

Dold (G.W.F.)

T.P. Fund Rate

Dold

22nd April 1953.

Dear Mr. Dold,

Canon Collins is away, and in his absence I write to thank you for your letter and will of course see that he has it on his return, and for which I know he will be most grateful.

Yours sincerely,

G.W.F. Dold Esq., M.A., B.C.L. Oxon, LL.B. London,
2, Paper Buildings,
Temple E.C.4.

TELEPHONE
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2, PAPER BUILDINGS,
TEMPLE, E.C.4.

19th April, 1958.

Dear Canon Collins,

re Treason Trial Evidence.

In continuation of my letter of the 8th instant I paid a visit to the High Commissioner for South Africa and took notes of the remaining sections of the new Act No. 9 of 1958. There do not seem to have an especial bearing on the Treason Trial.

I do not know whether my Opinion was adapted to the understanding of a layman, but if there is anything which seems complicated in it, I should be very happy if you would paraphrase it and I could then 'vet it' and return it to you, but I expect you were being very modest when you set the standard in your original letter and that you yourself have not experienced any difficulty in understanding it.

On reading the Opinion again, I think it requires a clarification. In paragraph 6 on page 4, please insert a comma after "document" and on line 3 after "object" insert "of an association as defined in the preamble to the section".

P. T. O.

Yesterday I came across the case of R.v. Margolis,
1936 Orange Free State Provincial Division, 143, in which
that doughty, Afrikaner judge, Peter Ulrik Fischer, refused
to make a statute ^{putting the burden of proof on the accused} retrospective and acquitted the accused.
He said in effect that where a statute throws an onus on
the accused, the Crown may avail itself of this provision
only for acts done after the particular Act came into legal
operation, i.e., after promulgation, the reason being that,
though the statute pertains to the law of procedure and
evidence, and is not a part of the substantive law as such,
yet it creates a great disability and in effect imposes a
new burden of a criminal nature on the accused.

This statement of Fischer J., (Supra) sums up s
very well what I implied in my last letter to you, viz: that
the Union Government having expressly
the Criminal Procedure Act
Amendment Act of 1958 retrospective has contravened the
rule of law, which in the present case is indefensible.

Nevertheless, it is the law of the Union!

Kindly acknowledge receipt.

Yours sincerely,

Walter R. ...

TELEPHONE
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2. PAPER BUILDINGS.

TEMPLE, E.C.4.

8th April, 1958.

Dear Canon Collins,

re Treason Trial Evidence.

Thank you for your letter of the 2nd instant, which I received just before leaving Chambers for the Easter holidays. I brought it home with me hoping to deal with it immediately after Easter, and I have in fact dealt with the matter yesterday and today. I am not returning to Chambers again until the 14th instant, but I shall then be most happy to meet you there or at your address (2, Amen Court) whichever is most convenient to you, should you feel that I have not succeeded in conveying my summary in a form which an intelligent layman can understand. I now enclose my original opinion.

I first heard of the amendment of the criminal law as to evidence last month by reading that excellent London ~~newspaper~~ periodical "South Africa" and shortly afterwards, to wit, on the 18th March I called at the office of the High Commissioner for South Africa in Trafalgar Square to purchase a copy of the Act. I found to my disappointment that while they would permit me to make extracts from the only copy which had come to hand, they had now discontinued the practice of selling copies of Acts of Parliament, though they would lend copies once they had received more than the one advance copy which comes by Airmail. As I was on my Chambers and was in a hurry, I only took an extract of section 3 of the amending Act, No. 9 of 1958, to which the Governor-General gave his assent on the 14th February, 1958. On the first page of my opinion you will see section 3 of the Act set out.

as already stated On receipt of your letter of the 2nd instant, which fortunately arrived at Chambers just before I broke up for the Easter Vacation, I telephoned the Librarian at South Africa House, and was able to impress upon her that I had called there on the 18th March, when she agreed that the spare copies should reach London today or tomorrow, when she would post me a copy. I have not yet received a copy

P.T.O.

of the whole Act (my recollection is that it is not very long), so in the meantime will you take it from me that if on receipt of the whole Act I come to the conclusion that the other sections do not affect the Johannesburg Treason Trial in any way, my present Opinion will be complete. I thought it advisable to get the present Opinion to you in case there might be some urgency in the matter, though I now see from "South Africa" (last issue) that the trial will not begin before the end of May. Should, however, the Act reveal that the other sections are relevant, will you kindly let me know the latest date by which my supplementary Opinion should reach you?

I do not know if you wish to make public use of my Opinion, in which case I have two conditions to make, viz; that Mrs Bunting's name should be removed from it and an innominate individual be inserted instead. Secondly, while I have no wish to saddle the Fund with unnecessary costs, it may be that I should have been instructed by you through a London firm of solicitors. Until I can see the Secretary of the Bar Council on Monday as to the Council's views on the matter, will you please not make the Opinion public? I shall be at my home: 12, Chesil Court, Chelsea, LONDON, S.W.3. (FLA:5594) until Monday morning should you wish to telephone me.

I met my nephew, Patrick Duncan, over the holidays (he is going back before the end of the month) and I told him that while I thought Act No.9 of 1958 was really a violation of the rule of law by making a law which was retrospective in a criminal matter (and I shall deal with this in my forthcoming work on the Laws and Constitutions of South and Central Africa), I thought that the enclosed item from "South Africa" of 29th March last was really even more against the fundamental liberties of the subject, viz: in the domain of religion. I have kept a copy of this, so please do not return it to me. Patrick Duncan's address is Flat No.178, St. James's Court, S.W.1. (Tel.VIC: 2360) - at weekends he is usually with his parents-in-law, Sir Patrick Ashley Cooper and Lady Cooper, Hexton Manor, Hexton, Herts.

Yours sincerely,

Robert Aldrich

OPINION.

1. I have been asked to advise on the interpretation of section 263(bis) of the Criminal Procedure Act, 1955, of the Union of South Africa. This section was inserted by Act No. 9 of 1958, which was assented to on the 14th February, 1958, and is in the following terms:

"3. The following section is hereby inserted in the principal Act ^[i.e., the Criminal Procedure Act, 1955] after section 263:

263(bis)(1). Any document (including any book, pamphlet, letter, circular letter, list, record, placard or poster) which was at the time on premises occupied by any association of persons, incorporated or unincorporated, or in the possession or under the control of any office bearer, officer or member of such association and -

(a) on the face whereof a person of a name corresponding to that of an accused person appears to be a member of such association, shall on its mere production by the public prosecutor in any criminal proceedings be prima facie proof that the accused is a member or such an office bearer of such association, as the case may be:

(b) on the face whereof a person of a name corresponding to that of an accused person who is or was a member of such association, appears to be the author of such document, shall on its mere production by the public prosecutor in any criminal proceedings be prima facie proof that the accused is the author thereof:

(c) which on the face thereof appears to be the minutes or a copy of or an extract from the minutes of a meeting of such association or of any committee thereof, shall on its mere production by the public prosecutor in any criminal proceedings be prima facie proof of the holding of such meeting and of the proceedings thereat:

(d) which on the face thereof discloses any object of such association, shall on its mere production by the public prosecutor in any criminal proceedings be prima facie proof that the said object is an object of such association.

(2) The provisions of sub-section (1) shall apply to any criminal proceedings in respect of any offence committed before or after the commencement of the Criminal Procedure Amendment Act, 1958."

2. It is a maxim of British law (and also naturally of Union law, which has been so much influenced by British law in this respect) that a man is deemed to be innocent until he has been found guilty: in other words, when a person is accused of a crime or criminal offence, the burden is placed on the Crown (functioning by the police or public prosecutor) to prove the guilt of the accused person beyond all reasonable doubt, and though in a civil case the burden of proof can shift during the trial from the plaintiff to the defendant and vice versa according to the evidence that is led by one side or the other during the course of the trial, the burden of proof in a criminal case lies on the Crown throughout. This is well illustrated by the recent South African decision in R. v. Clark, 1957(2) S.A.L.R. 122(N). The gist of the case was that it was alleged against the appellant (Clark) that he knowingly had in his possession goods liable to forfeiture, which, as applied to this case, meant four volumes of "J.Y. Stalin Works."

On the 2nd September, 1955, the Minister of the Interior had published a list of books in the Gazette, declaring that their importation was prohibited. One of them, which appeared in Item No. 123, related to the four volumes in question. The appellant raised the point that the onus (burden) was on the Crown to prove beyond reasonable doubt that the four volumes in question were imported into the Union. The Crown agreed, but the only evidence on which the Crown relied was of a printed line on one of the back pages of each volume: "Printed in the Union of Soviet Socialist Republics" and also the following words on one of the fly-leaves: "Foreign Office Publishing House, Moscow, 1954", and the following words, which appeared to have been put on with a rubber stamp: "Published in Great Britain by Lawrence and Wishart Ltd., 81, Chancery Lane, London, W.C.2. 1955." The appellant was convicted, but appealed.

The learned Judges (Holmes and Caney, JJ.), relying on the decision of the Appellate Division of the Supreme Court of the Union of South Africa in R. v. Blom, 1939 A.D.188, held that the inference sought to be drawn must be consistent with the facts and that it must be the only reasonable inference. Holmes J., delivering the judgment of the Court, in which Caney, J. concurred, ^(allowing the appeal) said:-

"Now one inference from the presence of these printed lines in each volume is that the book was printed outside the Union but that does not appear to me to be the only inference. It may well be that these books were printed in South Africa and that the printer, in order to give them a facade, added the lines to which I have referred."

It is true that this was a decision of the Natal Provincial Division but, until it is reversed by the Appellate Division of the Supreme Court of South Africa, it must be held to be good law, as in my respectful submission it is.

There are, of course, statutes in both Great Britain and the Union where the legislature has placed the burden of proving innocence on the shoulders of the accused, but this is exceptional. The general rule remains unaltered.

3. I have naturally not been able to follow the course of the preparatory examination in the Johannesburg treason trial not having been present, but I should imagine that the Attorney General of the Transvaal (who was prosecuting ^{at} that stage) feared difficulties of

the burden of proof when the 91 accused would eventually be committed for trial, in other words that he would not be able to bring home to any or all of the accused their complicity in the alleged act or acts of treason under the law of evidence as it then stood; hence the Government's need for passing the Act of 1958. For example, under section 263 bis (1)(a), let us assume that the police found upon premises in some part of the Union, occupied by an association, i.e., an incorporated company or a voluntary club or society (unincorporated), a list of members bearing no signature or signatures in handwriting at all but in typewritten or printed form, in which the name of Mrs Bunting (this is purely conjectural) appears; under the then existing law of evidence this would be no evidence against her at all, unless under pressure from the police she had been unwise enough to admit that she had seen the list and her name properly appeared in it. Now, under the amending Act No. 9 of 1958, if such incorporated company or voluntary club or society is proved by the prosecution, on its face, to have as one of the objects a clearly treasonable activity, ^{(Sec. 263 bis (1)(a))} the prosecution would merely have to establish the fact that the list was found on premises occupied at the time by such an association of persons, when the burden of proof would at once be shifted on to her shoulders, and unless she went into the witness-box and was prepared to assert that she was never a member of the association in question and that her name had been included without her knowledge or consent, the trial Court would be bound under section 263 bis (1)(a) to come to the conclusion that she was a member of such association, with all the consequences which such a conclusion might entail. In other words, Mrs. Bunting would have no option but to go into the witness-box and be subject to cross-examination not limited necessarily to her denial of such membership and how her name came to figure on the said list.

4. In view of what I have said in the preceding paragraph, I need not repeat my arguments in considering the effect of section 263 bis (1)(b). The mere fact that a book or any other document on which the name of an accused person appears is produced by the Crown will throw the burden on him to prove that he is not the

author of the book or document in question, whether it is written
in his own handwriting or not. If he does not go into the ^{witness} box and
the book ^{or document} advocates a treasonable act or acts, then it would seem
that his conviction for treason would be automatic.

5. In view of what I have said in paragraph three hercof. I
can refer to my arguments in that paragraph, except that ^{under s.263 bis(1)(c)} we are
now dealing not with an accused person as a member or an author
but with minutes or extracts ~~from~~ minutes of a meeting of an
association as defined in the preamble, viz: an association of
persons, whether incorporated or unincorporated. The mere pro-
duction by the Crown of such minutes or extracts will throw the
burden on all of the accused, who may be connected with such
minutes or extracts either by being named therein or by other
evidence, of proving that their names were wrongly inserted
therein and that they are not members of the association.

6. In view of what I have said in the preceding paragraph,
the mere production of any document which on its face discloses
a treasonable object will be prima facie proof of the correctness
of such disclosure; ^{(s.263 bis (1)(d))} in other words, an accused in the present
treason trial will be bound ^{the disclosure on (and certain to be convicted)} by such production, unless he is
prepared to go into the witness-box to give evidence that he never
was a member of such an association to which the document refers.

7. I have, of course, confined myself merely to the peculiar
problem of proof raised by section 263 bis of the Criminal Proceed-
ure Act. It may be, as I have gathered from the newspapers, that ~~as~~
the accused claim that, even on the evidence permitted by that
section, none of them have committed treason, ^{they will be acquitted.}

8. The Legislature having by s.263 bis ^{expressly} (2) declared that ~~the~~
sub-section (1) shall apply to any criminal proceedings in respect
of any offence committed before or after the commencement of the
Criminal Procedure Amendment Act, 1958, i.e., the 14th February,
1958, renders quite academic ^{the question} whether apart from sub-section (2) ~~the~~
section 263 bis (1) would have been retrospective.

London, 8th April, 1958.

*Wither D.D. Old
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DATED Eighth April, 1958

OPINION

as to the effect of section 26Bbis
of the South African Criminal Proceed-
ure and Evidence Act.

Collection: 1956 Treason Trial
Collection number: AD1812

PUBLISHER:

Publisher:- Historical Papers, The Library, University of the Witwatersrand

Location:- Johannesburg

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