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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
and
THE CROWN

REASONS FOR JUDGMENT

RUMPFF, J: On the 2nd March this Court made an order accompanied by some brief explanatory reasons. We indicated that we would give our full reasons later. They now follow:-

In the Notice of Exception and Application to Quash the Indictment dated the 28th January, 1959, the indictment was attacked on a number of grounds. The defence first argued the grounds set out in paragraph 10 and part of paragraph 12(a) and (b) of the Notice. Paragraphs 10 and 12 read as follows:-

"10. The indictment is bad in law and defective on the face of it, in that the acts set out in parts C, D and E thereof are incapable in law of constituting overt acts of treason, and the indictment pro tanto discloses no offence cognisable by the Court.

12(a) The allegations in sub-paragraphs (i), (vi) and (vii) of paragraph 4(b) of part B of the indictment are vague and embarrassing. Page 2.

(b) The allegations in sub-paragraph (i) to (vii) of paragraph 4(b) of part B of the indictment are embarrassing and bad in law in that they are

(i) irrelevant to the objects alleged in paragraph 1 of Part B, and
(ii) incapable in law of constituting means of achieving the said objects or any treasonable objects."

In part B(i) of the indictment the Crown alleged a conspiracy to overthrow the State during the period October 1952 toDecember 1956. Part B(4) of the indictment (unamended) reads as follows:-

"4(a) It was part of the said conspiracy that whilst the objects set forth in paragraph 1 hereof remained constant throughout the whole period as aforesaid, the means for achieving such objects would be determined from time to time.

(b) During the subsistence of the said conspiracy and at various times during the said period and at places to the prosecutor unknown it was agreed that the said objects should be achieved, inter alia, by the following means:- Page 3

(i) sponsoring, organising, preparing for and convening a gathering of persons known as the Congress of the People for the adoption of a Freedom Charter containing inter alia, the demands set forth in Part E hereafter, the achievement whereof in the lifetime of the accused would to the knowledge of the accused necessarily involve and was intended by the accused to involve the overthrow of the State by violenceand thereafter propagating the achievement in their lifetime of the said demands of such Charter, adopted at Kliptown, in the district of Johannesburg, on the 25th - 26th June, 1955;

(ii) recruiting, enlisting and preparing for acts of violence, a special corps of Freedom Volunteers, being a semi-military and disciplined body whose members were obliged

to/.....

to take an oath or solemn pledge to carry out the instructions, legal or illegal, of the leaders of the associations of persons and/or corporate bodies set forth in Schedule B hereto; and administering the said oath or solemn pledge to Freedom Volunteers.

(iii) advocating and propagating unconstitutional and illegal action, including the use of violence as means of achieving the aforesaid objects of the conspiracy; Page 4

(iv) organising and participating in various campaigns against existing law and inciting to illegal and violent resistance against the administration and enforcement of suchlaws and more particularly

(a) The Native Resettlement Act No.19 of 1954;
(b) The Bantu Education Act, No.47 of 1953.
(c) The Native (Abolition of Passes and Co-ordination of Documents) Act. No.67 of 1952;

(v) promoting feelings of discontent or unrest amongst the hatred or hostility between the various sections and races of the population of the Union of South Africa for the purpose of the ultimate violent overthrow of the State;

(vi) advocating, propagating or promoting the adoption and implementation in the Union of South Africa of the Marxist-Leninist doctrine in which doctrine there is inherent the establishing of a Communist State by violence;

(vii) preparing and conditioning the population of the Union of South Africa, and more particularly the non-European section thereof, for the overthrow of the State by violence, and inciting it to carry into effect the means hereinbefore set out; Page 5

The Defence argument ran as follows:-

although there are in the South African law of treason no recognised classes of treason, the examples of treason which have not become obsolete and which are mentioned by the authorities show that they fall into three groups, viz:-

(a) aiding the enemy in time of war;
(b) plotting or attempting the death of the Sovereign, and
(c) waging war against the State internally.

The treason charged in the present indictment falls into the third group. According to the Roman Dutch authorities, words, other than words constituting an agreement, when related to this particular form of treason, i.e. treason consisting in the levying of war against the State internally, can only be an act of treason when they constitute at least an incitement to sedition. None of the objects alleged to have been agreed upon in paragraph 4(b) of Part B of the indictment constitute incitement to sedition. Only a few of the speeches in Schedule C and none ofthe documents in Schedule D are capable of being an incitement to sedition.

In support of this argument the following authorites were quoted: De Bhoemer, Meditationes, 124;4 "Publica prodition incidit in perduellionem, quae latius patet, et absoluitur verbis, factisque subditorum, cum animo hostili coniunctis, et ad euertendum reipublicae statum efficacibus. Nam etiam voces seditoisae et turbulentae, hanc vim habent, et summa imis miscere et bella civilia excitare, animos aliorum civium irritare consequenter republicae vinculo perniciosissimae esseposint." Page 6

Carpzovius/.....

Carpzovius. Verhandeling der Lyfstraffelyke Misdaden, (Vertaling van Hogendorp) 38, 27:

"Verders, wordt de misdaad van gequetste Hoogheyd op veelerhande wysen en in menigvuldige gevallen gepleegd, waarop de Rechtsgeleerden konnen worden nagezien. Maar wordt doorgaans in twyfel getrokken, of hetquaad-spreeken tegen den Vorst hier toe ook te brengen zy? Dat oudstyds het lasteren der Vorsten tot de misdaad van gequetste Hoogheyd behoort heeft, doch naderhand in laatere tyden daaronder niet begreepen is geweest, wordt by gemelde Rechtsgeleerden eenstemmiglyk beweerd en aangetoond. Wier gevoelen niet slechts zeer eenparig, maar ook (myns achtens) zeer aanneemelyk is, zo maar de woorden der quaadspreekinge in zich zelve niet zyn of oproerig, waardoor 't volk ter opneeminge der wapenen tegen de Vorst wordt aangehitst, L.1.n ad L.Jul.Majest. of ter muytine geschikte toeroepengen, waardoor's Vorsten welstand en 't Gemeenebest in de waagschaale gesteld word, L.28 par 3 n de poen."

Moorman, Verhandelinge over de Misdaad, 1, 3, 4: Page 7

-- "Het is eene gelyke misdaad (d.w.s.Hoogverraad), segt deselve Ulpianus, gewaepent volk tegen de Republicq te doen samenkoomen, of te maeken, dat eene vergadering of toevloet van volk tot oproer worde beyeen geroepen."

Huber, Heedendaegse Rechtsgeleertheyt, 6,16,9: (Gane's translation).

"Examples of this crime against safety are when someone collects armed men or arms alone against the Commonwealth, occupies fortified places, helps the enemies of the State or conducts secret negotiations with them, stirs the soldiers or the people to insurrection, or engages in it himself, retreats unnecessarily before the enemy in war, surrenders position, abandons his military command, and the like."

Also to the same effect, are Voet, 48:4: 3, Matheus, 48:2, and other authorities.

The Defence contention was that from a consideration of Page 8 these authorities it is clear that apart from conspiracy the only words which are referred to as constituting perduellio are words of incitement to seditio or oproer. It was also argued that Part B of the indictment didnot allege that anyone of the means agreed upon for the achievement of the objects of the conspiracy was incitement to seditio, that the means alleged in Part B 4(b) of the indictment are incapable in law of achieving the objects set out in paragraph 1 of Part B, and that when the agreed means were put into action, as alleged in Parts C, D and E of the indictment, the acts set out in those parts could not be treasonable acts.

If the contention of the Defence is correct it follows that the test to be applied in ascertaining whether an act is an overt act of treason will vary according to circumstances, particularly according to whether an external war exists or whether there is internal insurrection. Indeed, the Defence argued that different tests should be applied because, in the one case, so it was suggested, there is an enemy, and in the other, where there is a conspiracy only, there is no enemy.

In developing these arguments, the Defence was compelled to concede the following result: a letter written but notposted, to the enemy in the time of war, containing information to the enemy, is an overt act of treason but a letter placing an order for a thousand rifles, written by a conspirator in pursuance and in furtherance of a conspiracy to overthrow the State, is not an overt act Page 9 of treason.

On the face of it the contention of the Defence seems untenable and indeed, in my view, the fallacy in this argument is apparent.

The authorities quoted do not purport to determine the qualities of an overt act of treason, they only quote examples of what constitutes/.....

treason. As Moorman 1, 3 1 puts it:

> "Het soude een werk van een bijna oneindige arbeit sys hier te spreeken van alle de verscheide wysen, op welke dit Hoogverraet kan gepleegt worden. Wy sullen derhalven maer alleen gewaegen van enige van de voornaemste, welke wy in de wette vinden opgenoemt."

The Defence argument is valid if the charge is based on words only.

If it is alleged by the Crown that mere words constitute High Treason and if the overt act is an act of incitement to sedition, the words must obviously be capable of inciting those to whom they were addressed.

That is what Carpzovius had in mind in 38, 27, when, in posing the question whether "quaadspreeken tegen de Vorst" constitutes treason, he says"zo maar de woorden der quaadspreekinge in zich zelve niet zyn of oproerig, waardoor 't volk ter opneeminge der wapenen tegen den Vorst wordt aangehitst, of ter muytinge geschikte toeroepengen, waardoor 's Vorsten welstand en 't Gemeenebest in de waagschaale gesteld wordt." Page 10

A similar principle is to be observed in the English law. In his charge to the Grand Jury, the Lord President in the King vs. Andrew Hardi, State Trials, New Series L. p.610 at p.625, inter alia, made the following observation: (The italics are mine)

> "Gentlemen, it is also proper that I should take notice of one species of overt act which has created more difficulty than any other, and as to which, in formertimes, some decisions were given which are now universally held to be against law - I mean words and writings. As to these, the law seems now to be settled that the mere words spoken, however, wicked and abominable, if they do not relate to any act or design then on foot against the life of the King, or the levying of war against him, and, in the contemplation of the speaker, do not amount to treason, though they may be otherwise severely punished; for example, if a man were openly to declare in so many words, that the King ought to be killed, and that it would be meritorious to do so. This would be a great crime and severely punishable, but it would not be treason, unless it were proved, that the man had in contemplation some plot, either of his own or others, then actually in progress for that purpose."

Page 11

and

> "The same may nearly be laid down as to writings. A treatise to prove that all Kings are tyrants, and therefore ought to be killed, especially if never divulged or published, does not amount to treason; and, therefore, the decision in the case of Algernon Sydney is now held to be against law; for, in that case, certain papers found in his private desk, and unpublished, were laid as a substantive overt act of High Treason. On the other hand, all writings, though unpublished and much more if they have been published, will amount to an overt act of treason, if they are in furtherance of any treasonable measure then in actual preparation."

The present indictment does not allege mere words.It alleges a conspiracy and the words spoken and written in pursuance and furtherance of that conspiracy. Page 12

To ascertain whether this indictment discloses a case against the accused, one should not look only at the words alleged to have been used by the accused. One should enquire whether the acts averred against the accused are in law overt acts of treason, having regard to the circumstances to which these words are alleged to be related.

The Appellate/.....

The Appellate Division, in Rex cs Leibrandt and Others, 1944 A.D. at p.284 approved of the definition of an overt act given by Lord Chief Justice Abbott in Rex vs. Thostlewood, State Trial 33, at p.685. In his charge to the Jury, the Lord Chief Justice, inter alia, said:-

> "I have already intimated, that any act manifesting the criminal intention, and tending towards the accomplishment of the criminal object is, in the language of the law, an overt act. It will be obvious, that overt acts may be almost infinitely various; but in cases where the criminal object has not been accomplished, the overt acts have frequently consisted of meetings, consultations, and conferences about the object proposed, and the means of its accomplishment; Agreements and promises of mutual support and assistance; incitement to others to become parties to and engage in the scheme; assent to proposed measures; or the preparation of weapons or other things deemed necessary to their fulfilment. All these, and other matters of the like nature, are competent overt acts of the particular kind of treason - of the particular compassing and imagination to which they may happen to apply." Page 13

Lord Reading, in his charge, in the Casement case, used the following Language:-

> ".... overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled."

In law, therefore, the treasonable overt act is a visible act, committed with the intent to overthrow the State, and it is an act which constitutes a means whereby the overthrow is sought to be achieved.

The Act itself need not per se manifest the treasonable intent. The act may be an apparently innocent act and the treasonable intent may be proved by circumstantial evidence. Cf. Rex ovs Wentzel, 1940 W.L.D. at p.275 and Cramer vs United States, United States Reports Vol.325, at p.32 where Mr.Justice Jackson observes:

> "Actions of the accused are set in time and place in many relationships. Environment illuminates the meaning of acts, as context does that of words. What a man is up to may be clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and sequence of his acts with those of others, the interchange between him and another, the give and take of the situation." Page 14

If this test is applied to the present indictment, two questions arise. Firstly, might it be said that the acts laid against the accused in parts C, D and E of the indictment, if proved, manifest the hostile intent, and, secondly, might it be said that those acts are capable of contributing to the achievement of the ultimate object. The latter question is of importance as far as the conspiracy itself is concerned because, if the means agreed upon by the accused are incapable of contributing to the achievement of the object, the conspiracy itself would be inefficacious.

As far as the first question is concerned, the acts laid against the accused are, on the face of the indictment, related to the alleged means by which it was sought to overthrow the State. If, therefore, the conspiracy is proved, with its alleged terms, the acts in C, D and E, if proved, might be held, in our opinion, to disclose the hostile intent. Page 15

The answer to the second question requires a consideration of the nature of the alleged means.

It seems clear that when a conspiracy to overthrow the State has been proved, ?(by) any act of whatever nature that would help the conspirators to achieve their object would be an act falling within the definition referred to above.

Such an act would be a link in the chain of events leading up to the actual overthrow of the State.

Between the conspiracy and the overthrow of the State may be a long road of preparation. There may have to be the acquisition of firearms, the enlistment of volunteers and the creation of civil disturbances or dissatisfaction with the Government. These acts, without the hostile intent, would never amount to treason, but they would, qua acts, assist in the achievement of the ultimate object.

In my view each one of the means set out in paragraph 4(b) of part B of the indictment could help the accused to achieve the alleged agreed object.

Convening the Congress of the People and drafting the Freedom Charter might constitute, on the face of the contents of the Charter, a potential weapon of propaganda. The document envisages a completely different type of state to what South Africa is. By advocating illegal action, organising campaigns against existing laws, by inciting violent resistance against the enforcement of laws and by promoting feelings of discontent and hsotility between the races of South Africa, a political climate and a mental susceptibility might be created without which the overthrow of the State might never be achieved. Page 16

In my view the means set out in paragraph 4(b)(i) to (vi) and the acts laid against the accused in Parts C, D and E of the indictment and related to the aforesaid means, might be held to tend towards the achievement of the criminal design alleged by the Crown.

No acts in Parts C, D and E of the indictment are related to the means set out in paragraph 4(b)(vi) and (vii).

The defence contended that inasmuch as these means are unrelated to any overt acts, they are irrelevant. It is also argued that paragraph 4(b)(vi) is vague and embarrassing in that the mere allegation that in the Marxist-Leninist doctrine there is inherent the establishing of a Communist State by violence, does not carry the inference that the accused agree to incite anybody to commit violence.

So, too, it was argued that paragraph 4(b)(vii) could not stand in that the words "preparing and conditioning" and "the population of South Africa" were too vague. Page 17

We do not agree that paragraphs 4(b)(vi) and (vii) are irrelevant. The Crown is entitled to set out the terms of the alleged conspiracy and the means set out in these paragraphs, even if unrelated to any overt acts, are relevant to the conspiracy itself.

The Defence did not ask for any particulars in regard to paragraphs 4(b)(vi) and (vii) concerning the words and phrases about which they complained. In my view these paragraphs are reasonably clear.

The Defence also asked for more particulars as to the alleged international movement known as the Liberatory Movement, pleaded as an innuendo in Schedules C and D. In my view the Crown's answers were sufficient.

The Court made no order on the Notice of Exception on the grounds of misjoinder.

The indictment alleged that the accused, acting in concert and with a common purpose, committed the overt acts laid against each accused in paragraph 1 of part B and in parts C, D and E of the indictment.

If the accused acted in concert, each accused would be liable in law for the acts of the other accused.

Towards the end of the argument Mr.Maisels indicated that if the indictment intended to charge each accused with the overt acts committed by all the other accused, he would contend that the indictment was bad. Mr.Pirow, on behalf of the Crown, then and later during Page 18

the same argument, stated to the Court that the indictment did not charge each accused with the overt acts of the other accused. Notwithstanding the form of the indictment, I consider that this Court is bound by the attitude of the Crown.

If the Crown does not seek to hold the accused liable vicariously, is there any justification for the joinder of the accused on the overt acts other than the act of conspiracy? I think it is necessary firstly to analyse the indictment.

In my view there is one charge of High Treason against each accused. The charge does not allege a single overt act against each accused but a series of acts. This series of acts is not a true course of conduct (in which no separate acts are charged), nor a series of closely following similar acts but a series of acts committed with one criminal design.

In Rex vs. Heyne & Others, 1956 (3)S.A. at p.626, SCHREINER, J.A., said:-

> .... ordinarily a crime consists of an act or groups of acts constituting a single transaction the place and the time of which can be described with some precision. Some crimes, such as crimes of omission, may be continuous in their nature. In the case of other crimes when there is a series of acts done in pursuance of one criminal design, the law recognises the practical necessity of allowing the Crown, with due regard to what is fair to the accused, to charge a series as a criminal course of conduct, that is, as a single crime. (Rex vs.Smit, 1946, A.D.862) Page 19

A survey of the indictments in treason cases in our law reports show that in a number of cases, more overt acts than one have been embraced in one charge or count.

In De Staat vs. Phillips, Rhodes en Anderen.

Z.A.R.III, 1896, 301, sixty-four people were charged on four counts. In the second count they were charged with giving information to Jameson; keeping armed troops to assist Jameson, and making seditious speeches. In the third count the following acts are mentioned:-

the enlistment of men and the organisation of these men in military units and the erection of defence works. The fourth count charged them with usurping the function of the Republic, compelling the Police to remove from the streets, organising a police force, supplying arms to this force and appointing one Trimble as a judicial police officer.

In Vol.XXI N.L.R. there are reported a number of treason cases arising out of the Anglo-Boer War. In Regina vs. Vermaak at p.204 the accused was charged with a larger number of counts, mostly with taking goods, cattle and prisoners. In count three he was charged with assisting the enemy to burn the Magistracy and other buildings and with looting certain stores. Count fourteen refers to the commandeering of cattle and the taling of prisoners.

In Regina vs. Marais and Marais, p.242, the accused were, inter alia, charged in one count with assisting the enemy in operations being carried on at Ladysmith, with accompanying the enemy in movements to Elandslaagte and Mhlumayo and with performing the duties of military policemen.

In Regina vs.Adendorff, p.230, the accused was, inter alia, charged in one count with performing the duties of the office of Native Commissioner, issuing passes to certain Natives and commandeering Natives to work for the enemy.

In Rex. vs. De Wet, 1915 O.P.D., the accused was charged on a number of counts. In the sixth count he was charged as follows:-

> "As also in that, upon or about the 28th day of October in the said year, and at Vrede in the district of Vrede aforesaid, Page.21

the said Christiaan Rudolf de Wet, owing such allegiance as aforesaid and despite thereof, did wrongfully, unlawfully and with the intent aforesaid, together with Johannes Martinus Krog, Gabriel van Dijk, Frans Engelbertus Mentz, Harm Oost and divers other persons to the prosecutor unknown, armed in a warlike manner, occupy and take military possession of the said town of Vrede, and did in furtherance of the said rebellion during such occupation and with the intent aforesaid:-

(a) Break and enter the Post Office there being and did damage or destroy or cause to be damaged or destroyed certain telegraph and telephone instruments and wires at the said Post Office, the property of the said Government, with the intent to deprive the said Government of the lawful use thereof.

(b) Cause Colin John Fraser, who there and then lawfully occupied the position of Magistrate of the said district of Vrede under the authority of the said Government to be wrongfully arrested and detained.

(c) Make a certain speech in which he incited certain Bri..sh subjects or others there assembled to commit acts of hostility and to levy and make war and rebellion or continue to levy and make war and rebellion against our Sovereign Lord the said King and his said Government. Page 22

(d) Demand, commandeer and take or cause to be demanded, commandeered and taken for the use of the rebel forces aforesaid, from the following persons the goods hereinunder specified:-

(i) From James Booth in his capacity as Gaoler at Vrede aforesaid which position he lawfully occupied under the authority of the said Government, certain food supplies and other goods, the property of the said Government.

(ii) From Samuel Tawse, in his capacity as Sergeant of the South African Police, which position he lawfully occupied under the authority of the said Government, and certain clothing, an electrical torch and other articles, the property of the said Tawse and other persons whose names are to the prosecutor unknown."

In Rex. vs.Viljoen and Others, 1923 A.D., p.90, the accused were charged on three counts, the last of which embraced five paragraphs, each dealing with a separate episode. Viljoen was convicted of High Treason on the first and second counts and in respect of the first three paragraphs of the third; he was acquitted as to the remaining paragraphs.

In Rex vs. Mardon, 1948 (1) S.A. the accused was charged with a number of hostile acts. The acts in counts 2, 3, 4, 5 and 6 are pure courses of conduct, e.g.

"2. Between the 1st October 1941, and the 30th April 1945, and at or near Dresden, Berlin, Nimitz and the river Oder, near Stretten, and divers other places in Germany, the accused did work for and served in the aforesaid organisation controlled by the enemy."

In Rex. vs. Strauss, 1948 (3) S.A., p.-34., the accused was charged inter alia, in the first count as follows:-

"1. Between the 6th day of September 1939, and the 28th day of February, 1945, and at Berlin and Konigswussterhausen within Germany, the accused did, on divers occasions translate, indict, prepare and record news services, talks, commentaries and radio plays with the object that the said news services, talks, commentaries and radio plays be broadcast on behalf of the Propaganda Ministry and the Foreign Office of the said German Reich from the German Shortwave Station to the people of the Union of South Africa." Page 24.

When/.....

When a number of acts are included in one count,a conviction will issue even if only one act is proved, see R. vs Smit and Another, 1946, A.D.862, where SCHREINER, J.A. said at p.872:- Page 24

> "Where a series of acts over a period is alleged any one or more may be proved without the Crown's being obliged to prove the whole series."

It follows that, but for the Crown's attitude, all the accused would be liable on the present indictment for any overt act proved against any of the accused qualified only to this extent, that there are not more charges than there are accused, and, it follows, that but for the Crown's attitude, there would be no question of a misjoinder.

The joinder of the accused in respect of the conspiracy is, of course, perfectly valid. Page 25

Although the Crown charges all the accused with one charge of treason, the overt acts (apart from the conspiracy) in the series laid against each accused differ, and it follows, I think, that the series of acts are therefore different.

The Crown has suggested that the conspiracy and the individual overt acts of all the accused constitute one course of conduct and that the indictment, in fact, charges all the accused with one course of conduct and that this is permissible in view of the decision in Heyne's case.

Although this Court indicated when it gave its judgment that it came to the conclusion that there was no misjoinder,inasmuch as the accused were charged on a course of conduct basis, on reconsideration I am doubtful as to whether the indictment, in fact, charges a single course of conduct within the accepted meaning of the phrase.

It seems to me that the indictment might be construed as embracing as many courses of conduct as there are accused.

Page 26

In Heyne's case the accused who were convicted had been charged, inter alia on one count of fraud. In this count the fraud was set out as a series of closely following acts over a stated period. The Court held that a planned course of fraudulent conduct could be charged as a single crime of fraud even if it might be possible to analyse it into a series of separate frauds.

It appeared from the Crown case that not all the accused could have been associated with the course of conduct overthe whole period of its existence but the Court held that that was not sufficient reason for holding that they could not be charged upon a fraudulent course of conduct if they acted in concert to make a systematic series of false representations. The Court said:

> "Where the participation of several collaborators had not covered precisely the same period, particulars may be necessary to inform them of the extent of their alleged participation,but the Crown would not be precluded from charging them together on a course of conduct basis. In each case it is necessary to decide whether there has been prejudice to the accused; in the present case there has been none."

As I understand the judgment, the Court held that a joinder was permissible because, although the participations of the accused did not cover the same period, nevertheless, the accused acted in concert and were, in fact, charged with substantially the same offence. To my mind they were so charged for the following reasons. Page 27

The indictment alleged that the accused acted in concert over a certain period and the Crown sought to hold each accused liable for the acts of the other. The act of one accused was therefore the act of the other, notwithstanding the fact that the number of acts were grouped in a series.

A joinder/.....

A joinder was therefore permissible under section 327 of the Code because on the face of the indictment the accused had committed the same offence; i.e. the same act or series of acts. From the evidence led at the trial it appeared that the participation of the accused did not cover the same period. The common period, however, covered almost all the acts constituting the course of conduct and in law the accused were liable for all the acts committed in the common period. The accused therefore committed substantially the same act because the majority of the acts in the series laid against the accused were committed in the common period.

The accused who were found guilty were not convicted in respect of any individual acts committed outside the common period. They were convicted in respect of the course of conduct.

Page 28

In these circumstances the joinder of the accused was held to be valid because, in fact, there had been no prejudice.

The position as far as the present indictment is concerned is different. Against each accused there is laid a single charge of High Treason embracing a series of overt acts. The first overt act, the conspiracy, is common to all accused. In respect of the other overt acts laid against accused the indictment alleges circumstances from which vicarious liability flows but the Crown does not charge vicarious liability. In the result each accused is only to be held liable for the overt acts with which he is charged, although there is a common period of participation.

In my view the accused are therefore not charged with the same offence or with substantially the same offence although they are charged with the same class of offence. If this is correct, then the authority of Heyne's case does not cover the present indictment, however desirable it may be to charge the accused jointly. I wish to add, in my opinion, the accused would not be prejudiced in any way if they were to be jointly charged. My brother Bekker has dealt with the question of prejudice and I agree with his views.

In addition, I wish to add the following consideration. The accused are properly joined as far as the conspiracy is concerned. In order to establish the conspiracy, the Crown intends to prove against each accused all the overt acts committed by all the other accused. The interest of each accused in the overt acts of the other accused is therefore similar to the interest he would have had if the Crown had sought to hold him liable for those acts.

The next question to be considered is whether the Crown can rely on the provisions of section 328 of the Code.

This section provides that:

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

In terms of this section there may be a joinder of persons (although, for some or other reason, not vicariously liable), who have committed different offences, i.e. different acts, provided the acts were committed aspart of the same transaction. As an offence may be charged as a series of acts,it follows in my opinion that the Crown is entitled to charge the "different offence" asa series of acts and to join the accused under section 328 provided the series of acts were committed as part of the same transaction.

I know that the generally accepted reason for the inclusion of Page 30
section 328 of the Code is to enable the Crown to deal inthe same charge with persons who commit an offence under one section of the act and persons who offend another section of the same act. The Immorality Act provides a good example.

In view of the wording of the section as it now stands, there is, in my opinion no reason to limit the application of section 328 to statutory offences or to limit the meaning of the word "transaction" so as to apply only to a short period of time or to a limited number of acts. The "different offence"

referred to in section 328 may be a transaction in itself so that a "transaction" in terms of the section may in itself contain other transactions. Page 30

In each case the facts alleged must be considered to ascertain whether or not a transaction has been established.

In Odhams Dictionary "transaction" is said to mean, inter alia, "... the doing or performing of any business; the management of an affair."

The Oxford dictionary defines "transaction" inter alia, as "the carrying on or completion of an action or a course of action."

When two or more persons assist each other to achieve some result by committing separate offences, they are, in my opinion, engaged in a "course of action" and therefore in a "transaction" in terms of section 328 of the Code.

If the persons assist each other, they are, of course, to be considered collaborators. If they are collaborators in respect of the same offence, they are liable to be joined under section 327. Page 31

If they are collaborators, in fact, e.g. in immorality cases, but they cannot be charged with the same offence, they can be joined under Section 328.

In the present case the position is that although on the indictment the accused are in fact collaborators in respect of all the overt acts and could be joined on the basis that the act of one is the act of all (under section 327) they are in fact not so charged. They are charged with separate offences of treason. In my view, as far as the indictment is concerned, the result under section 328 is nevertheless the same as if in law they could not have been charged with the same offence.

In the one case they are not charged with the same offence because they cannot in law be so charged.

In the other case (the present case) they are not charged with the same offence because the Crown has elected not to do so.

In either case, because they are collaborators they are engaged in a course of action and for that reason can be joined under Section 328 of the Code.

With reference to paragraphs 1, 4 and 5 of the Order of Court, dated the 2nd March, I have read the reasons prepared by my brother Kennedy and the reasons prepared by my brother Bekker. I agree with those reasons and do not propose to add anything thereto.

F. RUMPFF.

PRESIDING JUDGE.