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IN THE SUPREME COURT OF SOUTH AFRICA.

(SPECIAL CRIMINAL COURT - PRETORIA)

In the matter of the application of

FARRID ADAMS and 29 OTHERS. Applicants.

and

T H E C R O W N. Respondent.

REASONS FOR JUDGMENT. Date:

BEKKER, J. : I find myself in agreement with my brother Rumpff namely, that the exception to the indictment based on the grounds mentioned in paragraph 2 of the Order made by this Court on the 2 March 1959, should be dismissed.

I propose setting out Mr. Nicholas' main argument in support of the exception in some detail as it gives rise to some important considerations which may perhaps be fundamental to the present case.

He submitted that treason in peacetime, if it is to be reduced to basic terms, consists in active sedition committed with hostile intent; that the field covered by treason in peacetime, is identical to, and co-extensive with the field covered by the crime of sedition; that the presence or absence of the element of a hostile intent, determines respectively, whether the acts, otherwise identical, constitute treasonable overt acts or merely remain seditious acts. In support of this proposition Counsel referred to a number of Roman-Dutch authorities and in particular to certain passages appearing in R. vs Viljoen, 1923 A.D., at p. 92, R. vs Erasmus, 1923 A.D., at P. 87, and R. vs Christian, 1924 A.D., at p. 134. p.2

Mr. Nicholas, still relying on these authorities, next submitted that words spoken, or written, could only constitute treasonable overt acts, if, - accompanied by the necessary hostile intent, - they incited others to sedition; if they lacked this quality they could not affect the State detrimentally and were thus incapable of being regarded as an 'action' against the State, which meant, in other words, he said, that they were incapable of 'manifesting' a hostile intent. The test, so the argument proceeded, was a simple one: - if the words used, even though accompanied by the hostile intent, did not amount to sedition, they could not constitute treasonable overt acts; if on the other hand, the words were seditious, then, if coupled with the necessary intent, treasonable overt acts emerged.

Counsel next sought to subject the indictment to this test and contended that neither the 'means clauses' set out in paragraph 4(b) (i) to (vii) thereof, nor any of the overt acts alleged in parts C, D and E, produced a result favourable to the Crown; the 'means clauses' did not necessarily suggest or envisage violence or sedition; and the overt acts alleged, save perhaps two or three of the many speeches, were found to be sadly lacking in this necessary element. The indictment, said Counsel, was bad in law. p.3

I have/.....

I have no quarrel with the contentions so advanced in p.3
a case wherein the alleged overt acts are based on the user of words divorced from and unrelated to a conspiracy to overthrow the State by violence. To that extent the authorities quoted by Counsel support him fully; but they do not, in my opinion, deal with the situation such as the present where the Crown alleges that the accused conspired with each other to overthrow the State by violence and with a view to achieve that objective, and to make preparation therefor, they agreed upon the means so to be employed and that the words spoken or written, constituted the agreed means, put into practice or operation.

The immediate enquiry in such a case is whether such words, not per se inciting sedition, are incapable of manifesting a hostile intention, I think they are capable thereof. A person (let it be assumed endowed with knowledge of the matters alleged in the indictment), hearing or reading these words - ostensibly innocent in themselves - might reasonably conclude that they nevertheless represent a manifestation of the wicked intent to overthrow the State. This view I think is fully supported by the passages, appearing in the King vs. Andrew Hardi, State Trials, New Series 1, set out in the judgment of my brother Rumpff.

In these circumstances I am of the view that words p.4
spoken or written in furtherance of a conspiracy to overthrow the State by violence, alleged to be the means employed for the achievement of that purpose, do not amount to treasonable overt acts even if they do not per se constitute an indictment to violence or sedition; furthermore that the acts set out in parts C, D and E of the indictment, might for reasons mentioned by my brother Rumpff, be held to constitute acts manifesting such an intention and tending towards the achievement of the criminal design alleged by the Crown. I do not think it desirable, or necessary, that I should at this stage enlarge upon the reasons given.

I turn now to ground (2) of the Notice of Exception and objection. The first point taken by Mr. Maisels was that the Crown failed to make it clear whether part B of the indictment charged only one overt act - the act of conspiracy - or, whether in addition thereto, it charged as many overt acts as there were ancillary agreements contained in paragraphs 4 (b) (i) to (vii) of part B. This difficulty the Crown met by intimating that only one overt act, the act of conspiracy, was charged and that it would amend the indictment to clarify the position. This application was made, a matter to which I shall have to return later on, and the Court allowed the amendment. For present purposes part B of the indictment accordingly charges only one act, namely, the act of conspiracy.

Mr. Maisels'next pointed to the opening words, 'in p.5
pursuance and furtherance of the conspiracy', of parts, C, D and E of the indictment and said they caused the accused emparrassment in the following fashion:-

The words could be used, so he contended, for three purposes: - either to taint an act thus performed, but otherwise innocent, with illegality; or, to impose criminal liability on each accused for acts committed by others on the basis of vicarious responsibility, or thirdly, to achieve both such purposes.

The question whether the indictment charged the accused in a manner giving rise to vicarious responsibility became important, since Mr. Maisels intimated that he proposed addressing alternative arguments to the Court; if, so he said, the accused were not so charged, he would contend that they were improperly conjoined. On the other hand, if they were so charged, he would contend that the indictment was bad in law for that reason.

The Court/....

The Court was not presented with a full argument on p.5
the last mentioned basis, and as it may perhaps involve a question of some importance, it becomes necessary to deal with the events which gave rise thereto and rendered further argument unnecessary.

In developing this argument, Mr. Maisels had reached the stage where he was about to furnish his reasons, and had in fact given the first thereof, why it would have been improper so to have charged the accused, Mr. Pirow then intervened and stated that he 'entirely agreed' p.6
with Mr. Maisels and that it was in fact unnecessary for him (Mr. Maisels) to produce the authorities he wished to refer to. (of. p. 1232 - 1234 of the record). Counsel for the Crown went on to state that the Crown never attempted to 'charge the accused vicariously'.

On the plain wording of the indictment my prima facie view was that it was difficult to avoid a conclusion that the accused were charged vicariously; and had matters remained there, I might well so have interpreted the indictment, with what results - in view of Mr. Pirow's concession, I do not pretend to know.

However, further developments ensued and it is in this connection that I revert to the amendment applied for by the Crown on the 17th February, 1959. The amendment, which the Court allowed, deleted the last paragraph of part A of the indictment and substituted the following:

> 'namely, the hostile and overt act laid against each of the accused in paragraph 1 of part B of this indictment, the hostile and overt acts laid against him or her in part C of the indictment, the hostile and overt act laid against him or her in part D of the indictment and the hostile and overt act laid against him or her in part E of the indictment."

During the course of his argument on the manner in which the indictment p.7
should be construed, Mr. Pirow made reference to this amendment, - then sought, in the following terms:-

> "..but it is quite clear, if (one) looks at the indictment, and it will be if the amendment is granted - you will see that we specifically attach every charge to a particular accused. We speak of one or more of the accused in respect of certain overt acts. There can be no question of anybody being charged vicariously."

In the light of the statement made by Mr. Pirow, at the time when the application so to amend the indictment was before the Court, and with reference to one of the purposes it would serve, the indictment cannot now be construed in the sense that all the accused are sought to be held liable for each of the individual acts said to have been committed by the various accused mentioned in parts C, D and E of the indictment.

The true effect and scope of Mr. Pirow's statement, with reference to the indictment, - that no one was 'being charged vicariously', - has caused me some difficulty. Is it to be inferred that the accused were not collaborators and are not charged as such, despite the facts alleged - that they acted in concert and with common purpose; that they con- p.8
spired with each other ; that they agreed from time to time on the means they would employ for the achievement of their criminal design and that the overt acts set out in parts C, D and E, constituted the agreed means put into practice and operation by the respective accused therein mentioned;

or, does/.....

or, does it mean, that the Crown does not ask for a conviction against all the accused, - (and in this sense does not charge all the accused vicariously,) - in respect of the individual overt acts set out in these parts of the indictment, - but that the respective accused who were charged therewith nevertheless, in so committing those overt acts, remained and never lost the quality or capacity of having been and having acted as collaborators. p.8

To give effect to the first meaning would, so it seems to me, give rise to a contradiction in terms. If the accused acted in concert and with common purpose, were conspirators, agreed on the means to be employed for the achievement of their object and put those means into operation, those who did so, as all the others, remained collaborators. I find it impossible to construe the remark of Counsel in a manner giving effect to the first meaning without arriving at this contradiction in terms; and I do not think that Counsel intended this meaning to be attached to his remark, since, in his subsequent argument he proceeded on the basis that the accused mentioned in parts C, D and E of the indictment still acted as collaborators and were then about the business of advancing the conspiratorial cause.

If the second meaning is given effect to, then not only would it be in harmony with the stand taken by Mr. Pirow but also, no contradictory state of affairs would result. The true effect of, or meaning to be given to the remark, was not canvassed during argument, but in the light of the allegations in the indictment, and the fact that the remark was made particularly with reference to parts C, D and E thereof, the indictment, as I interpret it, charges the accused on the basis that they were and acted in concert and as collaborators throughout; insofar as parts C, D and E are concerned, the overt acts therein set out are charged not against all the accused but only against such of the accused as actually committed the act or acts - even though they continued acting as collaborators and for the purpose of advancing the object of the conspiracy. p.9

Having thus construed the indictment I now turn to consider Mr. Maisels' alternative argument that the accused were improperly conjoined in the present indictment, for which reason, he said, the proposed amendment should be refused and that the indictment should be set aside. The argument proceeded on the following lines: - in part B of the indictment all the accused are charged with the act of conspiring, which would naturally enable the Crown to conjoin the accused, and with which, Counsel said, he had no fault to find; but in parts C, D and E, each of the accused, either alone or with others, are said to have committed a separate overt act(s) with which only he or she and no other accused is charged. "As we see it" - said Counsel - "and looking at the matter most favourably from the Crown point of view for the moment, there are four counts, that is, taking all the counts in part C as one - all the counts in parts D and E as one. If that is so, it is perfectly clear that one has a further position that arose in Davids' case" (1958 (3) S.A. p.82 at P. 90). p.10

In our earlier judgment we had the occasion to consider Davids' case, and came to the conclusion, that but for the decision in R. vs Heyn and Others, 1956 (3) S.A. p. 56, the submission then made that the accused were improperly conjoined would have succeeded. Our reasons are available in the official reports. (of Farid Adams and others vs Regina, 1959 (1) S.A. p.646 at 664 et seq.)

No good purpose will be served by repeating them in this judgment and I will accordingly confine myself to the indictment and the question presently in issue. Although the Criminal Procedure and Evidence Act, whilst making provision for the conjoinder of persons in one indictment

does not/.....

does not deal with instances when they may not be conjoined, it would appear that 'the conjunction of different accused in one indictment may only take place in respect of the same offence or transaction, although their association with it may have been at different times and in different degrees." (of. Gardiner & Lansdowne S.A. Criminal Law and Procedure Vol. 1, 6th edition at p.358). The rule precluding the conjoinder of persons, albeit for the same class of offence, where it arises out of different facts or forms a different transaction, finds its origin, so it seems, in prejudice which might arise in a number of ways to persons so conjoined. p.10

The present indictment, as mentioned earlier on, alleges that the accused acted in concert and with common purpose; that they conspired with each other; that they, during the period of the conspiracy, agreed on the means they would employ for their purposes, and that the overt acts set forth in parts C, D and E represented the agreed means as put into operation. These allegations I interpret to mean, that the accused having agreed on all these things, put into operation - as collaborators, a planned course of treasonable conduct, in which the accused mentioned in parts C, D and E of the indictment took part in the manner therein set out. p.11

It is in this connection that I desire to return to a brief consideration of Heyne's case (supra) and to the basis of the judgment. The point at issue, as I read it, was whether the crime of fraud was capable of treatment on a course of conduct basis. The Court decided it was and could so be charged - the whole series constituting one offence. The Court was primarily concerned with that issue and not with the question of mis-joinder as such. Nevertheless, so it appears to me, the decision has a bearing on the present matter and serves as an authority in support of a joinder of the accused in this indictment. In Heyne's case, at page 617, SCHREINER, J.A. points to the fact that the accused were collaborators, acting in concert to make a systematic series of false representations. Because they acted in concert, even though their participations did not cover the same period, the Crown was not precluded from "charging them together" on a course of conduct basis, since, despite the fact that they could not, in the premises, all have been liable for all the false representations constituting the series of frauds, no prejudice ensued. p.12

Having regard now to the allegations in the present indictment, despite the fact that the acts in parts C, D and E might not have been "a series of closely following similar acts" giving rise to a course of conduct in the ordinary sense of the words, it is difficult to see why these acts, if so agreed upon and committed for the achievement of the purpose the accused are said to have had in mind, could not be regarded as a treasonable course of conduct arising from the conspiracy, and why the accused in the absence of prejudice, - a matter I shall deal with later on, - are not to be conjoined.

There is yet another approach to the question. It is a common cause that the accused are properly before the Court on the first overt act charged, - the act of conspiracy. That being so, the question arises whether the further overt acts committed by them individually, but nevertheless, if my interpretation of the indictment is correct, - namely, as conspiratorial collaborators seeking to achieve their common objective and acting with that intent, - renders the conjoinder improper. The accused are all charged with the same, and - contends the Crown, - one offence of treason based on a number or series of overt acts; on the framework of the indictment the overt acts introduced in parts C, D and E stem from a common origin, namely the conspiracy. They are not unrelated inasmuch as they find this common origin and were committed with the same intent. If I am correct that the disclaimer of vicarious liability on the part of the Crown in the circumstances set out, does not necessarily have the effect of robbing the accused of their quality or capacity of having acted as collaborators, p.13

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they in committing these overt acts, were still busy or about the commission of the same offence, i.e. treason, albeit at different times, in which event a joinder under section 327(1) of the Act is permissible. p.13

In this respect I am not unmindful of the fact that as many separate counts of treason may be charged as there are overt acts committed. The crime of treason, however, is perhaps sui generis - it is an inchoate crime - never successful, in the sense that the accused can be said to have achieved their purpose; the accused are brought to Court because their endeavour failed; whilst accused persons are working in concert, working towards the achievement of their common objective, the fact that they commit dissimilar overt acts does not mean, if these overt acts stem from a common origin -- the conspiracy in the present instance - that they are committing different offences. In committing these individual overt acts they, in the circumstances mentioned, are all committing the same offence but only at different times. If the Crown in charging the accused with one count of treason, relies on a series of overt acts committed by the various accused, the fact that the overt acts differ either in quality or, in the case of some of the accused, in number, does not mean that they are charged with the commission of different offences. In this setting I think it only means that some of the accused have committed the same offence at different times. If I am correct section 327(1) of the Act applies and a joinder is permissible. p.14

That the Crown is entitled to charge one count of treason based on a series of dissimilar acts seems to be, not only permissible but in accordance with practice in indictments of treason. My brother, Rumpff, has collected and referred in his judgment to some of the authorities which suffice to illustrate the point.

The present indictment in part A presents but one count of treason based on a series of overt acts set out in the remaining parts of the indictment, and although the Crown has separated and collected these acts in this fashion, I do not incline to the view that it offended against the practice in indictments of treason. It is entitled to base but one count of treason on a number of overt acts -- even if widely dissimilar in nature. In my view of the matter the indictment must be so viewed. If this is correct then section 312(2) of the Act, - requiring more counts than one to be consecutively numbered, has no application and the complaint made by Mr. Maisels on this score falls away.

I return once more to his contention that there is no room for the application of "a course of conduct basis". By way of example he pointed to part D of the indictment and said that the seven documents therein mentioned, spread over the lengthy period covered by this indictment, could not be said to give rise to a "course of conduct", in addition, so the argument proceeded, it would be strange indeed, if in the middle of a so called "course of conduct" one finds only some of the accused liable for their own particular overt acts said to have been committed in the course of such conduct. But these features, whetever strange results may ensue, do not render these acts any the less part and parcel of a course of conduct if the accused conspired with each other and, agreed upon and put these acts into operation. These acts, whether they are only a few or many in number, remain part of a planned course of treasonable conduct on my reading of the indictment. p.15

I next turn to consider the question of prejudice. In our previous judgment consideration was given to this question and we came to the conclusion there was no prejudice to the accused in having been conjoined in the earlier indictment. I shall not revert to those considerations but confine myself to certain additional aspects which were canvassed in argument.

On the/.....

On the present indictment the first overt act charged is the act of conspiracy. Proof of the conspiracy will involve, in the case of each accused, the evidence of or concerning, acts performed, speeches made and documents prepared by all the other co-accused and other co-conspirators mentioned in the indictment. This appears to be the position - inevitably confronting the accused, since the Crown, in its Further Particulars makes it clear that the existence of the conspiracy and the accuseds' adherence thereto, are to be inferred from the various speeches, documents and other matters referred to in its Summary Facts. p.15

How then may it be asked does the fact that the Crown has brought further overt acts against the accused individually, based on these speeches and documents on which it relies for its inference that the accused entered into a conspiracy, cause them prejudice. Mr. Maisels said they would be deprived of a statutory right. He pointed to section 256(b) of the Act which precludes a conviction on a charge of treason, except on the evidence of two witnesses - where only one overt act is charged; if the accused had been charged only with the act of conspiracy, the Crown he said, would have had to produce its two witnesses. By charging the accused with more than one overt act, in the manner set out, the Crown, he suggested, wished to take advantage of the position in the Criminal Procedure Code, which "might enable them to get a conviction which they could not otherwise get". p.16

It does not seem to me that this is a valid argument. It appears that every single accused, even if tried individually, could be confronted with a charge of more than one overt act; if for example accused No. 1 is charged with the act of conspiracy and in addition thereto the other overt acts laid against him in the indictment, the Crown could quite legitimately overcome the so called "two witnesses" rule. If this is correct then there is no room for an argument based on prejudice said to arise because the accused are deprived of their statutory rights under section 256(b) of the Act. This section does not deal with joinder of persons but only with sufficiency of evidence in a case of treason. It concerns itself, in other words with questions of proof. If therefore more than one overt act is charged, in fact a series of overt acts presented under one count of treason, the fact of the matter is that more than one overt act is charged; if per chance, in such event, the totality of overt acts so charged is for purposes of the section to be construed as a charge of but one overt act - (not that I now seek to construe the section thus) - no prejudice arises; it only means that the Crown would fail in the final result unless it complies with the requirements of the section. p.17

I must finally deal with Mr. Pirows' contention that the present conjoinder of the accused is authorised by section 328 of the Act which provides

> "whenever any person in taking part or being concerned in any transaction commits an offence and any other persons in taking part or being concerned in the same transaction commits a different offence, such persons may be charged with the respective offences in one charge and be tried thereon jointly".

The act which renders the section operative is, the act "in taking part or in being concerned in the same transaction". In other words, it is the participation of accused persons occurring at the same time in a particular transaction, giving rise to the commission of different offences, which brings the section into operation. Once that particular transaction is completed and the participants have not committed different offences, the section cannot be relied on.

The section/...

The section was originally introduced by the General Laws Amendment Act of 1935, and as it then read, (the old section 139 (bis) of the Act before its present amendment), the words "both" found its place between the words "different offence" and the words "such persons" where they presently appear. By section 57 of Act 68 of 1957, the word "both" was deleted and the scope of the section was accordingly enlarged. Even so, I do not think that this amendment affects the remarks of Blackwell, J. in R. vs. Meyer 1958 (3) S.A.L.R. page 144, at page 146 namely: p.17

> "It is usually accepted that the reason for inserting this provision in the General Law Amendment Act in 1935 was to deal with cases under the Immorality Act, where one section makes it an offence for a European male to have intercourse with a native female and another section makes it an offence for her to commit such intercourse.... What I would stress about section 139 (bis) is that you have two persons united in the same transaction but guilty of different offences, i.e. different classes of offences, offences under different sections of the same statute or possibly different offences at common law. In the present case, the offence charged against these two persons is the same offence. For that reason ... the section has no application to a matter like the present...."

If it is the act of union in the same transaction which governs the applicability of the section, then it follows that if the transaction is completed and different offences do not arise, then the provisions of the section cannot be involved. If therefore, the agreement whereby the accused became conspirators, representing for purposes of the section "a transaction", was included, that marked, by the same token, the conclusion of that particular transaction since it constituted an overt act capable in itself of supporting a separate count of treason. The union in that transaction however, gave rise to the same and not different offences. If it is to be assumed that the further overt acts set out in parts C, D and E of the indictment were committed by the respective accused therein mentioned, in concert with all the other accused and as conspiratorial collaborators or agents, then in theory, whilst all the accused can of course be said to have taken part or to have been concerned in the commission of those overt acts, or - for purposes of the section - those "transactions" - they would not be committing different offences; they all still commit the same offence. If on the other hand, the accused mentioned in parts C, D and E did not commit the acts in the capacity mentioned, but only in their individual capacities, then I find it difficult to see on what principle or basis it could be said that any of the other accused took part or were concerned in the individual overt acts - or "transactions" thus committed or performed. The only possible basis is that these acts were performed in furtherance of the main transaction viz. the conspiracy and represented a "continuing" participation in that transaction. If so, then apart from the difficulty that the conclusion of the conspiratorial agreement marks, in my opinion the conclusion of that "transaction " for purposes of the section, the accused, if their individual overt acts are to be regarded as a "continuance" of the main transaction, remain and continue to remain, collaborators. p.19

I am unable to agree with the conclusion of my brother Rumpff that section 328 authorises a conjoinder of the present accused; in the net result, however, the objection insofar as paragraph 2 of the Notice of Exception and Objection is concerned is dismissed. p.20