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and the other two in joining it and in signing the blood oath, were acting with hostile intent against the State.

It was against this finding that Mr. *Ludorf's* main argument was directed, and one of the grounds upon which he challenged it was that the hostile intent was not proved by two witnesses as required by sec. 284(2) of Act 31 of 1917. That section provides that ---

"it shall not be competent for any court or jury to convict any person of treason except upon the evidence of two witnesses where one overt act is charged in the indictment or where two or more such overt acts are so charged upon the evidence of one witness to each such overt act."

Several overt acts were charged against each of the accused, but No. 2 and No. 3 were convicted only of the first overt act, viz., conspiring. It was contended by Mr. *Ludorf* that even though more than one overt act was charged in the indictment, yet in the cases of No. 2 and No. 3, because they had only been found guilty of one overt act, the provisions of sec. 284(2) applied in respect of that overt act. Assuming that proposition to be correct, he next contended that in accordance with the decision of this Court in the case of *Rex v Hennig* 1943 AD 172 no conviction could take place unless every essential element of the overt act was proved by the evidence of two witnesses, one essential element of the overt act was the hostile intent and this element had not been deposed to by any witness at all, but had been inferred from all the surrounding circumstances; consequently, the conviction was bad in law. I shall assume, without deciding, that Mr. *Ludorfs* first contention is correct and shall proceed to consider whether the provisions of sec. 284(2) read with the decision in *Hennig's* case require the hostile intent which accompanies an overt act to be proved by two witnesses.

Now, clearly, intention is something subjective, a state of mind which is incapable of direct proof by witnesses. It can only be proved by inference from the acts and expressions of the

accused and from surrounding circumstances. It would, therefore, be very surprising if the law required direct proof of hostile intent by two witnesses. But, in my opinion, it does not. An overt act has been defined by Lord TENTERDEN in *Rex v Thistlewood* (33 S.E., Tr. 684) as "any act manifesting the criminal intention and tending towards the accomplishment of the criminal object" and it must be clearly distinguished from the state of mind or intention

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which accompanies it. *See Rex v Sharpe* 1903 TS 868 at p. 871). It is true that in *Rex v Hennig* this Court decided that each essential part of the overt act must be proved by two witnesses when only one overt act is charged, but it is important to bear in mind that the essential part of the overt act which was not proved by two witnesses in that case was the identity of the documents handed to a certain witness by the accused for transmission to the enemy. Had there been two witnesses on this point, the question whether the accused had a hostile intent would have been a matter of inference. That question was not considered in that case. Consequently, that case did not decide that the intention which accompanies an overt act must also be proved by two witnesses. In my opinion the law only requires the act, so far as it is overt, that is, so much of the act as can be perceived by the senses and consequently is capable of proof by witnesses, to be proved by two witnesses; the state of mind which accompanies the act, which is imperceptible by the senses and incapable of direct proof by witnesses, is left to be inferred from the surrounding circumstances. To hold otherwise would make it impossible to prove the crime of high treason, except in those cases in which the accused himself admits his hostile intention.

Another ground upon which Mr. *Ludorf* challenged the finding of the Special Court was that it was partly based upon inadmissible evidence which had been admitted in breach of the express provisions of sec. 302 of Act 31 of 1917. Sec. 302 is as follows: ---

"On the trial of a person charged with treason, evidence cannot be admitted of any overt act not alleged in the indictment, unless relevant to prove some other overt act alleged therein."

The evidence alleged to be inadmissible was: ---

(a) The evidence of a Crown witness Welman that at the meeting in No. 2 accused's house in Potchefstroom in August, 1941, No. 1 accused said he had been a parachutist or paratrooper in the German army and that he was due to go to Crete with the German forces but obtained leave or permission from the German authorities to come to South Africa to help his people;

(b) the evidence of a Crown witness, a German Prisoner-of-War, that from November or December, 1940, to January or February 1941, he and No. 1 accused were training in the same company in the German Air Force in Germany, that

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the accused was then transferred from the company and was never heard of again by the witness who went with his company to Crete.

The English section, on which sec. 302 seems to be based (7 Will. III, ch. 3, sec. 8) reads: ---

"No evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever."

In England this section has been held merely to state the Common law rule that the proof must correspond with the allegations and be confined to the point in issue (Taylor on *Evidence,* 10th ed., vol. 1, sec. 327). *Wigmore* (vol. 1, sec. 369) says: "that the rule was one of pleading only sand did not prohibit the use of other overt acts as evidential of intent." The learned author of Foster's *Crown Cases* (at p. 246) gives this reason for the express enactment of what was already part of the Common law: "Had not those concerned in state prosecutions out of their zeal for the publick service sometimes stept over this rule in the case of treasons, it would perhaps have been needless to have made an express provision against it in that case, since the Common law grounded on the principles of natural justice

hath made the like provision in every other."

The contention that was advanced on behalf of the accused is that the insertion of the concluding words in sec. 302 "unless relevant to prove some other overt act alleged therein" has given it a meaning different from the English section and that evidence of other overt acts could only be admitted if the evidence was relevant to prove that No. 1 accused had committed the act alleged and could not be admitted to show his purpose in committing it.

In the argument as to whether the evidence I have referred to should have been admitted, it was assumed that this evidence was evidence of an overt act of treason, notwithstanding the fact that there was no proof as to the date when No. 1 accused had enlisted in the German army or that his enlistment was voluntary. I have not
considered in what circumstances the fact that a Union National is a member of the army of a state with which this country is at war would render him guilty of treason. I propose to make the same assumption as was made in argument, but am of opinion that the point must be answered in favour of the Crown.

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Paragraphs (c) and (d) of the indictment allege that on two separate occasions the accused communicated or attempted to communicate with the King's enemies by means of a wireless transmitting set and a wireless receiving set. An earlier portion of the indictment shows that these enemies are the German Reich and the Italian Empire. These paragraphs are clearly allegations of overt acts and if the evidence objected to is relevant to prove these acts, it is admissible. It is plain, of course, that it is sufficient if this evidence proves any portion of the overt act.

The trial Court came to the conclusion on other evidence that No. 1 accused came by submarine to near the coast of Namaqualand and so reached the shore there; that he brought with him a wireless transmitting set, a code, South African and American currency; that he had been in Germany in the beginning of 1939 and was not heard of again until he arrived on the Namaqualand Coast in the middle of 1941. It was also proved that on the two occasions mentioned in the indictment, attempts had been made by No. 1 accused or his followers to communicate with some person or persons by wireless and the Court came to the conclusion that it was unlikely that the person or persons were in South Africa.

In these circumstances it seems to me relevant to the allegations in these paragraphs to prove that No. 1 accused had been released from the German army to enable him to come to South Africa. It need not be decided whether this was cogent evidence to prove that the persons with whom wireless contact was sought were persons in Germany; all that is material is whether it was relevant and I think there is no doubt on this point. I am inclined to think that the mere fact that he was a member of the German army is also relevant, but this need not be decided. What is clearly relevant is that he was released from the German army and it is impossible to prove his release without proving his membership; proof of the former is *ipso facto* proof of the latter.

I may add that even if we held this evidence to be inadmissible, the further question would have arisen whether in view of the proviso of sec. 374 of Act 31 of 1917 this Court could have disturbed the conviction; the proviso forbids any interference with a conviction unless there has been a failure of justice, and on the evidence and the reasons of the trial Court it would have been impossible to say that there had been such a failure *(Rex v Johnson* 1939 AD 241).

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It may be as well to point out here that since this evidence was admissible against No. 1 accused, Nos. 2 and 3 accused cannot raise any objection to its admission.

So far I have dealt generally with the nature of the crime of treason and the rules of evidence concerning its proof without reference to the bearing of these matters upon the specific questions of law reserved. It now becomes necessary to turn to those questions and answer them in the light of what I have said.

Dealing first with the case of No. 1, it will be seen that the first four points reserved all relate to the question whether there was evidence properly before the Special Court from which it could reasonably be inferred ---

(1) that No. I was guilty of committing the overt act of conspiracy with others as alleged in clause (a) of the indictment;

(2) that No. 1 was guilty of committing the overt acts of attempting to communicate with the enemies of the state in Germany as alleged in clauses (c) and (d) of the indictment; and

(3) that those overt acts were committed with hostile intent so as to amount to treason.

It will be noticed that these inferences were conclusions drawn from a large number of related facts which were proved in evidence. Those facts are dealt with in detail in a very carefully prepared judgment by SCHREINER, J., and it is unnecessary to do more than refer to the reasons which he has given for his conclusions and to say that we agree with them.

It has been suggested that several of the inferences of fact which the Court drew from the evidence, e.g. that No. 1 came to South Africa by a submarine, that the money which he brought with him from Germany was money received from the German Government, that he brought a code and a wireless transmitter with him from Germany, that Exhibit 36 was a bomb-casing, were not the only reasonable inferences which could be drawn from the facts and therefore that they should not have been drawn. But this matter is not an appeal from the findings of the Special Court, and I may add that even if it were an appeal in the full sense of the word this Court would not differ from the findings of the Special Court, because there was clear *prima facie* evidence to support those findings, some of which were based upon statements made by the accused himself, and he gave no evidence to contradict that evidence.

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It is somewhat difficult to understand the references to sec. 284(2) of Act 31 of 1917 in the points reserved on behalf of No. 1 accused, because in his case he was not only charged with, but convicted of committing more than one overt act of treason and consequently the two witness rule has no application.

As regards sec. 285 of Act 31 of 1917, that is a section which empowers a Court to convict on the single and unconfirmed evidence of an accomplice, provided that the offence has been proved by other competent evidence to
have been actually committed. Presumably the question which the reference to sec. 285 was intended to raise was the question whether there was corroboration of the evidence of witnesses who were accomplices. Without going into detail, it is clear that there was ample corroboration.

The fifth question reserved has already been disposed of, and the sixth is not a question of law at all and should not have been reserved.

The sentence was a competent sentence (see sec. 338(1) of Act 31 of 1917), and when the sentence is competent it cannot be questioned (except, possibly, under our inherent jurisdiction if it is unreasonable), unless some question of law has been reserved or a special entry relating to an irregularity has been made on the record. See *Rex v Brocade* 1939 AD 460, at p. 466). In the present case questions of law were reserved, and it was therefore possible for the accused to attack the severity of the sentence. There is nothing, however, in the record which would justify us in interfering with the sentence which was passed. It follows that the questions reserved on behalf of No. 1 must be answered in flavour of the Crown.

I come now to the case of accused No. 2 and No. 3. They were found guilty of one overt act of treason, viz.: conspiracy with hostile intent to overthrow the Government. The fact that the overt act took the form of a conspiracy, provided Mr. *Ludorf* with a foundation upon which he built up a rather ingenious argument. He said that a conspiracy differed from other overt acts in that the purpose of the conspiracy was an essential element in it. A

conspiracy, he said, was an agreement between two or more persons to carry out some purpose, and that it consisted of two essential elements, the agreement and the purpose, each of these elements had, in accordance with the decision in *Rex v Hennig* 1943 AD 172, to be proved by two witnesses. He admitted that the agreement between the signatories to the blood oath was

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proved by their signatures, but he said that there was no proof by any two witnesses of the common purpose which the signatories of the blood oath had in view. But this argument is more ingenious than sound. It rests upon a confusion between the terms expressly agreed upon (which may be called the purpose of the agreement) and the unexpressed intention existing in the mind of each signatory. In *Rex v Mulcahy* (3 E. & I. App. 306 at p. 328) Lord CHELMSFORD refers to this confusion as follows: ---

"It is too late to argue that a conspiracy may not be an overt act of treason. There are many authorities which establish that it is a sufficient allegation in an indictment for this offence, all of which are collected in the judgment of the Lord CHIEF JUSTICE of the Queen's Bench in Ireland in this case. It is a mistake to say that conspiracy rests in intention only. It cannot exist without the consent of two or more persons, and their agreement is an act in advancement of the intention which each of them has conceived in his mind. The argument confounds the secret arrangement of the conspirators amongst themselves with the secret intention which each must have previously had in his own mind, and which did not issue in act until it displayed itself by mutual consultation and agreement."

In the absence of evidence to the contrary, the terms of the blood oath itself indicate what the signatories agreed to, viz.: that they would strive, among other things, for the building up, in South Africa, of a National Socialist State and that they would serve their people and country as directed by No. 1 accused, the leader of the National Socialist rebels and by nobody else and that they would guard their secrets with their lives. In other words, by signing the blood oath, they, with No. 1 accused, formed, for the purpose of building up a National Socialist state in South Africa, an organisation, the members of which were sworn to obey No. 1 accused and no one else. The oath, therefore, was in terms an agreement or conspiracy, inconsistent with the allegiance owed by a citizen to the State, which both accused No. 2 and No. 3 admit having signed. The common purpose of the signatories is set out in the document itself and no further evidence is required under the terms of sec. 284(2) to prove what the signatories agreed to. There may, in fact, have been further purposes not set out in the oath to which the parties agreed, but these have not been proved against the accused and are not relied on by the Crown.

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Whether the signatories entered into the agreement with a hostile intention against the State is another matter, the intention of each signatory is something existing in his own mind which, as has been pointed out above, cannot be proved by witnesses (other than by the accused himself) and which must be inferred from the surrounding circumstances.

Mr. *Ludorf* was, in effect, basing his argument upon SCHREINER, J.'s, words quoted earlier in this judgment, viz.: "Whether any particular signatory entertained a hostile intent when he signed it will depend on the circumstances known to him and on his evidence in explanation of how he came to sign." By those words I take the learned Judge to have meant that it was open to any signatory to produce evidence to negative the inference of hostile intent which the Court drew from the terms of the oath signed in the circumstances in which it was signed. Most of the signatories who gave evidence attempted to acquit themselves of any hostile intent, but in the case of Nos. 2 and 3 the Special Court rejected their evidence as to their intentions when they signed the oath, and in our opinion rightly rejected it. .

I have now disposed of all the questions of proof raised under secs. 284(2), 285 and 302 of Act 31 of 1917, but there still remains the question whether, on the evidence which was placed before the Court, the conclusion that No. 2 and No. 3 were guilty of high treason was one which could reasonably have been arrived at. Mr. *Ludorf* contends, on behalf of

No. 2 that it was not; he says that the inference that a hostile intent against the State existed in the minds of No. 2 and No. 3 when they joined No 1's organisation was not a reasonable one to draw from all the circumstances of the case, particularly in view of the evidence given by the two accused as to their attitude towards the blood oath. The circumstances from which the Court drew its conclusion and what it thought of
the evidence of the two accused are set out in the reasons of SCHREINER, J., which have already been quoted. Mr. *Ludorf* challenged some of the findings of fact, but he could not show that any of them were clearly wrong or unreasonable. He also suggested that there were certain matters relevant to the state of mind of the accused which had not been given sufficient consideration by the Court. One of these matters to which he referred was the propensity of No. 1 to indulge in extravagant and hyperbolical language and melodramatic acts which counsel

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suggested presented a completely distorted picture of what was really passing in his mind. This trait in No. 1's character, he said, was well known to No. 2 and consequently No. 2's signature to the blood oath should not be taken as a literal acceptance of all that was contained in it. He also pointed to the fact that No. 2 had abandoned the organisation very soon after he had joined it and he contended that the reason for his doing so was his discovery of the fact that it was treasonable and that reconciliation between No. 1 and the Ossewa Brandwag was not possible. But a perusal of the reasons given by the Special Court shows that its conclusion was arrived at on evidence which was properly admitted, it was not based on any false premises or upon any fallacious reasoning and it was a perfectly reasonable conclusion on the evidence. Consequently we cannot interfere.

What I have said with regard to Mr. *Ludorf's* argument on behalf of No. 2 applies also to the case of No. 3, who handed in a written argument.

It follows that the points of law reserved on behalf of No. 2 and No. 3 must be answered in favour of the Crown.

Application was made on behalf of No. 2 and No. 3, in the event of the questions reserved being decided in favour of the Crown, that the Court in the exercise of the powers conferred on it under sec. 373 should order the period of imprisonment to run from 11th March, the date of conviction. In the circumstances of this case we think that this application. should be granted.

The convictions of the accused and the sentences passed upon them are confirmed and it is ordered that the sentences on Nos. 2 and 3 do run from 11th March, 1943.

TINDALL, J.A., CENTLIVRES, J.A., FEETHAM, J.A., and GREENBFFRG, J.A., concurred.