

as you are concerned you would not have much work, depending on what Mr Jacobs is going to say except that you will have to address me on the credibility of certain witnesses, apart from those of the accused.

MR CHASKALSON: Yes, I think that is so, and also we would have to finalise the special entries which we may have in mind and let your lordship have that, have those as well. I think that I, from the UDF side of the case, should be ready to meet your lordship's time limit. I would hope to be able to be ready. If I am not I will tell your lordship then but I (10) would try. All of us would like ...

COURT: Yes I would like to ...

MR CHASKALSON: We can see it is in everybody's interests.

COURT: I would like to complete the matter this week if possible.

MR CHASKALSON: Well I think we would too, I think all of us feel that way and we just want to make sure that we do not neglect any of our responsibilities to our clients.

COURT: Mr Bizos?

MR BIZOS: Yes my lord. In relation to the Vaal part of (20) the case we would submit that the one ground of appeal which does not to any great extent depend upon the credibility of witnesses is whether, on the indictment and the further particulars, it was correct to convict them of the type of terrorism that your lordship found them guilty of. I want to very briefly explain the point that the case which the accused came to meet was one that they were party to a conspiracy to commit acts of violence against the person of the councillors and their property. The question of foreseeability was not part of the indictment in the further particulars and the (30) accused/....

accused did not direct their defence to that aspect. And that insofar as there may have been some questions asked in relation to foreseeability and illegality they were really nothing more on that indictment and on those further particulars than questions of credibility rather than the basis upon which an eventual conviction may have resulted. And it may well be that if our interpretation of the indictment and the further particulars is concerned is correct then appellate division may hold that they were prejudiced by this finding. It may be that we may be able to persuade the appellate (10) division that we could have called evidence, if that is the charge that we were facing, of marches which did not lead to disorder. I think I have made the point in a brief form and I do not know that I want to expand on it but ...

COURT: No I will hear you on the point later on.

MR BIZOS: That is the one point.

COURT: It is clear at the moment, yes.

MR BIZOS: As your lordship pleases. Now in, on the question of prejudice I will also address your lordship. I want now to, your lordship has indicated in relation to accused no. 16, (20) but leaving that aside at the moment if that point has any substance in it it would affect all the accused that have been found guilty of terrorism. I want to deal with the special position of accused no. 5, Mr Malindi and if we take into consideration the findings of fact which your lordship has made in relation to him then the findings of fact depend to a certain extent on the admissibility and the interpretation of the documents that were found in his possession. Your lordship will recall that your lordship relied on passages of documents found in his possession in order to draw inferences (30)

as/....

as to his knowledge and ability to foresee things. The other factor, and credibility does come in in this respect, is that the only witness that really contradicted accused no. 5 was Rina Mokoena in relation to the events on the morning of the 26th, Masenya on marginal issues in relation to the meeting of the, the afternoon meeting of the 26<sup>th</sup> and IC.8 on whom your lordship did not rely at all in relation to Motsuenyane(?). For the rest his evidence was not contradicted by any state witness, and subject to those limited matters the question will really arise as to whether he can be found guilty on (10) the facts found proved. The further point is that your lordship found him guilty on the basis that he was a member of the management structures and we may be able to persuade the court of appeal that the state used that expression in the indictment and the further particulars in a very specialised sense and that it is bound by it and on that specialised sense, in the manner in which your lordship understood this during the time that the indictment and further particulars were discussed in Delmas in October a number of years ago, he was not a member of the structures. The further point is a comparison (20) between his position, accused no. 10 and accused no. 2, may persuade the appellate division that his role was not any greater and that the process of the drawing of inferences in relation to accused no. 10 and accused no. 2 by parity of reasoning may lead to a different result in relation to accused no. 5. It is these matters which really have struck us on, that struck, and the conviction of accused no. 5, being the first person that was convicted seriatim was really on your lordship's judgment used as the basis for the conviction of the others and if ...

(30)

COURT:/.....

COURT: Yes but I could have started with somebody else as well but he was no. 1.

MR BIZOS: Well this is why I say that, this is why I was about to say that any success in our submissions in relation to accused no. 5 must of necessity mean similar success to the, for the other accused. With respect we will be able to show in your lordship's judgment that certain of the inferences that were drawn in relation to accused no. 5 are not permissible inferences. If I may just give your lordship one or two examples, that for instance there was no evidence that he (10) had any knowledge of ANC documents or listening to any radio broadcasts but your lordship finds that he must have, and such other matters. Again the position of accused no. 11, Mr Mokoena, is also on the basis of his being a youth leader. There are other aspects in the Vaal judgment to which we would like to make submissions to your lordship and that is that despite any satisfactory evidence that there were actually obstructions on the route which may have coloured the foreseeability of the accused your lordship finds that they must have been aware - or accused no. 11 in particular - that he knew of the (20) obstructions on the road and other matters. And other findings such as that he must have organised things the previous night and other matters, and in respect of which there was no evidence. Also that insofar as the accused as witnesses were concerned, and also some of the witnesses, we will be able to show your lordship that some of your lordship's prima facie views in Annexure Z were never put to the witnesses, and whether it was permissible in the circumstances to draw the inferences that your lordship drew in relation to their credibility. There is one point that runs right across the Vaal case that we will (30) want/.....

want to submit to your lordship and that is this that whereas your lordship rejected the evidence of many of the witnesses for the defence in strong terms your lordship did not make findings in favour of the accused where there were disputes of fact and your lordship rejected the state evidence. So that insofar as it will be necessary for the Vaal accused to persuade your lordship to grant them leave we would submit, with the greatest respect, that the credibility findings in relation to the accused as truthful witnesses the appellate division may well come to a different conclusion, and of (10) course if their evidence was wrongly rejected then it may colour the act or acts which they admitted that they performed and it may not be the terrorism that your lordship found them guilty of. There is also of course, but depending on the nature and terms of the leave, that the question of the lack of the disclosure of the statements, we will submit to your lordship in that regard that your lordship's judgment in that regard is too benevolent to the state having regard to what the evidence of the witnesses is and what we will submit the strange statement made by Mr Jacobs when your lordship (20) asked him for an explanation. I do not want to mention other smaller points such as, just one example that the failure to cross-examine on, or putting a somewhat different interpretation on events in a confused situation such as what happened at the march, when it reached the intersection, when one has people viewing a scene from different angles. To rely on contradictions of a minor nature what we submit are of a minor nature in order to disbelieve them is not a correct basis. What we also, and this is a fundamental point which has a bearing in addition to the Vaal accused also to Mr Manthata, (30) accused/....

accused no. 16, we may be able to persuade the appellate division that it is clear from the record that false evidence, deliberately false evidence was tendered to your lordship in matters in which your lordship did not find it false but your lordship said that the witnesses could not be relied on. Now, and I am particularly referring to the witnesses Masenya who in his evidence-in-chief did not ascribe violence but changed it after a short adjournment in his cross-examination and again made a further mess of it when your lordship asked questions about it. Rina Mokoena who introduced violence on the (10) morning of the 26th and introduced violence into the meeting of the afternoon of the 26th. The deliberately false evidence in relation to the morning of the 3rd as to the speech supposedly made by Raditsela and accused no.8 and 17. The witness IC.10 who deliberately and falsely tried to implicate Mr Lekota, accused no. 20. The witness Phosisi who tried to rescue the state's case as pleaded by telling your lordship that the whole march went up to Motjeane's house. All of which, in our respectful submission, your lordship should not take into consideration but what we will submit is that that evidence(20) was in fact false and we may be able to persuade the appellate division that it was false evidence. Now if that was false evidence the question may well arise how did that false evidence come to be given and it must be someone connected with the prosecution, either before or during the course of the trial. Now if that is so and if we can persuade the appellate division that that is so it has tremendous implications for your lordship's finding against accused no. 16 because the question which ought to have been posed by your lordship we may be able to persuade the appellate division is this, if (30)

IC.8, IC.10, Masenya, who is also in a responsible position as a court interpreter, and others came to give evidence which could not or ought not to have been relied upon why is it not reasonably possible that Sergeant Koago and IC.9, that their evidence was not procured on a similar basis and with a similar motive. So that, in our respectful submission, in the absence of posing that question ...

COURT: Posing what question?

MR BIZOS: The question is that if seven or eight other witnesses were untruthful and that they gave evidence deliberately prejudicial against the accused without there being any basis for it why cannot, by similar reasoning, the evidence of IC.9 and Koago have been procured in a similar way? Your lordship's finding in relation to .... (10)

COURT: Yes well this is now very interesting Mr Bizos but I thought I indicated to you that I would grant you leave in respect of accused no. 16 to argue what you like?

MR BIZOS: But what I am saying my lord is that that is not entirely separated from the facts and circumstances in relation to the other Vaal witnesses. (20)

COURT: But these witnesses have been, you have findings about them and on their credibility and the fact that I did not take them into account. So you can put up your argument.

MR BIZOS: No there is a difference between making, not making a finding of fact and finding that your lordship ought to have found that these persons gave deliberately perjured evidence.

COURT: Yes.

MR BIZOS: And that is really the reason why we say that the position of accused no. 16 cannot be entirely separated from the rest. May I say that, and may I take IC.10 - your lordship/.... (30)

lordship will recall the young woman. Your lordship says that she was discredited. That is not so and we will be able to refer your lordship to authority. But if a witness says in the witness box that a particular bit of evidence was given under compulsion and thereafter changes that version that witness is not discredited. There is authority for it. His lordship Howard, J. and Thirion, J., in an unreported judgment so that what I am really saying that these witnesses cannot be written off merely on the basis that I did not rely on them. They had done considerable damage to the state case and we (10) may be able to persuade the appellate division that if it was possible to persuade Sergeant Branders to give deliberately false evidence against accused no. 20 - your lordship will recall that. And it is not enough, in our respectful submission to say that I consider him unreliable. He switched funerals, he switched funerals in order to put accused no. 20, Mr Lekota, in order to make him a stone thrower. I do not know whether your lordship recalls the details. It is not merely a question of unreliability. And similarly Sergeant Branders is in no greater danger of losing his job on the (20) reasoning that your lordship has indicated, than Sergeant Koago. I have been reminded that I must not argue the case at this stage but merely give your lordship the headings.

COURT: Well what has been stated now has been written down and will not be repeated.

MR BIZOS: Well I think I had better then be careful to leave a couple of door open for further argument. Now IC.6 in our respectful submission deliberately lied about Dr Beyers Naude, about Stompie and about the old man. Now once we have that sort of evidence we may be able to persuade the appellate (30) division./....



division. Now although your lordship indicated that there will be, we can argue whatever we wish in relation to accused no. 16 there is, in our submission, the question as to whether it was correct - I will just put it as a heading - to rely on the alleged report by Koago to Major Steyn as to the identity of the person who advocated violence at the meeting of the 19th, limiting cross-examination on it. Your lordship will recall the, your lordship's warning to me not to open a can of worms and thereafter allowing the question in re-examination. I am sorry I elevated my learned friend Mr Chaskal- (10) son who was giving me some advice and I said "as your lordship pleases" by mistake. The question of the credibility of witnesses such as Raboroko and Kevin Harris may have wider implications in relation to the case and not limited to accused no. 16. And insofar as we are stating the grounds in relation to accused no. 16 the basis, the basis of his conviction really rests upon two pillars. Firstly his knowledge of the UDF conspiracy and if that is a finding of fact which the appellate division may find a view on, have a different view then even if the finding in relation to the (20) speech of the 19th then it will not be treason on your lordship's judgment, which may have certain consequences. These are very briefly, we submit, the general grounds but there are others that, the finding that the VCA was organised by the UDF is not supported by the evidence we submit, that the conference at Daleside was material which can be taken into consideration as to whether violence was foreseen or not, the finding that violence was organised by the VCA and also the finding that your lordship makes in relation to the role of COSAS in the Vaal and to what extent any of the accused can be, or (30)

the/....

the VCA can be held responsible. Subject to correction I have not, we have not been able to find a finding in the judgment - but we may have missed it - in relation to the meeting of the 2nd. That is the Sunday morning. I am informed that there is one, that there is a finding. But there was no evidence to the contrary in relation to what happened at that meeting and we will submit that the fact that that meeting took place, that steps were taken to have an organised march with marshalls and the handing over of a memorandum, may well persuade the appellate division that the violence (10) and coercion that was concluded by your lordship was not well founded. There may well be other points but we certainly want to motivate, with authority, some of the points that we have mentioned to your lordship. This is what we would require that for.

COURT: Is there going to be an appeal against sentence?

MR BIZOS: We have thought about that and we would submit that in the circumstances there ought to be an appeal against sentence. In relation to the Vaal accused the only matter which may require the attention of the appellate division (20) is the conditions which your lordship described as novel and ...

COURT: Are you contending that you have been instructed by your clients that they would rather not have the conditions but have the alternative?

MR BIZOS: That is a choice which I do not have to answer on, with respect. But the question is that they are novel conditions which may or may not be considered to be within the ambit of the section but that is all I want to say in relation to those sentences.

(30)

COURT:/.....

COURT: And the other sentences?

MR BIZOS: In the other sentences we submit that there ought to be leave to appeal on the other sentences.

COURT: As being shockingly inappropriate?

MR BIZOS: My lord ...

COURT: Because that is the test.

MR BIZOS: No my lord, but it may be, and we will be, we may be able to persuade the appellate division that having regard to the type of treason that your lordship has found them guilty of, the fact that practically all the other persons (10) involved in the UDF were not charged and that they were really part of a large executive, that the work was done openly - but even on the assumption that your lordship's finding is not overturned on appeal - that it is treason of a special kind committed in a particular milieu which is disclosed by the evidence and whether, in the circumstances, those sentences are correct or not. The shocking aspect is not the only basis. And there is also of course a possibility that we may have success, some possibility of success on appeal in relation to the unequal participation. It may well be that ... (20)

COURT: Is that now the Vaal accused?

MR BIZOS: No my lord the UDF accused that I am speaking of. And that is the lesser participation of Mr Chikane, accused no. 21. Your lordship will recall the diplomatic way in which, or rather the quaint way in which he put it that he did not even have a pigeon hole and the question is as to whether the general secretary - who is really in command - and he should have been treated on the same basis. This is the one point. And there is also the sentence of Mr Malindi, accused no. 5. If we start off with the assumption that his sentence too (30) would/....

would have been suspended on conditions if it had not been for the previous conviction, which may of course - even if I was wrong in my submission that it was, that the deliberate stone throwing is different to this type of offence. What it comes down to is this that because he committed an act of violence when he was 19 or 20 years of age which was thought a proper case to suspend his sentence at that time that his sentence now should be so materially different. I think that those are the main headings that we would want to argue to your lordship. (10)

HOF: Wil u nog iets sê mnr Jacobs?

\* MNR JACOBS: Die staat wil niks sê nie, dankie edele.

HOF: Wat van die 204 persoon, ek sal u nou nou daaroor hoor.  
Ek wil net eers hierdie ding uitmaak.

(20)

(30)

PAGES 28 988 AND 28 989 - AWAITING REVISED ORDER.

COURT: Now the question of the section 204, wat is die posisie daar?

MNR JACOBS: Die posisie met artikel 204 is dat dit is 'n diskresie wat die hof rig of die hof vrywaring gaan gee van enige vervolging indien dit blyk dat die beskuldigde, ekskuus, die getuie geredelik geantwoord het op die vrae en as die hof tevrede is, ook 'n tweede been waarop staan, of hy eerlik geantwoord het. Dit is slegs die hof wat daardie vrywaring aan 'n getuie kan gee edele, nadat die saak afgehandel is en op die bevinding van die hof, dit word (10) saamgevat dat dit blyk dat die hof dit het bevind dat twee van die getuies, dit is Rina Mokoena op bladsy 343, dit is in die 2 deel van die uitspraak, en dan IC.10, op bladsy 199 het die hof uitdruklik bevind dat hierdie twee getuies is twee leuenaars. Edele so as ek dan mag op die hof se terrein hierso 'n voorstel maak is dat dit volgens my oordeel dan blyk asof hierdie twee getuies, Rina Mokoena en IC.10, nie geregtig is op die hof se beskerming nie. Soos ek sê ek wil dit weer beklemtoon dit is eintlik 'n hof beslissing wat heeltemal by die hof berus, of die hof hulle dit gaan gee ... (20)

HOF: Wel eintlik is dit iets wat u baie wesenlik raak want u verteenwoordig die Prokureur-eneraal en die Prokureur-eneraal het 'n reg om persone aan te kla. Dus basies is daar so 'n bevel gemaak word dan het u nie meer die reg om die persoon aan te kla nie.

MNR JACOBS: Ek stem saam daarmee maar ek, wat ek, die eintlike onderskeid wat ek probeer duidelik stel is dat op die ...

HOF: Het u 'n lys van almal wat gewaarsku was onder die artikel?

MNR JACOBS: Edele ek het, volgens die waarskuwing het ons (30)

deurgegaan/....

C.1574 deurgegaan op al die getuies, blyk dit dat IC.7, IC.8, McCamel, Lord McCamel, dan sal ek die ander wat ek reeds genoem het, Rina Mokoena is dan een, Peter Mahape, Mahlatsi en dan is daar IC.10 en dan IC.24 was die getuies wat gewaar-sku was. So dit lyk dan vir my dat behalwe vir Rina Mokoena en C.10 dat die hof die ander wel vrywaring kan gee in die geval.

HOF: Wel doen u afstand van die reg op vervolging dan?

MNR JACOBS: Ja edele.

COURT: Would you like to say anything Mr Bizos or Mr Chaskalson? Normally it is not in your province. (10)

\* MR BIZOS: I think generally speaking that this is not a matter with which we really have a right of audience. And in any event even if we do we do not wish to say anything.

COURT: Then we will adjourn until Wednesday morning at 10h00.

COURT ADJOURNS.

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