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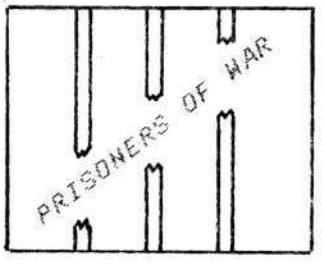
PRISONERS OF WAR ?
THE SOLDIERS OF UMKHONTO WE SIZWE

Norbert Buthelezi (23) : The son of two teachers from the Mahlabatini district. He was registered at Turfloop University for 2nd year B Admin when he left South Africa in 1982.



James Marupeng (26) : The only member of the group who is not from Natal, he lived in Vosloosrus with his mother and uncle at the time of his exile in 1972. Several other members of his family have also left the country.

Mfundisa Dumisa (26) : The commander of the group, he comes from a peasant family in the area near Nongoma. He left the country in 1979 when he was at high school in Empangeni.

Wilfred Mapamulo (28) : Originally from Mapamulo district, he is part of a large peasant family, his father having six wives. His siblings are either workers or unemployed. He left the country in 1981.

THE TRIAL

It could be any district court in South Africa. The ceiling fan chops through the fly-thick heat in the room. The prosecution slowly takes its witness through the cross-examination. An old woman, one of the accused, coughs and leans her head on the rail in front of her.

But this is the Estcourt security trial. To the left of the court is a long table covered with an array of automatic rifles, mortars, ammunition boxes ... In a glass and wooden box between the audience and the judge, advocates and court orderlies, are the thirteen accused, on charges of terrorism and the illegal possession of firearms and ammunition.

When the trial began on the 15 October 1985, four of the accused demanded prisoner of war status and refused to participate in the proceedings. In a statement read to the court, they rejected allegations that they had committed crimes as they were soldiers of Umkhonto We Sizwe and had been arrested in the course of duty.

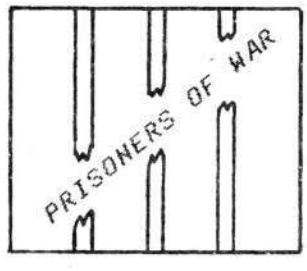
"We believe in the fundamental human right recognised by a civilised nation to democratically elect the government. It should also be possible to democratically remove from power a government that is no longer legitimate, and since this is not possible, this gives us the right to remove the government by force if need be.

We reject the courts as a loyal and faithful arm of the very government we wish to destroy and are happy for the trial to continue without us and would face the consequences, no matter how bitter, because it is impossible for the government to be impartial in its own case. Our cause for justice is too precious to be soiled by participating in the lowly and sinister exercise of the court that is not a people's court but a mockery of justice.

The ANC is a signatory to the Geneva Convention. We were captured in the process of executing our mission to liberate our people. Therefore we must be accorded prisoner of war status. The Boers took up arms against their British oppressors and those who fought are heroes today. But we are called terrorists."

The judge, Mr Justice Wilson, replied that a main function of the Supreme Court was to guard against the invasion of the individual's rights. He said that he acknowledged and understood the position they had adopted, but did not have the power to authorise their absence during the trial. He also said that if they were to be treated as prisoners of war, the final sentence could be heavier than a judgement passed down by the court.

One could argue that the four have a right to POW status on a purely moral basis and that they have stated their case sufficiently succinctly for the court to consider their claim as a legal defence.



THE LEGAL POSITION

Apart from the moral claim, one could also use the existing legal machinery to debate their cause. The important document in this regard is Protocol I of 1977 to the Geneva Convention of 1949, which deals primarily with international conflicts, but includes "armed conflicts in which people are fighting against colonial domination, alien occupation and against racist regimes in the exercise of their right of self-determination". Combatants engaged in such struggles are to be accorded POW status in the event of falling into the hands of the enemy. A combatant must, however, belong to a military organisation, wear a uniform or other such insignia as a means of identification, and wear arms openly immediately prior to a military engagement.

This is clearly intended to encompass the conflict in South Africa. However South Africa has not signed, ratified or acceded to the 1977 Protocols and in terms of the treaties, is consequently not obliged to apply them. On the other hand, it would be bound if the treaties have become part of customary international law. Professor Georges Abi-Saad, a leading Third World spokesman on this issue, has provided a convincing argument to support the claim that this is the case.

Recent trials in South Africa and Namibia have not focussed on whether the protocols reflect international customary law. Less contentiously, it has been argued that the Protocols provide evidence of a trend in humanitarian law, and in this context the court is bound to find mitigating circumstances. Justice Bethune, in passing sentence on Sagarius and others in Namibia, did consider the trend relevant to his decision and imposed a relatively light penalty for similar offences under the Terrorism Act. On the other hand Justice Curlewis, in summing up the case of Mogoerane and others in Pretoria, stated that the trend was of no relevance at all, because South Africa is not a signatory of the Geneva Protocols and the concept of giving POW

status to members of groups such as the ANC had not become part of customary international law. Mogoerane, Mosololi and Motaung were sentenced to death and executed on 9 June 1983 in Pretoria.

The current trial in Estcourt has not discussed this issue, nor has the defence argued that mitigating circumstances apply. Indeed, this seems unlikely to take place because the four accused have rejected the legitimacy of the court and are not strictly represented by the defence counsel.

This is perhaps a pity, considering that the details of this particular trial make it suitable for establishing a precedent ruling on the question of POW status for the members of Umkhonto We Sizwe. That the accused openly admit to belonging to a military organisation, that they received military training, that they returned to the country in order to recruit further members, that they carried arms and conducted training camps, these all are important in fulfilling the requirements for combatants in terms of the Geneva Protocols. Furthermore recent rulings in the Natal courts have indicated that the Bench has been less concerned for the security of the state and more concerned with the liberty and freedom of the individual. In particular one might expect self-determination to be recognised as an international legal principle.

DETENTION AND SECURITY LEGISLATION IN S.A.

Proceedings of a conference held at the University of Natal, September 1982 (University of Natal Press)

In his opening address, Arthur Chaskalson questioned what could be achieved by the conference, considering the long history of protest against increasingly repressive legislation in South Africa. Nevertheless the conference would be a failure, he said, if it did no more than "mourn the passing of freedom and express a little fastidious sorrow over human imperfection". At the least its purpose should be to clarify the implications of the Internal Security of 1982, and to make this information generally available.

The publication of the conference proceedings finally honours those intentions, although quite why we have waited three years is not explained. As one might expect, the limited reforms which have taken place over this time do not detract from the current relevance of the booklet and it will be of great use to lawyers, doctors and community organisatons.

The conference covered a wide variety of topics, from the psychological effects of detention and the ethical responsibilities of the medical profession, to the historical context of security legislation in South Africa and the admissibility of detainee evidence. An address by Professor Louis J West from the University of California, on the effects of Debility, Dependency and Dread (DDD), a syndrome which was used in Vietnam to extract 'confessions' of germ warfare and the use of bacteriological weapons in North Korea, provoked a wider discussion on parallels for South African detainees. The effects of DDD alone can place considerable doubt on whether truth is arrived at as a result of interrogation.

In reviewing the proceedings, advocate Zac Yacoob hoped that the conference would give rise to greater cooperation between lawyers, doctors and community organisations in challenging detentions. He will not have been disappointed by the events of the last three years. Progress has been made in challenging the inviolability of police action under Section 29, and MASA has been forced into taking a limited stand on the quality of medical assistance available to detainees. This gives force to Chaskalson's suggestion that there is reason to 'lecture in navigation while the ship is going down'.

'REASON TO BELIEVE'

DESCOM Bulletin spoke to Richard Lyster, attorney of the Legal Resources Centre, about last month's court judgements on Section 29 detainees.

DB : Recently lawyers, acting on behalf of Archbishop Hurley and Carmel Rickard, obtained a landmark judgement from the Supreme Court for the release of Paddy Kearney, held under Section 29 of the Internal Security Act. I thought that such detainees were beyond the jurisdiction of the courts. How is it that the action was able to filed in the first place ?
RL : Firstly to describe this as a 'landmark' judgement, or as some legal commentators have described 'the first step towards the restoration of the rule of law' is overstating the implications of the judgement. The re-establishment of the rule of law will require a great deal more than this, but I agree that it is an important judgement. In answer to your question, Section 29 contains what is termed an ouster clause, which prohibits the courts from deliberating on any 'action' taken by the police in terms of the section. Chris Nicholson and David Gordon argued, and the court accepted, that if it could be shown that 'action' taken in terms of Section 29 was not lawful, then the ouster clause would not apply. In other words, the court does have jurisdiction if the police action is unlawful.

DB : On what basis was it then argued that Paddy Kearney should be released, given that the court had agreed to hear the application ?
The task was to prove that the action taken by the police was in fact unlawful and this is where the now infamous words 'reason to believe' become relevant. Section 29(1) says that if a police officer has reason to believe that a person has committed certain offences, then that person may be arrested without warrant and detained. Our courts have tended to interpret these words in a subjective sense, in other words to mean 'in the opinion of the police'. It was argued that no-one could reasonably believe Kearney to have either committed an offence or to be withholding information relating to the commisson of an an offence under Section 54, given his status as a universal pacifist and his religious convictions.

DB : How did the police respond to the application ?
They raised the initial technical defence that the ouster clause applied and that such an action could not be brought to the court. They also refuted that 'reason to believe' was objectively determinable, and in any event the reasons which they had could not be revealed because of state security.

DB : On what basis did the judge give his decision ?
The judge agreed that 'reason to believe' was objectively determinable and in view of the fact that the police had put up no reasons for Kearney's detention, other than to say that he was withholding information, the judge ordered him to be released.

DB : Aren't we in difficult territory here ? A person held under section 29 is being detained for the purpose of interrogation. How much must the police already know before detaining someone on order to elicit further information ?
This is the police's problem. Obviously they must have some information that the suspicion is reasonable that a person is involved in certain offences. It certainly cannot be mere speculation.

DB : How many people were subsequently released after similar applications ?
Immediately after Kearney's judgement, we instituted action on behalf of three End Conscription Campaign detainees. The court followed the precedent set by Kearney's case and ordered their immediate release. We then threatened action by telex on behalf of six other people and the security police released these people within twenty four hours of the telexes being received.

DB : This sounds too good to be true. How do you think the State will retaliate ?
Unfortunately they are retaliating hard and fast, and have appealed against the judgement of Justice Leon. The appeal will probably take place towards the end of February 1986 in Bloemfontein in the Appellate Division. If this also follows the course taken by the Durban courts, the State has the other easier alternative of ammending Section 29(1) of the Internal Security Act.

DB : It is significant that these rulings have been obtained in Natal only. At a conference held at the University of Natal, Durban, in 1982, Professor Dugard revealed that 17% of the Transvaal judiciary (including acting judges) heard 84% of the serious offences under the Internal Security Act 44 of 1950 over the period 1978 - 1982. Without coming to any conclusions, do we have a similar situation in Natal ?
I think that Professor Dugard's figures are very revealing and no doubt the same situation applied in Natal in the past. However at the moment we have a situation where judges who peviously have not sat in on security cases, are now doing so and a review of cases indicates a fairly noticeable change in the approach taken.

DB : The judgement on the release of detainees is only one of two sucessful applications on the treatment and circumstances of detainees, the other being the granting of orders restraining the Security Police from assaulting Section 29 detainees. Certainly detention without trial, and the horrifying conditions under which detainees are held, have been with us in South Africa at least since the 90-day detention laws in the 1960s. Do these two judgements represent a change in attitude by the courts or simply that the action of the Security Police has not before been contested by the courts ?
The white South African establishment have always been concerned that it be accepted as a member of so-called civilised western society. The recent behaviour of the security police has been so universally condemned that in order to protect the claim that we have an independent judiciary, and also out of a real sense of revulsion against the activities of the police, certain judges have shown their initiative and this is evident as a change of attitude. It is also true that very few applications have been made to test the legality of police activities because lawyers have tended to accept the inviolability of their action.

WHEN WILL IT STOP ?

On Friday 26 October the state of emergency was extended to the districts of Cape Town, Bellville, Goodwood, Wynberg, Kuils River, Simonstown, Paarl and Worcester. In the same week, it was revealed that the size of the SAP is to be increased by 11 000 employees, a total of 25 percent. Of this figure 5000 black policemen will be trained in the next six months to assist local authorities in the maintenance of 'law and order'. This is more than seven times the present number, and can only mean that the state is preparing for an even stronger offensive.

Figures released by the police indicate that by the 31 October, 5876 people had been detained under the emergency regulations, of which 1152 are still being held. Between January and November 1985, 686 people have died in township violence. The daily average before the state of emergency was 1,4 , afterwards 3,4.

DPSC has estimated that 25000 people have been arrested for political reasons between September 1984 and November 1985, and that so far this year 1633 people have been detained under security legislation. When these figures are seen in the context of a recent report published by the Institute of Criminology at the University of Cape Town, which maintains that a detainee taken under South Africa's harsh security laws, has an 83 percent chance of being physically tortured, the extent of repression and terrorisation of members of organisations opposed to the government and its 'reforms' is fully revealed. And it is still escalating.

BEHIND THE STATISTICS

For many in South Africa, detainees are merely a statistic. Their names appear in the newspaper, followed by the relevant section under which they have detained and, as far as the general public is concerned, they are not heard of again until they come to trial if, in fact, they are charged.

But for the time of their detention and for a long period afterwards, DESCOM lives with these detainees through their families. From mid-August, when the number of known Durban detainees increased from six to about thirty, the attendance at DESCOM's Monday night meetings increased in direct proportion - wives, girlfriends and parents came to find out what could be done for their loved ones. they swapped stories with one another about clothing and food parcels which had been allowed in by the Security Police, or about how they had been turned away.

The detention of their children had also singled them out for harrassment from people in their communities who were opposed to activities which security detentions presume. One woman asked DESCOM to trace a son overseas who is studying to become a doctor. She wanted us to tell him that she would soon die at the hands of these people and that he must come home to look after the 'little ones'. Each week there would be new reports of homes being petrol bombed and goods destroyed.

As the majority of the detainees were school children, every Monday night DESCOM was faced with the agony of parents who did not know where their children were being held, or how they were being treated. At least two of them discovered that their sons were in hospital being treated for injuries as a result of assault. One parent told DESCOM how only a year ago, she had five children. Since then two had died in motor accidents, another was now a detainee in hospital under police guard, and the fourth an epileptic who suffered a severe relapse after the police had taken away her brother in the early hours of the morning.

This contact with the families of detainees is a constant reminder of the suffering which apartheid's laws bring to people's daily lives. After that knock on the door, they can never be the same again.

NOW MASA WILL CHOOSE

The Medical Association of South Africa (MASA) announced in a statement released in Pretoria recently that detainees would in future be able to choose from a panel appointed by MASA if 'for some reason' they were dissatisfied with the medical care offered by the district surgeon.

The timing of the statement, and the fact that the announcement was made by MASA and not by the authorities, suggest that it was a publicity stunt on the eve of the World Medical Association Conference in Belgium, and seems clearly designed to boost the credibility of MASA in that forum.

Whether the new plan will benefit detainees at all, will depend upon how the panels are to be constituted. DESCOM believes that any detainee should be entitled to see a doctor of his or her choice and that this should not be restricted to a panel put forward by MASA.

MASA, however, seems satisfied with the new plan, describing it as a major breakthrough which will ensure that there are no further deaths in detention.

The progressive medical organisations are less optimistic. It is particularly surprising that MASA has not called for the abolition of the entire system of detention, in view of the extensive evidence of assault and torture of detainees. It is, after all, this system which is the root cause of ill health and deaths amongst detainees. The latest proposals do nothing to change the conditions for detainees, neither will they curb the activities of the Security Police. If MASA is indeed serious in its concern for the welfare of detainees, then it surely must address these aspects first. Until that time, its half-hearted attempts at reform will have little impact on the general health of detainees.