

THE STATE VERSUS

1. J.C. HOFFMAN
2. J. PARKER
3. I. JACKSON

1977
CAPE TOWN

IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. KB 475/76

CAPE TOWN, 18th March, 1977

In the matter of :

STATE VERSUS :

- 1) JOHN CHRISTOPHER HOFFMAN
- 2) JIANGODIEN DANNE
- 3) ISMAIL JACKSON

THORON, J. : The three accused were brought before my learned Assessors and me to be tried summarily on a charge of committing the offence of participation in terroristic activities, by contravening section 2(1)(a), read with sections 2(2) 5 and 9, of the Terrorism Act, 1967 (Act No. 83 of 1967).

The particulars of the offence which were set out in an indictment, as amended in the course of the hearing, read as follows (the charge having been drawn in Afrikaans only):

"Deurdát die beskuldighede op of onternt Maandag, 13 September 1967, on te of naby Athlone, in die distrik Wynberg, openlik, wederraagtelik en met die opset om die handhawing van wet en orde in die Republiek van Suid-Afrika te gevaar te stel dade gepleeg het en/of te wete die prokureur-generaal vervat in Skedule A, op te wete en/of afgelei en/of versprei het en/of persone van die Staat onbekom, uitgeloek en/of aangeroep en/of aangemoedig het on te staak, welke pleeg van die bedoelde misdad of dade die een of die ander of al die gepleeg is soos in artikel 2(2)(b), (d), (h) en (i) van die genoemde Wet 83 van 1967, uiteengesit, in die kennis van en/of n gedoolte daarvan gehad het of waarskynlik gehad het".

Tho/.....

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Tho/.....

The pamphlet referred to the indictment (to which I shall refer hereinafter simply as "the pamphlet") is well known to all those who have been concerned with this case throughout the trial and I do not intend to read this out. Nor do I intend to read out the various sections of the Statute referred to in the charge. Certain further particulars regarding the charge were requested by each of the accused and particulars were furnished by the State in reply to these requests. These also I do not intend to read out.

At the commencement of the trial all three the accused (1) pleaded not guilty. Each was represented by Counsel: number 1 by Mr. Soligson, number 2 by Messrs. Thirion and Aygnon, and accused number 3 by Mr. Weinkove. Towards the end of the trial Mr. Soligson was unavailable for a few days and Mr. Weinkove appeared for accused number 1 as well as accused number 3. Mr. Soligson, however, returned to argue first accused's case for him.

Mr. Klen, who represented the Attorney General, did not seek to establish by the evidence called by him that the pamphlet had been composed or drawn up by any of the accused as was alleged in the charge. He did, however, lead evidence to show that accused numbers 1 and 2 had been responsible for the printing or reproduction of the pamphlet - one Adale Williams Mrs. Horna Gabriel having rendered assistance in minor respects while the task was in progress, at the request of the said accused. According to this evidence the pamphlets were printed or reproduced on Monday the 13th September 1976, probably in the course of the afternoon but certainly not later than about 4.00 p.m. by means of a cyclostyle or duplicating machine which had been brought into a room at the back of the house of accused number 1's father, at 44 Port Jackson Road, Lincoln Estate, Grand Cayman.

This/.....

This room was one which was occupied at the time by two persons named Frederick Haupt and John Thoffler, both of whom became witnesses for the State. There was no evidence as to how many pamphlets were printed, although there was evidence that some 2000 sheets of paper (some of which were white, blue, green and yellow) had been available for printing.

In addition Mr. Klem adduced evidence intended to show that on the evening of the 13th September, 1976, the three accused and 5 or 6 other persons gathered in a bedroom at a house situated in Doreon Road, Rylands, in which one Jeff lived - Jeff being a friend of accused number 1. A couple of pamphlets, presumably two of the printer earlier that day, were circulated in the bedroom amongst those present there. In this bedroom it was decided by the three accused that the pamphlets which had been printed (or at any rate some of them) should be distributed that same evening by three teams consisting of two men each. According to this evidence adduced by the State, the decision was that with this end in view, Haupt, who happened to be amongst those present, should accompany accused number 3 in his car to distribute pamphlets at the Athlone stadium, where a soccer match was in progress; that number 2 should accompany number 1 in the latter's car to the Mosque, where Moslem members of the public would be attending a service or services; and that someone else - unidentified - should accompany Jeff in his car to some other place or places (which were not mentioned by the witness).

After this decision had been taken the people in the bedroom went to another room in the same house, where a television show was in progress. Here number 1 brought and handed over to number 3 a pile of pamphlets about one inch to one and a half inch in thickness. These pamphlets were identical with the pamphlet Schedule A to the indictment, save that they were yellow in colour/.....

colour. With this pile of pamphlets accused number 3 and Haupt
got off to the Athlone Stadium, which is situated about imme-
diately alongside Klipfontein Road, about one mile away from
Jeff's home. Outside the Stadium number 3 collected four young
newspaper vendors who were waiting for the end of the match with
the object of selling copies of the Herald newspaper to members
of the watching crowd when they should emerge from the grounds.
He handed all the pamphlets he had been given by number 1, with
the exception of about 10, to the four vendors with instructions
to distribute these amongst the crowd, and paid them ten cents (10)
each in anticipation of their doing so. Immediately thereafter
number 3 drove off with Haupt, dropping the latter near to where
he lived.

As regards the activities of the other two terms mentioned
earlier, the only evidence put before the Court was that just
before accused number 3 and Haupt drove off from Jeff's house to
go and accomplish their mission, accused number 1 was seen to be
sitting in the driver's seat of his car, outside Jeff's home,
with a cardboard box (about 18" x 10" x 6" in size) on his lap.
He had his hand in this box, which appeared to have papers in it,
and was fiddling with it or with its contents.

I shall not proceed any further with my discussion of the
evidence tendered for the State, as I have no intention of deal-
ing today with all the facets of the evidence put before my
learned Assessors and me during the course of the long trial
over which we presided or, for that matter, of dealing with all
the points of law argued before us by Counsel. This is because
we have come to a conclusion which renders it unnecessary to enter
upon the whole field of the enquiry opened before us.

In asking us to find the three accused guilty of the offence
charged, Mr. Klein did not contend that the intent to endanger

the/.....

the maintenance of law and order which was ascribed to the accused in the indictment - and which is a necessary element of the offense of contravening Section 2(1)(a) of the Terrorism Act - could be found proved without invoking the presumption created by Section 2(2) of the Act. Correctly, in our view, he accepted that the burden rested upon the State of establishing that the commission of the act alleged in the charge "had or was likely to have had" one or other of the results mentioned in the indictment, namely those described in paragraphs (b), (d), (h) or (i) - to wit :

- (b) "to promote, by intimidation, the achievement of any object";
- (d) "to cripple or prejudice any industry or undertaking or industries or undertakings generally or the production or distribution of commodities or feedstuffs at any place";
- (h) "to cause substantial financial loss to any person or the State", and
- (i) "to cause, encourage or further feelings of hostility between the ... and other inhabitants of the ... Republic".

Once the State had discharged that burden, the accused would of course be presumed in terms of Section 2(2) to have committed the acts alleged in the charge with intent to endanger the maintenance of law and order in the Republic, unless it is proved - and of course this means proved by the accused - beyond a reasonable doubt that they did not intend any of the results aforesaid.

It is entirely clear to my assessors and me that it cannot possibly be concluded that the mere act of printing or reproducing the pamphlet had or was likely to have had any of the

four results to which I have referred. Each of these results could only have flowed from a communication of the contents of the pamphlet to the minds of persons disposed to be influenced in a particular way by such contents - the particular ^{way} depending upon which of the four paragraphs of subsection 2(2) mentioned above is claimed to have resulted from their conduct. In other words, the distribution of the pamphlet is a pre-requisite for a conviction.

In this regard it will have been noticed from what I said regarding the evidence adduced by Mr. Klem that there was testimony of a distribution of the pamphlets on the evening of the 13th September in the home in which Jeff lived and at the Athlone Stadium. This evidence implicates each of the three accused. Unfortunately for the State, all the evidence in question emanated from a single witness. What is worse, it emanated from a witness whom Mr. Klem had asked the Court to regard as an accomplice and who, if an important part of his evidence is to be believed, was indeed one. I am referring to Frederick Haupt.

Haupt was a man of 23 with a nimble mind and an assured manner. He spoke at a terrific pace, giving his answers in rushed - often unfinished - sentences, which rendered it extremely difficult to all concerned to follow his evidence. He made a reasonably good impression upon my associates and me while in the witness box, but after detailed study and discussion of his evidence we have become wary of it. As I have already mentioned, he was one of the occupants of the room in which the printing or reproduction of the pamphlet had been done by means of the cyclostyle or duplicating machine on the 13th September. He occupied it by reason of the fact that he and his mother hired this room and an adjacent one from Hoffmann Senior, the father of accused number 1.

It is clear that he was not present when the machine was brought into the room on the morning of the 13th.

at his place of work at Thorden Island -- a considerable distance away. Indeed, we do not think he had anything to do with the printing or that he even knew that it was taking place in his room. We hold this view despite evidence emanating from three of the other State witnesses, who stated or implied that Haupt visited the room round about lunchtime and in fact caused alterations to be made to the wording the pamphlet had originally been intended to have. In our view he probably did not know about the presence of the machine in his room until he had returned from work at about 6 to 6.15 p.m. that night. Then, however, he learnt from Theiffner, the other occupant of the room, that the machine had been used that day for printing something.

Some time after his return home he heard Hoffmann Senior scolding his son, accused number one, and eventually it became obvious that Hoffmann Senior's ire centred around the duplicating machine. Haupt therefore suggested to accused number one, with whom he was on fairly friendly footing, that they remove the machine from the premises. The latter agreed and subsequently, at about 7.15 p.m., the two of them carried the machine out of the room to number one's motorcar so that number one could take it away. Haupt offered to accompany number one and the offer was accepted. They drove to the house of Jeff, who was a friend of number one -- as I have indicated before -- and with whom Haupt was acquainted. Apparently with Jeff's permission, the machine was carried by number one and Haupt into a room there. According to Haupt, he was then introduced by accused number one to accused numbers 2 and 3, both of whom had arrived at Jeff's house at about the same time as he and accused number one had. The four of them, accompanied by some other men, who had also appeared upon the scene, then proceeded into the bedroom to which I have already referred as the place where a couple of pamphlets were handed/.....

hurdled about and the decision taken (according to the State evidence) by the three accused to distribute pamphlets printed during the day.

From this point onwards the main line of Haupt's evidence is as I have already indicated.

The main reason for our becoming wary of Haupt's evidence is a feeling that he knew more about what had gone on than he was prepared to admit in Court, that he may possibly have been prepared to implicate the three accused in order to make certain of saving his own skin, and that he had a tendency to be glib (1) rather than reliable. I am putting it no higher than that he may possibly have been prepared to implicate the three accused in order to make certain of saving his own skin. The Court cannot find that that was the position.

Haupt was not seen by the police until the 14th October 1976, when he was taken to the Headquarters of the Security Branch at Caledon Square and a statement was taken from him by Sergeant Goldenhuys, the investigating officer in this case. When he arrived at Caledon Square on that day, he already knew that accused numbers 1 and 2 had been arrested and while there, so he (2) testified, he heard that number 3 had also been arrested. According to the testimony of Sergeant Goldenhuys, Haupt was originally unwilling to talk. He himself testified that Goldenhuys told him that the police suspected him of having distributed pamphlets with number 3, an allegation which was not denied by Goldenhuys when the latter went to the witness box later. Haupt testified further that Goldenhuys threatened, while he was questioning him and while he was busy making his statement, that if he did not answer satisfactorily, he would be locked up and, furthermore, that if he did not talk, he would be slapped. Goldenhuys, in his evidence (3) denied threatening to smack or otherwise assault Haupt, but admitted/.....

admitted that it was possible that he had told him that if he was not prepared to make a statement, he would be detained in custody until he did so. The Sergeant stated that he could not remember whether he had explained the provisions of Section 6 of the Terrorism Act to Haupt, but added that if he had done so he would have told him that he could be detained until he made an acceptable statement. In this connection I feel compelled to remark that while one's sympathies are with the police, whose they are working at high pressure and find themselves faced with prospective witnesses who are reluctant to talk, the mere possibility that a witness - and especially one falling into the class of accomplices - may have been threatened with detention if he does not produce a satisfactory statement, is sufficient to tarnish him from the point of view of a Court required to do justice according to our practice in a criminal case. 15.

Where, therefore, a person such as Haupt, who has been told that he is suspected of distributing pamphlets with accused number 3 and that if he does not answer the questions put to him satisfactorily he will be locked up, states that he did indeed go with number 3 to distribute pamphlets but that they actually did no more than to leave the pamphlets in question with four Herald boys, the Court is bound to ponder very deeply before convicting accused number 3 on his evidence. It is too possible that Haupt might have decided to take an easy way out by telling the police what he thought they wished to know or would be prepared to believe. Accused number 3 might even have been substituted by him for someone whom he preferred to protect. I am not criticising the police, and I am not criticising Sergeant Goldenhays or his methods in this case, but this is one of the unfortunate results of having and invoking a provision such as section 6 of the Terrorism Act. It may be necessary to invoke these/.....

these provisions, but it does have the effect of destroying the witness' image for the Court and maybe making it impossible for the Court to proceed with confidence upon the basis of his evidence.

A strong additional reason for caution in this case is to be found in Haupt's evidence regarding what he saw outside Jeff's home just before he and number 3 are supposed to have driven off to the Athlone Stadium. This evidence, as given originally, would have provided strong support for Haupt's other evidence as to the decision taken by the three accused that numbers 1 and 2 were to form one of the three teams to distribute the pamphlets, and thus would have helped to implicate numbers 1 and 2, but under cross-examination it soon became clear that the evidence had either been recklessly given or was deliberately false. In his examination-in-chief Haupt stated that an accused number one sat in the driver's seat of his car, with the cardboard box which I have already described on his lap, the box was half open and he could see what was in it, namely, yellow papers. In answer to questions by the Prosecutor he said it was dark in the car and then stated that he "assumed" it was yellow paper - a watering down of his original evidence. Under cross-examination he did not speak of a box which was half open, but of a box the flaps of which were down, which meant, he said, that the contents were covered. This, of course, would have rendered it impossible for him to see what was in the box, let alone what the colour of the papers in the box might have been - if there had been papers in it. He then said: "I saw what I thought was sheets of paper" - an impossible feat if the flaps of the box were down. He then repeated that it was dark there but said he was fairly sure. Under pressure, he said: "I never saw the flaps open, but number one's hand was in the box". In reply to Mr. Whitney,
who/.....

who subsequently cross-examined him on behalf of accused number 3, he again reverted to the statement that he could see that there were sheets of paper in the box when number one had his hand in it. It can be seen from this that Haupt's story altered from a half open box in which he could see yellow paper (and one must remember that the pamphlets which had been handed over at the home of Jeff were all yellow pamphlets): eventually he was uncertain of the colour and even had accused number one fiddling in a box which was closed, which simply means that he would not have been able to see at all what was (1) inside this box. Apart from this, Haupt's demeanour when he was asked to state why he was in a position to see what was in the box, was not satisfactory, in our view. He was vague about why he had come to be about a yard away (as he said he was) from where accused number one was sitting, and as to why he was looking at what accused number one was doing. As I have stated before, scrutiny of this evidence leads one to the conclusion that when he originally stated that he had seen yellow papers in the possession of accused number one there in his car, he was either being reckless and therefore unreliable, or was (2) deliberately lying - this Court cannot say which.

Haupt claimed that he knew nothing about the contents of the pamphlets until he was in Jeff's house. Now this claim seems to my learned assessors and me to be suspect. He had arrived home at 6 p.m. or 6.15 p.m., had been told by his roommate, Pfeiffer, that the machine had been used for running off papers, he had heard Hoffmann Senior scolding accused number one in regard to the machine (and obviously this must have been not in regard to the presence of the machine but to what had been done with the machine). He suggested to number one that (3) they take the machine away, he helped him to take it away and

yet/.....

yet he tells the Court that he had no idea, at any time while he was in a bedroom in Jeff's house, what had been run off on that machine. It will be realized that accused number one, according to this story, must have trusted Haupt and taken him into the house where they were going to discuss the distribution of pamphlet. That being the position, it would seem remarkable that accused number one would not have informed Haupt of the contents of the pamphlet or given it to him to read. It is equally remarkable that Haupt would not have asked about the pamphlets before he arrived at that house. (10)

His evidence in regard to his first sight of the pamphlets goes further than this, because during his examination-in-chief he stated that he first saw the pamphlets when he was in what I may call the T.V. room, whereas under cross-examination it appeared that he had seen the pamphlets in the bedroom - something which he never told the police. It is true he explained that he did not think it important, and it is not a very important point, but it does render suspect Haupt's memory or his honesty. It seems probable to us that when he took the machine away from the house, he helped carry it into Jeff's house because of the un- (20) pleasantness which had taken place at Hoffmann Senior's house due to the presence of the machine there, he would have found out what the machine had been used for and would have known that it was to turn out a pamphlet calling for a strike. It seems highly unlikely to us that if he had not found out then, he would not have tried to get hold of a pamphlet when it was being passed around in the bedroom, as he said it was and as he said he did not; and also unlikely that when accused number one brought in the stack of pamphlets and handed them to accused number 3, he, Haupt, knowing that he would have had to go with number 3 to deliver these pamphlets, would not have asked to see one of them. (7)

As/

As it is, his story is that he only read that pamphlet for the first time when he was in the car of accused number 3, travelling to the Athens Stadium to deliver it.

He says that he read the pamphlet then and gathered what its contents were, although the lights in the car were not on and he had to rely purely on the illumination provided by the street lights as they were passing these. In this connection I might mention that in fact it was not a continuous trip: they stopped along the way at a Cafe or restaurant to obtain change and buy a Coco Cola. (10)

Haupt's account of what happened in the bedroom in Jeff's house is also unsatisfactory. He stated in Chief that it was decided between accused numbers 1, 2 and 3 that the pamphlets would be given out, as if none of the other people present, the four or five other people present, had anything whatsoever to do with it; but when he was asked later on to give details he faltered. He stated, for instance, that he did not know who suggested that he should go with accused number 3, but he implied at that stage (i.e. the first time that he mentioned this) that it was clearly not any one of accused numbers 1, 2 or 3, because he added that (2) they would have heard somebody suggesting this, those three would have heard it. Yet it is highly unlikely that anyone but one of the three accused would have suggested it, if it was suggested at all. Later on, under cross-examination, he said that it was decided "mainly amongst the three accused" that he go with accused number 3. When he was asked what he meant by "mainly amongst the three accused", he said he meant by the three accused. He immediately thereafter, however, said: "I must think who suggested it that I go with number 3. I can't think of any particular person that suggested this. It is not likely that it is someone other (3) than the three accused". It will be seen that this is highly unsatisfactory/.....

unsatisfactory evidence by a witness regarding what he had said in regard to himself. The unsatisfactory nature of this evidence may be due to the fact that he has an unbalanced mind. It may, however, also be due to the fact that he was making up a good deal of what happened and was indulging in wishful thinking or, at any rate, speculation when he stated broadly, as he did in the beginning, that it was decided amongst accused numbers 1, 2 and 3.

It transpired also that he did not know who suggested that number one and two should go to the Mosque, but he said it was decided between the three accused. He had to say that he did not know whether it was decided that the other people in the room had to distribute pamphlets also - a most important thing. It is almost incredible that he should not have known if he had paid any attention at all to what was going on. And in fact he ended up by saying that the person who suggested that the pamphlets should be distributed may have been someone other than one of the accused. Now it must be remembered, when considering this evidence, that Haupt claimed that at the time, in the bedroom, conversation started about Hoffmann's annoyance at the presence of the machine in his house and that about 10 minutes was spent in discussing this. Thereafter about 5 minutes were spent in discussing the distribution of the pamphlets. He said at first that he had not spoken to anybody in the room, but it transpired subsequently that he had joined in and that a general conversation had ensued during the first 10 minutes. When, however, the conversation turned to the distribution of the pamphlets, he says: "At this time I picked up a book". It happened to be a music book and he stated that he had never before seen music written and the Court can understand that this would have been an interesting

thing/.....

thing to look at, but it is hard to accept that he would have become interested in a music book when the conversation turned to something entirely new and which involved himself, namely the distribution of pamphlets and the arranging of tempo for the distribution of pamphlets. If he had in fact concentrated on this music book and ignored the conversation going on, the Court can't rely on his evidence as to who took the decision regarding the distribution. It may be that somebody other than the accused was the main speaker who made the suggestion, and that other people took the decision in question. (1)

In this regard it is an unfortunate feature that Haupt was unable to give us the names of any of the other persons in that room. He was introduced formally to two persons, accused numbers 2 and 3, he states, so that he knew all three the accused and Jeff whom he had known before, but he could not tell the Court who the other people were. He said that Jeff was told to go with someone else but he could not give the name of that person and he could not remember who suggested that Jeff go. This strangely apathetic attitude he adopted during the 5 minutes during which something interesting was happening, is a feature which must count against the acceptance of his evidence.

He stated that there in the bedroom "I was not bored but nothing caught my interest sufficiently to sit and listen to that". This can't be accepted. If it is so that nothing caught his interest sufficiently to sit and listen to that, the Court can't rely on his evidence. It seems highly unlikely that this could have been so.

Now there is some evidence which we find puzzling, if Haupt's evidence is true as to the limits of his association with the machine, and that is that at some or other time after

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this evening - we can only guess that it must have been after the arrest of accused number one - he went to accused number 2's house with "Ash" (that is Errol Hoffmann, who is stated to be a cousin of accused number 1) and accompanied accused number 2 to the house which had been occupied by Jeff in Doroon Road. He helped to put the machine into accused number 2's car, and saw accused number 2 taking the machine away from there. He never explained to the Court why he took this interest in the machine. We can guess and one of our guesses makes his story in general more credible, namely that the people living at that house were worrying him and saying "You brought in the machine, see that it gets taken away!"; but other guesses are possible too and we cannot speculate. There is a feature here which indicates that Haupt was more closely connected with the machine than he led us to believe, otherwise he would simply have said to anybody who complained about the machine being in the house at Doroon Road: "Look, I have got nothing to do with it: I merely helped carry it on the night of the 13th September". It was put to Haupt, while he was in the witness box, that he went to accused number 2 and told him to go to Doroon Road and remove the machine otherwise they would make things difficult for him. He denied that he went to accused number 2 to tell him this, but he was unable to explain on any other basis why he went to accused number 2's house at all, because they were not friends; they had only met on the night of the 13th and there is no indication that they associated with each other after that. His interest in having the machine removed, therefore, as Counsel for accused number 2 stated in his argument, remains unexplained.

Regarding what happened in the bedroom, Haupt says he was prepared to hand out pamphlets about the strike and he eventually went to do so because he wanted to, but at the same time he said:

"I/....."

"I haven't given the strike any thought and I don't know whether I was in favour of it or not". It is impossible to accept that both these things were so.

Another unsatisfactory feature of his evidence was that, testifying in regard to the statement taken from him by Sergeant Goldenhuys, he said he remembered seeing that the word 'pek' had been written down in it by Goldenhuys. He did not understand this word but he did not ask Goldenhuys what it meant. He then added: "I didn't understand half of the statement". Yet he was prepared to sign the statement and he does not suggest that Goldenhuys forced him to do so. He says Goldenhuys asked him to read over the statement and then sign it.

According to Mr. Klem's argument, corroboration for Haupt is to be found in the unsworn statements made by the three accused at the end of the trial. This argument, I consider, has very little to it. I put it to Mr. Klem that an unsworn statement by one accused could not be used as evidence against another, only to find that Mr. Klem was not prepared to accept this proposition. I myself at the time could find nothing specific on the point but Mr. Seligson, during the course of his argument, produced a footnote in Prisoners on Evidence, 11th Ed., paragraph 1564, which supports my view - see note 86. In the text the learned author states the following:

"It is, however, the duty of the Judge to impress upon the Jury that the statement of one prisoner not made on oath in the course of a trial is not evidence against other and must be entirely disregarded".

Commenting on this in the footnote, after referring to the case from which this quotation was taken, the author stated:

"The/....."

"The statement in this case was made to the police and not from the dock, but in principle it would seem to be inappropriate for such a statement to be evidence against a co-defendant unless he had an opportunity of cross-examining its maker. See too Allan v. Allan 1884 Probate 249."

I have looked at this case which was referred to there, namely Allan v. Allan, the headnote of which reads as follows:

"The evidence of one party cannot be received as evidence against another party in the same litigation unless the latter has had an opportunity of testing it by cross-examination. Therefore in a divorce suit, the evidence of the respondent is not admissible against the co-respondent if the Judge refuses to allow the co-respondent to cross-examine upon it". (1)

At page 253 of the report, Lord Justice Jones states the following:

"It appeared to us contrary to all rules of evidence and opposed to natural justice that the evidence of one party should be received as evidence against another party without the latter having an opportunity of testing its truthfulness by cross-examination. In the case of prisoners jointly charged with an offence the Jury are always most carefully warned that what one may say inculcating the other, is not evidence against the other. The reason is because one prisoner cannot cross-examine another and therefore their statements condemnatory of each other, unassailable by cross-examination, would be valueless". (2)

Now this is a reference in a civil case, this is true, but to criminal law - the criminal law of England, where at that time
cross/.....

cross-examination of one accused by another was not allowed. To my mind it is clear from this reference that in England, at any rate, the unsworn statement of one person is not allowed against another; and I have no doubt that that accords entirely with our law on the subject.

Now, of course, we have to deal here with three accused who chose not to go into the witness box themselves. It was a matter of great surprise to me when they elected not to go into the witness box and to subject themselves to cross-examination. They chose not to go into the witness box to deny under oath (20) what Haupt had stated under oath and this is a feature which cannot be considered to strengthen Haupt's evidence considerably, especially in the case of accused number 3. It is almost incredible to me that he preferred to stay out of the witness box when he had clear evidence against him by Haupt and no assurance that the Court would not consider Haupt a satisfactory witness, because - as I have already indicated - while in the witness box Haupt made quite a good impression upon all three of us sitting here.

Another safeguard which is to be found insofar as Haupt (2) implicates accused numbers 1 and 2, is the strong probability that if they were the printers of the pamphlet, as we have no doubt that they were, they would have been prepared to distribute it. There is, however, always the possibility that they were the printers and no more. They, for instance, say that Kahn took away the pamphlets and in this connection I should say that Kahn is another person about whose evidence we have considerable qualms. We don't think it is probable that Kahn took away the pamphlets, but it is a possibility the Court cannot ignore. It is a reasonable possibility. (3)

Everything considered, we feel that Haupt's evidence, even
supported/.....

supported as it is by the features of the accused and the evidence and the likelihood that accused numbers 1 and 2, at any rate, would have wanted to distribute, is not sufficiently convincing to justify us in convicting on it, bearing in mind that he is a single witness and an accomplice. I am not going to mention the cases dealing with accomplice evidence and single-witness evidence. It is clear that the Court has to be careful before convicting on such evidence. We have considered the matter fully. We feel that though there are safeguards, there are not adequate safeguards; and although we suspect that Haupt's evidence, taking it broadly, is probably the truth, we are ^{not} satisfied beyond reasonable doubt that it is. (10

In the circumstances the accused are entitled to have the benefit of the doubt and all three of them must be acquitted.

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