

IN THE SUPREME COURT OF SOUTH AFRICA.

(TRANSVAAL PROVINCIAL DIVISION)

BEFORE: The Honourable Mr. Justice DE WET, Judge-President.

In the matter of:

THE STATE vs. NELSON MANDELA AND OTHERS.

12th JUNE 1964.

- ADDRESS IN MITIGATION -

MR. HANSEN:

May it please your lordship. My lord I rise under very difficult circumstances to address your lordship on what is really the most troublesome part of any criminal case, and that is the sentence which your lordship should pass on the accused.

These accused, my lord, who stand before you, are men who for many years, on the evidence before your lordship, have taken a leading part in the political life of their people. The reasons for their doing so, the causes, their motives, have been referred to in evidence before your lordship, and I want, briefly, my lord, to touch on some of these. These accused, my lord, in my submission, represent the struggle of the African people, the non-European people, for the attainment of equal rights for all races in this country. They are men who have been moved by the poverty of their people, by the absence of foreseeable opportunity for the masses of their people to raise themselves out of the depression of poverty. They are men who have been moved by the existence of barriers which apparently prevent the attainment by their people of

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what they conceive to be full human dignity. In this connection your lordship will remember references that have been made to resentments that have been engendered by the continuation of pass laws to men, their extension to women, by regulations involving influx control, by raids under the Liquor Laws, by job reservations. I think, my lord, it was Mbeki, if my instructions are correct, who described to your lordship the hope that was engendered in him by the declaration in 1941 of the Atlantic Charter as a world concept, which promised, for the whole world, two freedoms - 10 freedom from want and freedom from fear.

The submission, my lord, which I propose to make to your lordship is that it was not and is not a reprehensible thing, far less an immoral thing, for the leaders of the people to desire freedom of opportunity for complete advancement for all their people in all spheres of life, and my lord, to express this desire. The transgression for which they now stand in front of you is not the motive, but it was the means employed.

But I urge on your lordship this fact: that 20 the denial of freedom, as they saw it, the existence of laws which made impossible even a partial attainment of what they wanted - these things became the grievances of the African people: grievances which have been voiced not only by the accused, but by generations of them who became the leaders of the African people. And the body which historically became the forum through which these grievances were expressed, through which the hopes and aspirations of the African people were expressed, was the African National Congress, which was formed and called 30

into being as far back as the year 1912.

From the point of view, my lord, from which I address you, the outstanding principle of the A.N.C. was the attainment of a non-racial democracy, and the recognition my lord that having regard to the permanence, the size, the importance of the white population of this country, that the democracy should be multi-racial in character. It differed from other organisations which ultimately adopted a slogan of "Africa for the Africans" - this was a recognition, my lord, of multi-racial society in the hope that what change could be brought about, or would be brought about, would take into account the whole population of South Africa.

It has been said in evidence, and I think it is historically true, that from 1912 until 1952 the efforts of the A.N.C. were directed to achieving these ends by legal and constitutional methods. And my lord, it was only the lack of tangible results which in 1952 caused the African National Congress to abandon the strict adherence to the limitation of legal means. That was the time, my lord, in the period after this when the well-known, 20 notorious "Defiance Campaign" was launched, and 8,500 volunteers were committed for petty breaches of the apartheid laws. It was in this period, my lord, the period which followed, that the African National Congress was party to the adoption of the Freedom Charter, which again re-affirmed the principle of a non-racial democracy.

I think it was in 1956 that that Freedom Charter was written into the Constitution of the African National Congress, and the writing of it into the Constitution, my lord, caused a parting of the ways between them 30 and other organisations that did not stand for the same

principle. That, my lord, was a declaration which set as a goal, if I can summarise it in a sentence, the attainment of rights for equal opportunity for all races in South Africa.

It was during this period, my lord, 1952 to 1961, that the African National Congress resorted to illegal but non-violent political activity, and it is said, my lord, and seems indeed to be the position, that that activity was intended to focus attention on its claims that African people were being discriminated against, and that in their view laws existed which were destructive, insofar as their people were concerned, of human dignity and family life.

My lord, it is a fact, and a sad fact, that those years were the years which went hand in glove with laws, the effect of which was to deprive the African of what rights they possessed at that time, and which made gatherings and protest more and more difficult. These latter years, my lord, must have been years of great strain to the then leaders of the African movement, amongst whom were the accused, because they were years, my lord, which marked the failure to secure attention from the public to African grievances. Their leaders were, as a fact, silenced by banning notices, the organisation itself became outlawed. Public meetings became impossible - there was no venue which remained for the public expression of African grievances, and such a situation, my lord, in my submission was bound to lead to illegal action.

Human experience over centuries has demonstrated the urge in man to attain freedom. It is an urge, my lord, 30

if I can put it in parenthesis, which has brought into being the present Republic of South Africa.

Human experience has also demonstrated another thing, that man's endeavour to obtain freedom is irrepressible. It is on these basic facts that I intend to address your lordship in mitigation.

May I say, my lord, that even after 1961, and this is important from the national point of view, even when the A.N.C. approved the adoption of a resort to the illegal violent means it did so, so the evidence before your lordship makes clear, with the object of affecting public opinion and to avoid, as far as humanly possible, injury to race relations. The explanation has been given to your lordship that the intention was to control the violent means that were being adopted, and to channel them so as to avoid injury to human life.

Out of all this, my lord, emerges - in my submission - the factors which I shall soon submit your lordship is entitled to take into account. The motivation of the accused, the leaders of the A.N.C. was not the overthrow of the State or its institutions. The motivation was not the despoiling of any one of their property or their rights - their motivation was entirely, in my submission, an attempt to influence public opinion in the direction of extending to all the coloured population, a full right to share in the benefits and the responsibility of this fair land of ours. And at least, my lord, to ameliorate the position of the non-European.

I am reminded, my lord, throughout my thoughts in mitigation, of the major upheavals in this country that

took place before this, in the grievances, my lord, that one section or another claimed that they did not have full rights. At one time it was the "uitlanders" who claimed that they did not have political rights; at others it has been the Afrikaner people who have resented the rape of the Transvaal as far back as 1877 and who claimed the right to full national expression. It was not without some significance and interest that I read the statement made by the Reform Committee in their trial in these Courts in the last century where what was said, my lord, as a preamble was that they were denied the rights of citizens. (I don't think that right was justified - historians doubt its sincerity - but it was their claim that they were denied the right of citizens, denied the right of the vote; that protest had not succeeded, and all that was left to them was a resort to force.

In other upheavals in our country, with people of more education and greater background than the masses of the people that are being concerned in this struggle, we found the same thing. In the years 1877 - 1881, when the great leader of the Transvaal, Paul Kruger, visited England and English diplomats, with the cry that the Transvaal should be returned to the people. He claimed that the annexation was not done with the consent of the people, and asked for a plebiscite. The refusal of that plebiscite, my lord, is what led to a rebellion and what was then a successful rebellion.

I don't want to weary your lordship with events of history. I have to refer to them in other connections when I come to legal authority. The struggle of people

that is denied has led to violence. It did so in 1914 in this country - it did so in 1939 and 1940.

But my lord, in mitigation of sentence in this case I ask your lordship to bear in mind that there was no forum through which the grievances and claims of the African people could legitimately be expressed, and I will ask your lordship to understand the frustration which those leaders felt, which ultimately led them inevitably to conspire to commit acts of sabotage and so to arouse attention. Other sections of our people that have had forums have felt the same frustration. General Hertzog, ultimately acclaimed as a great leader of this country, felt this frustration very strongly in 1949 when he issued his warning in the House of Assembly - but he did have the House of Assembly to express it in. He said, my lord: "The abuse of the rights and liberties of the Afrikaner nation, if it is persisted in with impunity any longer, no force, no power, no authority, from wherever it may be, will prevent the people of South Africa setting such an example to those who are misgoverning her, that through all time it will reverberate throughout the history of Afrikanerdom." He went on in that strain, my lord. I don't propose to read it, but it is evidence of the human reaction to an inability to obtain redress of grievances.

In the nature of things, my lord, this trial which has dragged its way for very many months, has been concerned with the vital politics of this country, and a political trial can only be concerned with the clash of divergent opinion, of opposing views, and of a contest between deep-seated and sincerely-held beliefs on both sides

of the question. It is true that a court of law, whose function it is simply to administer the law, is not concerned to adjudicate between opposing views; it is not involved in an analysis of the laws, nor is the court involved in the ezequy of the opinions of those who differ from the lawgiver - certainly not, my lord, up to the point of conviction. But on conviction, in considering punishment, in considering condign punishment, the Court is indeed concerned with the motives and sincerity of the transgressor.

This submission of mine is well-rooted in our law. It is expressed in the sources of our law, and it has formed, in my submission, the basis of judicial decision in this country for over half a century. Van der Linden, "Institutes" (2) Ch. 4 Section 4 para. 3 has this to say: it is quoted with approval in the case of Rex vs. Jolly 1920 A.D. 163 and in a later case of Rex vs. Gomez 1936 C.P.D. 235. The passage at page 235 of the latter judgment contains it all, so it is the only one I will read,

"In Rex vs. Jolly, de Villiers J.A. cited with approval the observations of Van der Linden Book 2 Ch. 4 Section 4 para 3 with reference to the crime of 'oproc' which is sedition, a far more serious branch of crimen laesae majestatis than the one with which we are dealing. Van der Linden has this to say:

"As however the origin of this crime is often found in the different opinions respecting the measures of the Government, there is hardly any crime in which greater caution is to be enjoined upon the judge as on the one hand to preserve the maintenance of peace and good order

and on the other hand not to render anyone the unfortunate victim of political dissensions by excessive severity."

His lordship Mr. Justice de Villiers went on to comment on this in one sentence as "embodying as they do the ripe experience of the ages and are so very much in point" and his lordship Mr. Justice Davis went on to say:

"It is always undesirable by any unnecessarily harsh sentence to make anyone appear to be a martyr because of his political convictions."

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I have accepted this brief, my lord, because I feel with great conviction that too often the face of history has been altered by an absence of true understanding of the grievance and motivation of the offender. In this century, and in this modern world, the firing squad, the unduly prolonged incarceration, have effectively gagged the voice of grievance, but they have also, my lord, opened the doors of history. I could cite from the experience in many modern countries, but it is unnecessary for my purposes. On the other hand, judicial verdicts in political cases, particularly in this land, which have been based on a true understanding and wisdom, have led to tolerance, compromise and ultimate evolution, because they are the result of true compassion. It is only a short 2,000 years ago that mankind was brought face to face with this God-given policy. It broke then, my lord, like a light on an intolerant, sadistic humanity, and in comparatively short time it was eclipsed throughout the civilized world. It is a matter for sad reflection that in these 2000 years mankind has had to be reminded of it

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so often, but it is the reason why a plea for leniency in a case of this description is based on moral and on ethical grounds.

My plea, my lord, is not a plea for mercy, but a plea for the exercise of understanding, wisdom and compassion. When your lordship is now called upon to deal by way of punishment with the views of a group opposed to those in political power, views sincerely held and regarded by the accused as for the general welfare although, my lord, they were illegally expressed - leniency in these 10 circumstances, my lord, in my submission, is in the interests of society and is a guarantee for the future.

And it is worthy of remark, my lord, that this capacity for compassion has been the hallmark of our way of life in this country, and is reflected in all our judicial decisions of our age and our time. Our judiciary, our judicial system, stand high in the estimation of civilisations for its fairness, its justice and its humanity; and if I can say so, my lord, as a member of a practising profession which is part of that administration of justice - deservedly 20 so. We have shown compassion, not only in crimes of a political nature, but in crimes of all natures. And it may well be that because of our heterogeneous population, and it is certainly so, that our judges have always been moved by a plea of wise leniency. Particularly so, in our political trials, because we in this country, my lord, understand well the struggle for national liberation. We understand its motivation, we understand it better than the people of any other land. I have referred, my lord, to some of the instances, and I am not going to repeat them, but it is re- 30

markable.

On the one hand there was the struggle of the "uitlander", there was the struggle of the Afrikaner people - both have survived, and both are coalescing today in a spirit of tolerance. Then not least my lord in its influence to this end was the role played by the civil courts of this land, as distinct from the military courts, because it is in the civil courts that they were shown understanding and sympathy when the frustration of one section or another has led to a legal action and civil trial. The archives of this Division are stacked with records of these cases, but I would only like to cite a few.

Some of them arose out of the Boer War - I only want to refer to trials which came before the Courts, as I say, as distinct from the military tribunals. In Rex. vs. Vermaak, 1921 N.L.R. 204 Mason, J. said this:

"By the law of this Colony it is unquestionable that the punishment for acts of high treason is death, but the Court has power in its discretion, even though it has been doubted, to adjudge a lesser penalty. In exercising this discretion we are entitled, and it is our duty, to take into consideration the circumstances of the country as a whole, the large number of persons who stand in a similar position to the prisoner, and the more humane tendencies of modern criminal jurisprudence. Nonetheless, in the interests of the community must the penalty, though not vindictive, be of such substantial character as to deter subjects from forsaking their allegiance".

And the sentence in that case was three years imprisonment.

Without reading from the judgments, my lord, the most serious offenders on charges of high treason (I refer to B(?) and de Jager were sentenced to five

years imprisonment and a fine of £250, 5 years imprisonment and £5,000 - and there were other cases that were legion, which ranged from an imposition of a fine of £10 up to 3 years imprisonment.

Then the next series of cases arose out of the 1914 Rebellion, and again I will cite two cases which by the Courts were regarded as the most serious, the case of General Beyers and the case of General Kemp. The sentences in those cases were 7 years and 5 years. Your lordship will find, though it is unnecessary to refer to them, 10 these cases in the Archives of the Transvaal Provincial Division, 15

Your lordship will remember that the Court regarded the case of General Kemp with great seriousness, he had gone into armed rebellion, he had gone over to the enemy, he captured a town, and arising out of that rebellion hundreds and hundreds of people lost their lives. When the Court regarded that crime in its seriousness, the greatest penalty that it could inflict was seven years.

Then my lord there were numbers of cases which 20 arose out of sabotage acts in 1939. I don't think any good purpose could be served by referring to the judgments, but with your lordship's permission I would like to refer to what was said about them in the House of Assembly, where there was a plea made for the matter to be re-considered. The late Mr. Dawald Pirow, an eminent member of our profession, said this: "I want to say a few words about the new Emergency Regulations under which the death penalty is imposed for sabotage, and even certain preparations for sabotage. I also warned against violence, as all leaders 30

did. I want to know whether the things that took place were not merely acts of despair, which must be attributed to the attitude and action of the Government itself. There are many families in South Africa where the same feeling of despair exists, as a result of this action.

"The matter of treason is elastic. I think that the Honourable Member Mr. Meyns was also a rebel at one time, and that he simply did not regard treason in that way. Sometimes a job is coupled with certain attitudes, sometimes it is not. I want to remind the Prime Minister 10 what the effect of the death of Jopie Fourie" (that was by a Military Court, my lord). "he has more than one grey hair on his head as a result of it, and has often wished that it had never happened. But if instead of one, half a dozen youngsters will suffer the death penalty, then he will be responsible for bitterness and possibly bloodshed on such a scale that it could easily convert this country into a second Mexico."

Mr. Verster, my lord, in my last quotation, said: "I take up the attitude that we shall find that 20 these people often regret the things they have done. I am convinced that ^{if} these people who have committed acts of sabotage, which we certainly do not approve of, can find mercy at the hands of the Minister, it will be much better for the country."

To conclude, my lord, there are a few observations I wish to make. Political offences, my lord rarely take place when there is an avenue through which grievances can be stated, and a remedy sought. The average men, my lord, anywhere in this world, eschew violence. 31

as long as he can hope for amelioration, but it is when hope ceases entirely that you have a sense of frustration which leads men to less peaceful methods of indicating their grievance.

How much more is this so, my lord, with the present accused, to whom all venues of complaint were closed. It is as if, my lord, almost the last forum available for the expression of grievances is in the Courts of the land, because here, my lord, a man is permitted to say what moved him to act as he did. It is here that the formulation of views opposed to the prevailing views of the land can and must become vocal. From such expression, my lord, some synthesis to the benefit of all the inhabitants can arise.

Your lordship is called upon now to punish those who have transgressed. I do want to submit to your lordship that the element of deterrence is not a strong element. Life, in the experience of mankind over the ages has demonstrated that man will not be deterred from being grieved about his position in life. He will not be deterred in formulating hopes for benefit and uplift, as he sees it. And man cannot be deterred from expressing those views and hopes.

My task is almost done. The responsibility passes to your lordship. I sincerely submit that if your lordship will hearken to my plea, the process of compromise may well be hastened in this country, to the benefit of the whole land.