

COMMISSION OF INQUIRY INTO THE RIOTS AT
SOWETO AND OTHER PLACES IN SOUTH AFRICA.

AFTERNOON SESSION:

21st FEBRUARY, 1977.

VOLUME 111

(Pages 5 343 - 5 360)

COMMISSION RESUMES AT 2 O'CLOCK.

CHAIRMAN: Under the caption "Observing a Legal Maxim" the Rand Daily Mail published a leading article on the erosion of the principle: audi alteram partem. In my view the article is calculated to bring this Commission into disrepute.

On the day of its publication, the 10th February, 1977 I telephoned the editor. The following day he paid me a visit and informed me that the Rand Daily Mail did not intend saying anything which could affect the Commission adversely. We discussed the article and my views of it fully. I finally informed (10 the editor that I would in due course read to him a statement I intend making in the Commission.

The article starts off with these words: "A fundamental tenet of our system of justice is expressed in the legal maxim that the other side must be heard". It is later said: "Unfortunately there has been in recent years a trend outside the courts which goes counter to the maxim".

Reference is then made to another Commission and to a statement by a Minister in Parliament.

The third example of erosion is introduced as follows: (20 "Another departure from the maxim can occur within the courts themselves when someone who is not a party to proceedings is unjustly attacked".

Facts are given of a so-called "celebrated Appeal Court decision". If that reference is to the case of Pogrund versus Yutar, 1967(2)S.A. 564A, it is to a case which deals, not with the maxim but with defamation and the privilege attaching to an advocate's address.

The second half of the article is devoted entirely to commissions and to this Commission in particular. I quote the (30 last five paragraphs fully.

"When/..

" When it comes to commissions of inquiry the essential maxim is even more open to erosion. While Commissions can serve an invaluable purpose there is need to guard against assassination of character and a great responsibility rests on those conducting the inquiry to protect uninvolved and innocent people.

This kind of erosion, we believe, has been manifesting itself this week in the Cillie Commission. A number of people have been named by witnesses, sometimes in relation to specific events in last year and at other times, seemingly, in a more passing way. The witnesses concerned are current Terrorism Act detainees, freed only temporarily and in a formal sense, from their incommunicado detention where they are wholly at the mercy of their captors.

(10

As their names are concealed by order of the commission, it is difficult to evaluate their testimony and anyone who considers himself injured certainly faces obstacles in seeking redress.

(20

The problem is aggravated because of the absence of normal court safeguards where evidence can be challenged by defence counsel. Thus the way would be open to character assassination.

That of course, cannot be the Commission's intention. But the situation must cause disquiet. "

I wish to make the following comments:

1. In a court of law and in a commission the practical application of the maxim is that a judicial officer should not make an adverse finding against a person who has not been given/..

(30

given the opportunity of being heard.

2. The writer of the article did, apparently not consider that the best way of refuting damaging evidence, is to lead contradictory evidence. And this commission has on a number of occasions and in a number of ways, asked members of the public to testify.
3. During the telephone conversation referred to before, the editor mentioned the name of a person whom he considered could have suffered as a result of the evidence given before the commission. At the subsequent meeting, I asked (10 the editor whether, before the article was published, the newspaper had communicated with that person or that person's attorney or this commission. I was informed that it had not been done and that to do so would not have been in accordance with normal newspaper practice. One may well ask whether audi alteram partem is only a legal maxim which does not apply when a newspaper with a wide circulation and read by all sections of the community, attacks in an editorial expression of its opinion, a judicial commission for the supposed erosion of that very maxim which it has deliberately (20 disregarded.
4. A telephone call to that person, the attorney, or the commission would have been sufficient for the newspaper to have been aware of the fact that the attorney had been in touch with the commission on the day preceding the publication, that the supply of a copy of the evidence was discussed and that an appointment had been made for the attorney to discuss a date for the cross-examination of the witnesses concerned, if that was required, and for the leading of evidence, if that was considered. I may add that the (30 meeting was held last Friday. I should also add that the attorney/..

attorney was in touch with the secretary of the commission towards the end of last year in connection with the giving of evidence by his client. To anyone else who considers himself aggrieved by evidence, the door of the commission is open.

5. The regulations of this commission provides for the cross-examination of witnesses and the non-disclosure of a witness's name and identity at his request.
6. It is difficult to understand the third-last paragraph which relates to the concealing of names. It is the commission (10 who is to evaluate the evidence of a witness and the fact that it has ordered that the name of the witness must not be published, cannot affect the commission in its evaluation. This, the editor conceded but said that the public was also entitled to evaluate the evidence. Any member of the public present in the Commission would have heard the names. Those not present would have had to base their evaluation on newspaper reports of the evidence. The fact that the name of the witness is not known fades into insignificance when his first difficulty is that such reports may through (20 their incompleteness, unintentionally, convey an erroneous impression.
7. The second part of the same paragraph has reference to redress. I have been told that the newspaper had legal opinion that a person defamed would not be able to sue a witness whose name had been ordered not to be published. On the facts before me, I do not share that opinion.
8. The final paragraph does not soften the attack on this Commission, as contained in the complete article, viz. that it has acted unfairly and not in accordance with justice, (30 that it has performed its functions without regard to an important/..

important legal maxim and therefore may not be able to evaluate certain evidence and that, as a result, its report may be unfair, incomplete and unreliable. Such an attack may well cause prospective witnesses to refuse to testify.

9. I have read the statement over the telephone to the editor of the Rand Daily Mail.

10. Meanwhile, I leave it to the newspaper concerned to repair as soon as possible the damage it has caused the Commission. (10)

Dit sou miskien van pas wees indien op hierdie stadium die Kommissie net weer herhaal dat sy deure vir almal oopstaan; dat enige een wat getuienis wil kom lewer in verband met die opstote en wat daar gebeur het en wat die oorsake daarvan was, slegs met die Kommissie in verbinding hoef te tree. Indien so 'n persoon beskerming wil hê, dan hoef hy slegs daarvoor te vra. Indien nodig, sal sy naam nie bekend gemaak word nie en ook nie enige feit wat tot sy identiteit aanleiding mag gee nie.

Verder, indien selfs daardie beskerming nie genoeg- (20) saam is nie, dan kan enige getuie die Kommissie nader en om, indien hy goeie redes daartoe het, vra dat sy getuienis agter geslote deure gehoor sal word.

DR YUTAR: Edele, ek roep terug een van die vorige getuies, mnr. Columbus Malebo. Hy wil graag 'n korreksie maak in die getuienis wat hy die ander dag gelewer het.

COLUMBUS MALEBO: sworn states:

DR YUTAR: You gave evidence last week in which you referred to a report made to you by your daughter, who attended a high school named? -- Sekonontoa.

The report was to the effect that school children had barricaded themselves inside the school grounds, the gates were locked. that the police arrived on the scene, fired at the children (10) and also fired .. (intervenies)

CHAIRMAN: Shot off the locks.

DR YUTAR: Shot off the locks and I then asked you if the police fired at the children, whether anybody had been killed or hurt and you said no, nobody had been killed or hurt. Now you want to make a correction? -- Yes.

And this correction is based on what? -- On the evidence that was given by people who approached me after they had read the article in the press.

Who are those people? -- One was Shiko Ramaselela. (20)

Who else? -- Donald Ndebe, and the other 2 I do not know.

Now these two, are they students of the school? -- No, Shiko works for the Old Mutual.

The Old Mutual. -- Yes. Ndebe I do not know what he does.

But he is not a student? -- He is not a student.

And these 2 plus 2 others told you after they had read your evidence in the paper that? -- That it is not true that the police shot to frighten the children, they actually shot and killed 2 children and that not less than 10 students were injured.

Now these people were so ready to correct your evidence (30) that the police fired at the children in order to frighten them, did they give you any further information as to why the/...

the children locked themselves into the school grounds? -- Except the known fact that they were demonstrating against the presence of Dr Kissinger in the country, they gave me no other information.

Did they perhaps tell you who had asked the police to come there? -- No.

Did they tell you why the police opened fire? -- No.

They did not. Is there anything else you want to say by way of correction or addition? -- No, that is just all.

M'Lord, I am of course taking steps to have this matter investigated and also the death of this Sarah Tshabalala, (10) referred to as Sarah Nkosi by the witness Miss Gibson, and I propose to lead evidence in due course about those incidents.

CHAIRMAN: About both those incidents. That would be about the shooting too at the school?

DR YUTAR: The shooting at the school and also about the shooting of this mother, Sarah Tshabalala.

CHAIRMAN: Now these 4 men who spoke to you, would they be prepared to come and give evidence? -- I asked them but only one said he would be coming if he had not just procured a job and he finds it difficult to be let off. The others refused. (20)

Well, if you see him again, tell him that I have no doubt that his employers would have no difficulty in giving him an opportunity to come and give evidence. If he has any such difficulty will he get in touch with me and I am prepared to hear him at the time when he does not work so that it will not affect his work at all. -- I will tell him.

All right, so he must get in touch with the secretary and the arrangement will be made. -- I will tell him so.

DR YUTAR: M'Lord, may I just ask one more question. Did he give you the names of the children, the two children who had been (30) killed? -- He could only remember one, a Buthelezi girl.

Buthelezi? -- Buthelezi.

Buthelezi/...

Buthelezi. --- That is the surname of the one girl, he could remember.

The surname of the one girl. --- Yes.

He couldn't give you any other name? --- No, he couldn't remember the others. The one, the other girl that is killed and neither could he remember any of the injured ones.

I have no further questions.

CHAIRMAN: Thank you very much.

NO FURTHER QUESTIONS.

DR. YUTAR: Edele, ek roep die volgende getuie, dit is dr. H.J. (10 Möller.

HENDRIK JACOBUS MÖLLER, verklaar onder eed:

DR. YUTAR: Doktor, u is nou die dominie verbonde aan watter kerk? --- Die N.G. Kerk in Afrika.

N.G. Kerk in Afrika. U is die Moderator, nie waar nie? Van Noord-Transvaal, ja.

Noord-Transvaal. Nou u het 'n brief geskryf aan Sy Edele, in verband met hierdie onluste wat uitgebreek het in Soweto in Junie verlede jaar. --- Ja.

Daardie brief is nou voor u, sal u so goed wees om dit (20 uit te lees asseblief? --- "Hooggeagte Heer, insake Die Indiening van Memoranda. U is moontlik nog bewus daarvan dat die Ned. Geref. Kerk in Afrika van Noord en Suid-Transvaal aansoek gedoen het om 'n memorandum in te dien. Dit is die kerk van die N.G. Kerkfamilie wat onder die Swartmense is. Die twee moderature het 'n hele aantal vergaderinge gehou waarby 'n hele aantal lede van die kerk op uitnodiging deelgeneem het, Na vele dae se werk is besluit om nie meer 'n memorandum in te dien nie. Lede is daarop gewys dat hulle as individue wel getuienis kan lewer voor u. Die tyd het egter reeds so ver (30 verloop dat die opstel van 'n deeglike persoonlike memorandum nie

meer/..