THE TRIAL TAKES SHAPE (III)

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JUST about every weapon in the political armoury was used by the Nationalists in the General Election campaign; but one gun, elaborately prepared, has been strangely silent. No mention was made of the Treason Trial, no use made of its enormous vote-carrying potential. Of course, the case is still *sub judice*—legally off limits for public discussion—but this did not deter Cabinet Ministers or Nationalist newspapers from making extensive political capital out of it a year ago. So blatant was their disregard of the *sub judice* rule then, that defence counsel appealed—in vain—to the Court for an order restraining them. The reasons for this reticence are obscure, but if embarrassment is one of them, it has not so far deterred the authorities from pushing on with the case. As things stand, ninety-five persons have been committed for trial on charges of High Treason; Mr. Oswald Pirow[1], one of the country's leading Queen's Counsel, has been retained to lead the prosecution, and a date (July) and venue (Pretoria) have been provisionally given out.

The black-out of the Treason Trial in the election campaign is only one of the curious features of a case that has abounded in strange and unpredicted twists. Last December, a few weeks before the Preparatory Examination was due to resume, sixty-one of the accused were discharged, with a statement by the Attorney-General that there was no case against them. This, after a detailed preparation of the case had occupied a team of Special Branch detectives and prosecutors for two years, after ten thousand documents and millions of words of evidence had been led in proceedings that kept the accused in the Drill Hall for a full year. These sixty-one had been arrested in Nazi-style 4 a.m. blitz raids and imprisoned in the Johannesburg Fort, where attempts were made to deny them visits by friends and legal advisers. Bail was at first refused, and only granted later on condition that they surrendered their passports, reported weekly to the police, and did not attend gatherings. During the year that they sat in the Drill Hall, in a case which according to the Attorney-General contained no evidence against them,

1. A former Minister of Justice and one-time personal friend and admirer of Adolf Hitler.

they lost their jobs and their livelihood and became dependent on the Treason Trial Defence Fund. Now, without any compensation for the 'mistake', they must struggle to find new jobs and fight their way out of debt.

Nor has this happened to a few individuals inadvertently caught in a net cast a little too wide by the Security Police, but to more than one out of three of the arrested persons. Their release really means that there was never any case against them, for it came before the accused were called upon to give evidence on their own behalf, or even before the defence submissions were argued.

More puzzling than the releases themselves were the names of some of those selected to be set free. In his opening address, the prosecutor made it clear his main allegation would be that launching the Freedom Charter was an act of treason. Yet among those released was Chief A. J. Lutuli, one of the prominent sponsors of the Charter. The prosecutor's address even included a quotation of Chief Lutuli's message backing the Freedom Charter. Did Lutuli's release mean that the Crown had abandoned the allegation? Not at all—Mr. Pirow, in summing up the case at the end of the Preparatory Examination, left no doubt that this was still the essence of the Crown's case. If any one organization has been on trial in the Drill Hall, it is the African National Congress. Yet not only has Chief Lutuli, who is President of the African National Congress, been freed, but so too has Mr. Oliver Tambo, the Secretary-General—while lesser officials and simple A.N.C. members remain behind to face the charge that the A.N.C. was the moving spirit behind the East London and Port Elizabeth riots, and the campaign for the violent overthrow of the Government. In his opening address, the prosecutor made spine-chilling references to the Evaton bus boycott—which, he said, was "exploited to an extent where violence was used and (the bus boycott) became a preliminary to a revolution." Yet among those released was Mr. V. Make, chairman of the committee that organized the boycott, and Mr. Bob Asmal, a prominent boycott leader. It is impossible to fathom why certain persons were released and not others, or what pattern lies behind the withdrawals.

In a case that is setting precedents and records all down the line, it is not surprising to find the Government seeking the assistance of Parliament to help close the case against the

accused. This is the first time that legislation has been rushed through, *in the middle of a case*, to overcome difficulties of evidence revealed in the proceedings. For many years the ordinary rules of Court procedure have sufficed to bring criminals to book, but for the Treason Trial, special rules have had to be devised. The Criminal Procedure Amendment Act, passed just before the resumption of the Preparatory Examination, contains a section that Mr. Swart unabashedly admitted was inserted to help the prosecution in the Treason Trial. It provides that any document which was at any time on premises occupied by any association of persons, or which was in the possession of any office bearer, officer or member of such association, shall, on its mere production in any criminal proceedings, be *prima facie* proof that the accused was an office bearer or member of such association. Furthermore, any document which appears to be the minutes of such association shall, on its mere production, be *prima facie* proof of the holding of a meeting and the proceedings thereat. Any document which discloses any object of such association shall, on its mere production, be *prima facie* proof that the said object is the object of such association.

The purpose, of course, is to let the vast mass of confiscated documents speak for themselves and to require accused persons whose names are mentioned in documents found in the offices of an organization to prove that they do not, in fact, belong to the organization. By this means, too, the Crown need not prove that a meeting was in fact held, or certain decisions actually taken. It has only to produce 'minutes', and it is then up to the accused to show that they are false. It must have been disheartening to the Crown to see one witness after another demolished by the withering cross-examination of defence counsel during the Preparatory Examination. Now at the trial it will be possible to spare numerous witnesses the ordeal. The documents are now the witnesses, and documents cannot answer questions. It is not possible here to discuss all the implications of this new procedure. The difficulties of proving a negative are notorious. It is obvious that it will now be alarmingly easy for persons to be convicted on forged evidence. And persons can be forced into the witness box to deny the truth of a document, and compelled under cross-examination to implicate third parties against whom the Crown might have no other evidence.

A remarkable feature of the case has been the way the Crown shifted its whole position, bringing in a completely new area of evidence, in the middle of the Preparatory Examination. In its opening address, the events on which the Crown relied were fairly clearly indicated. They related to the Freedom Charter, the Evaton boycott, the opposition to the Western Areas Removal Scheme, and the campaign against apartheid laws, with inferential allegations of a conspiracy to seize power with the aid of foreign governments—all clearly fixed in the period 1953-1956. The warrants under which the accused were arrested stated that the crime of High Treason was committed in the period 1953-1956. But just when the marathon proceedings seemed to be drawing to an end, the Crown started leading evidence of matters prior to 1953, and of events that had not even been hinted at when the prosecutor outlined his case. The Defiance Campaign, the Cheesa-Cheesa letters,[2] the boycott of schools, the attempt to link the A.N.C. with the Mau Mau disturbances and the Korean war—these, which prolonged the hearing by several further months, were purely an afterthought. Several witnesses to this aspect of the case admitted that they were only approached to give evidence some time after the case had commenced. The idea of improvisation, of the Crown searching round for new charges after the case had started, is profoundly disturbing and adds further weight to the suspicion that the arrests were not without an element of capriciousness.

No doubt it was done to strengthen what the Crown considered an unsatisfactory case, as defence counsel submitted, but it led to some curious extravagances. Guilt by association of persons is by now fairly well known, but here we came across a unique example of guilt by association of *words*. Persons would testify about the Defiance Campaign and follow it with evidence of robbery, murder and rioting in Port Elizabeth or East London. As Mr. Berrangé said: "The juxtaposition of evidence relating to the campaign and that relating to violence allows unthinking persons to believe, merely because such evidence was mentioned in almost the same breath by the same witness, that there is a causal relationship between the two. This, of course, is quite false." In fact, the much hinted causal relationship was fully investigated by the Supreme Court some years before, when the leaders of the Defiance

2. See AFRICA SOUTH, Vol. II, No. 2, "The Trial Takes Shape (II)."

Campaign were on trial, and found to be non-existent. The Court completely exonerated them from the very acts of violence which the Crown has now tried, for a second time, to link them with. It is extraordinary, in view of the previous Court decision, that this bearded old myth should be revived for the Trial.

The Crown also tried, in the later 'expanded' stage, to prove that the A.N.C. had decided to adopt the same tactics of murder and pillage that were used by the Mau Mau, in order to unseat the South African Government. For this purpose it produced a witness, Mgubasi, who professed academic titles that made him almost a rival of Dr. Murray, the professor who gave expert evidence on Communism. It was shown by the defence, however, that the degrees were not conferred by any university, but by Mgubasi himself, and, as the cross-examination proceeded, it became obvious that the witness's evidence was as bogus as the letters after his name. At a time when, according to his testimony, he was leading the riot in Port Elizabeth in the company of A.N.C. leaders, he was, in fact, in gaol in Durban. "The most elementary investigation would have proved it," Mr. Berrangé said. "I hesitate to say that such investigations were deliberately not undertaken by the Security Police, but the facts seem to justify no other conclusion." The defence showed that Mgubasi had a formidable criminal record, and, in fact, he was back in gaol for fraud before the Preparatory Examination ended.

The defence made biting comments about some of the types of witnesses produced. To prove the allegations about the Evaton boycott, the Crown relied on the evidence of a notorious thug and gang-leader named Ralakeki. "It is with reluctance that I have to refer to the Crown's conduct in presenting to the Court the evidence of the witness Ralakeki. One wonders how it is possible for the Crown to put into the witness box a witness of this type. Is it possible that the prosecution really could not have been aware of the part he played at Evaton and the fact that he was a gangster and a killer—of the fact that he was employed by the bus company to break the boycott—of the fact that he collected around himself a band of armed thugs and that his function was to set upon and attack those who, although engaged in the boycott of the buses, were nevertheless not acting unlawfully?" Mr. Berrangé asked, in his closing address.

When the charges were presented at the end of the Preparatory

Examination, it became obvious that the case had shifted in many respects from that outlined by the prosecutor when the proceedings began. The allegation that the accused sought foreign aid to subvert the Government has apparently been abandoned. The emphasis was no longer on the employment of violent means, but something more subtle. It is now alleged that the hostile acts that resulted in the charge of High Treason were—that the accused hampered or hindered the Government in its lawful administration by organizing, or taking part in, a campaign against existing laws (various apartheid laws are named), and that they adopted extra-Parliamentary and unconstitutional means in endeavouring to secure their objectives. It is no longer alleged that any part of such campaigns was unlawful, or that any persons were incited to commit offences.

This, of course, is an entirely novel conception of High Treason, and Mr. Berrangé pointed out that, if this is the crime, every Church that opposes the apartheid laws, the Black Sash in its campaign against the Senate Act, the university professors who oppose the Separate Universities Bill, are all traitors and busy endangering their necks. He called the idea 'nonsense' and accused the Government of formulating the charge in this manner, in order to "stifle all public opinion, all freedom of expression, all acts which even in the state of our existing laws are still legal, and which have as their object the eradication of laws that are an affront to Christian as well as to social conscience." He pointed to the complete collapse of the Crown contention that violence was contemplated, and drew attention to one remarkable feature of the case—that not one witness called by the Crown failed to admit that the organizations involved in the Trial had, through their speakers, repeatedly stressed the same theme. "We must avoid violence, even if provoked, even if violence is used against us. We must employ moral, not physical, force." It was the Crown witnesses who proved overwhelmingly that *peaceful* methods provided the keynote of the campaigns. He showed, similarly, how the evidence completely contradicted the allegation that the accused stirred up racial strife. Speaking of the Freedom Charter, he reminded the Court that this was not a cloak-and-dagger conspiracy, but a widely proclaimed campaign, and that the contents of the Charter are enshrined in most civilized political systems, having been confirmed as an ideal of human statehood by the United Nations in its Declaration of Universal

Human Rights. If the Crown's definition of High Treason were correct, then the most astonishing collection of world leaders and thinkers would find themselves on trial if they lived in South Africa. The framers of the United Nations Declaration, for instance; Earl Russell, Edouard Herriot, Thomas Mann, for striving for peace; Jefferson, Milton, Woodrow Wilson, Franklin Roosevelt, for writings which were solemnly pronounced 'Communist' by Professor Murray.

Mr. Oswald Pirow characterized Mr. Berrangé's speech as more suitable for a meeting of the United Nations than for the Court. If by this he meant that the speech sought to fit the case in a perspective of public events and an assault on basic freedoms, and that it was filled with sympathy and indignation on behalf of the people drawn into this extraordinary trial, he was right. Mr. Pirow's own effort was a lawyer's speech. He agreed that at meetings speakers always exhorted their listeners not to use violence. But what did this mean? The exact opposite—*use* violence. By telling people not to throw stones at the police, you are subtly suggesting that they should do just that. This is a curious argument, for it means that in spite of the voluminous evidence of what people said during the campaigns, all this must be ignored, and an entirely opposite intention inferred. This strange tone of inferring opposites and looking for hidden meanings ran right through his address. It was true that the United Party, the Churches and women's organizations opposed this or that law—and it was in order for them to do so. But when the A.N.C. did the same thing, it really wanted something quite different. It was merely using these campaigns as a "stalking horse". When there is reference to blood and tears, it can mean only one thing—these people are contemplating something illegal and are inviting the police to shoot and beat them up. It is in order to say and do certain things anywhere and to anyone, except to and before Africans. "It is possible that you can preach that sort of thing in Hyde Park without leading to trouble. But very little of what we have quoted can be preached to Africans in an excited state." Whatever you say on other occasions, to other audiences, it must inevitably lead to trouble in South Africa.

These arguments impressed the magistrate. Taking one night to consider the evidence and submissions, he committed all 95 of the accused for trial on charges of High Treason.