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10TH APRIL, 1961.

COURT RESUMES : APPEARANCES AS BEFORE.

BY THE PUBLIC PROSECUTOR:

Your Worship, No. 8 accused, i.e. Emmanuel Teketsi, the man who broke his ankle, is present today. Accused No. 3 is not present.

BY THE COURT:

Now, let us deal with the question of No. 3 accused. Has the Crown got any information?

BY THE PUBLIC PROSECUTOR:

No Your Worship, the position remains unchanged as from the last hearing. I have no further information.

BY THE COURT:

Yes, but I issued a warrant for his apprehension.

BY THE PUBLIC PROSECUTOR:

That has not been executed yet, Sir.

BY THE COURT:

The Police have not been able to execute the warrant for his apprehension?

BY THE PUBLIC PROSECUTOR:

No, Your Worship.

BY THE COURT:

And you have no further information?

BY THE PUBLIC PROSECUTOR:

No Sir, I have no further information.

BY THE COURT:

What is your attitude in regard to accused No. 3?

BY THE PUBLIC PROSECUTOR:

Your Worship, the Crown is applying for the

estreatment/....

estreatment of bail. Your Worship will recollect that at the last hearing Your Worship intimated that there was a depositor, Ellen Mohape. I don't know whether she is present today.

BY ACCUSED NO. 4:

Your Worship, the depositor of the bail bond is in gaol. I am still waiting for her. She may call at any time because I sent somebody to fetch the receipt if possible from her.

BY THE COURT : TO ACCUSED NO. 4:

You sent her a message; is that right? Have you got information back that she is now in gaol? Is she supposed to be in gaol today? --- The person I sent is supposed to be here today and not Ellen. The person who is supposed to bring the receipt from her is to be here today.

Who is that person? ---Molete.

Well, you see it is now a quarter past ten, i.e. three-quarters of an hour after the Court was supposed to have started its session this morning. Have you any information where Molete is? What can he do? Can he just come and tell me where the depositor is or what else can he say? Can he come and tell me whether the depositor wants to make any representations to me? --- This Molete will explain everything which the depositor had to come and explain if she came here personally.

Now, what do you suggest Thomas More? It is really not your affair, but you have interested yourself in it perhaps quite correctly on behalf of accused No. 3. What do you suggest --- Your Worship, I would suggest to the Court that if possible the case should be postponed, so that I could get in touch with Molete if possible.

How/....

How long will that take you? --- Only one day, Your
Worship.

But have you any idea why Molete is not here this
morning? --- No Your Worship, I do not know.

BY THE COURT: TO THE PUBLIC PROSECUTOR:

What is your attitude, Mr. Prosecutor? --- Your
Worship, I have no objection to the matter being being post-
poned. There is just one point that I might enquire Sir. I
think - if this is the Molete that the accused is referring
to - he was an accused person in the Evaton trial.

BY THE COURT: TO ACCUSED NO. 4:

Is that right? Is he an accused in another case? ---
That is true, Your Worship.

That case is due on the roll tomorrow?

BY THE PUBLIC PROSECUTOR:

The Evaton case has been disposed of, Your Worship.

BY THE COURT: TO ACCUSED NO. 4:

Is that right? --- That is correct, Your Worship.

BY THE COURT:

Well, we will go into that matter just now further,
because there is the question of No. 8 accused.

Mr. Unterhalter, I don't know if you are interested
in this matter? Perhaps after I have dealt with No. 8 I will
ask whether there is anything you want to put to the Court.

--- As Your Worship pleases.

BY THE COURT: TO ACCUSED NO. 8:

Now, why were you not at Court on the 9th March,
1961? --- I was lying in hospital at Maseru, Your Worship.

Well, I will tell you you were absent on the day
when you should have been here. Now, you can explain to me -

I/.....

I am calling on you now to explain your absence. You can do so either on oath or by way of an unsworn statement. You are not compelled to give evidence on oath, but I place much more reliance on evidence on oath than on an unsworn statement. I naturally don't disregard an unsworn statement, but I must take it for what it is worth. Now, how would you like to explain your absence, by evidence on oath or by way of an unsworn statement?

BY ACCUSED NO. 8:

Your Worship, I will make an unsworn statement from where I stand. I do not want to make a statement on oath.

BY THE COURT : TO ACCUSED NO. 8:

Now, you say you broke your leg when horse riding in Maseru? — No Your Worship, I was travelling in a van.

In a van? — Yes, Your Worship.

In Maseru? — Yes.

That is in Basutoland? — Yes.

What were you going in Basutoland? — I went there to visit.

To visit who? — I visited my relatives there.

Is there anything else you want to say? — That is all, Your Worship.

BY THE COURT : TO THE PUBLIC PROSECUTOR

In regard to accused No. 8 is there anything you want to put to the Court, Mr. Prosecutor? — Your Worship, I am applying for the imposition of the same conditions as Your Worship applied in respect of the other accused.

Is that all? You are not applying for anything further? In other words, you have no reason to doubt his explanation? — No, Your Worship.

By/....

2,941.

11TH APRIL, 1961.

COURT RESUMES : APPEARANCES AS BEFORE.

BY THE COURT:

Now, there is firstly the question of the bail for No. 3 accused. Is the depositor of the bail present now today? Perhaps accused No. 4 can help us.

BY ACCUSED NO. 4:

The position is this, Your Worship, that the depositor is not present today. Molete has explained to me that he could not get the documents; he could not get the necessary documents from Ellen, i.e. the bail documents, the receipts.

BY THE COURT:

Well, I think we can go on with the application in the absence of those documents. Is there anything else you know of that should be placed before me on the question of the estreatment of the bail, and the question of declaring that money forfeited to the State?

BY ACCUSED NO. 4:

Your Worship, I leave it in the Court's hands.

BY THE COURT:

Perhaps Molete knows something. Is he here today?

BY ACCUSED NO. 4:

He is not here, Your Worship.

BY THE COURT:

And you can take the matter no further on behalf of accused No. 3?

BY ACCUSED NO. 4:

The only help I can give to the Court is that His Worship will see what to do in the matter, because Molete and Ellen/....

Ellen are not here.

BY THE COURT:

Are there any of the other accused who perhaps know anything about the matter, or anything they wish to place before me? I am talking to the undefended accused now.

BY THE UNDEFENDED ACCUSED:

We have nothing to say, Your Worship.

BY THE COURT:

Mr. Unterhalter, I don't say that you have any instructions on the matter, but you don't know of anything that you can place before me?

BY MR. UNTERHALTER:

I am not able to assist the Court at this stage, Your Worship.

BY ACCUSED NO. 8:

If I recollect well Your Worship told us sometime back that this case would not proceed in the absence of one of the accused. Today I do not know whether the case would proceed, whether in fact it would proceed in the absence of one of the accused.

BY THE COURT:

You would like to know whether the case is going to proceed or not? Is that what you would like to know?

BY ACCUSED NO. 8:

It is in fact my view that the case should not proceed in the absence of one of the accused, as Your Worship has already intimated before that the case cannot proceed if one of the accused is absent.

BY THE COURT:

I don't recollect ever having said anything like that. Is that clear to you? I say now that I would not make such/....

such a foolish statement, because it would be foolish. It would mean that if one of the accused chose to stay away the proceedings could not proceed; it would be a nullity. If your view is correct then this case cannot proceed now because No. 3 accused has chosen to go somewhere; we don't know where, but he has chosen not to come to Court. I never said anything of the kind. If I said anything similar to that you have misunderstood me. However, I am not dealing now with the question of whether the case will proceed, but I am dealing firstly with the question of whether I must estreat the bail of accused No. 3 on account of his non-appearance which apparently is deliberate. Have you got anything to say on that?

BY ACCUSED NO. 8:

No Your Worship, I have nothing to say in connection with bail.

BY THE COURT:

The order is that the amount of R.60, i.e. £30, cash deposited as bail for accused No. 3, Nyakane Tsole, is declared forfeited to the Crown.

BY THE PUBLIC PROSECUTOR:

Your Worship, the Crown intends proceeding with the trial against the accused who are present today. If and when No. 3 accused chooses to come back the Crown will commence de novo against him, Sir.

BY THE COURT:

Yes, the warrant for his arrest will stand. Accused No. 8, you have heard the Prosecutor's suggestion. Do you want to address anything to the Court on that?

By/.....

BY ACCUSED NO. 8:

I have nothing to say to the Court about what to do, Your Worship.

Accused Nos. 1, 4, 38 and 39 have nothing to say.

BY MR. UNTERHALTER:

May it please the Court. Your Worship, I should like to be of assistance to the Court. I am not quite certain that I understand the suggestion of my learned friend. At the moment on the charge sheet No. 3 accused, who is absent, is joined with all the others who are here, including those whom I represent, and as I understood his words he was making the submission to Your Worship that the trial will proceed in his absence, he still being joined as one of the accused, and if and when he should be found the Crown stated it would commence de novo against him.

New Your Worship, in the ordinary course if a person is still joined with others it would appear from a study of Section 156 of the Code that being one of the accused, proceedings must take place in his presence, and it would appear further, although I don't have the authorities to hand - I have the references - that the provision is peremptory. Section 156 says that "every criminal trial ^{shall} take place and the witnesses shall, save as is otherwise expressly provided by this Act or any other Law, give their evidence viva voce in open Court, in the presence of the accused, unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable, in which event the Court may order him to be removed and may direct the trial to proceed in his absence". I would submit in passing Your Worship, that that last section can only refer to a person who does not behave/....

behave himself in the presence of the Court, and who is removed, the assumption being that he is nevertheless in the precincts of the Court.

New Year Worship, the section has been extensively amended and the Court had occasion I think many months ago to refer to the amendments. I shall briefly intimate to the Court what they are. Section 156 ter says: "When a trial may proceed in the absence of an accused and procedure to be observed", and it commences, sub-section (1) "If an accused at a trial referred to in Section 156 bis absconds or is removed or is granted leave or is absent for any other reason...", and then it goes on to say what the Court may do. So we then have to refer to Section 156 bis, and 156 bis says that "the Court may grant leave of absence from trial if two or more accused after a preparatory examination are charged jointly at a trial before a Court of any Regional Division..." and then it goes on with the various provisions that follow after that. It would therefore appear that the Court may grant leave of absence from trial if two or more persons who are charged jointly at that trial are so charged after a preparatory examination, which certainly is not the case here.

Now, as I said Your Worship, I am not quite sure as to what my learned friend intends, because when he says that he will start de nove against No. 3, and yet he says that he is going on, is he - I am asking this - in effect making an application to Your Worship for a separation of trials? If that is so then I will address Your Worship in a moment, but if the intention is that he should figure as one of the accused charged jointly with the others, but that the trial will proceed in his absence, then I would submit that there

may/....

may be a possibility of an irregularity quite apart from other submissions I might wish to make on behalf of the accused generally. As I said it would appear that they are peremptory. I notice Your Worship, although I said I don't have the references to hand, that in "Swift's Text Book" it says:- "the provisions of the section are peremptory and every trial must proceed in the presence of the accused", and then it quotes certain cases. Your Worship, I won't develop that because my learned friend may have a complete answer to what I am saying.

BY THE PUBLIC PROSECUTOR:

I did not actually phrase my words correctly, Your Worship. What I was endeavouring to tell the Court was this, that the Crown will proceed against the accused who remain here today, and that if and when accused No. 3 should ever return and the warrant is executed, the Crown will commence a new trial against him alone. I feel that it is not competent for the Crown to make an application for a separation of trials in the absence of an accused person.....

BY THE COURT:

Are you afraid that he is not being heard?

BY THE PUBLIC PROSECUTOR:

Yes, Your Worship.

BY THE COURT:

But if he deliberately stays away can he complain that he is not being heard? If the other side deliberately stays away, prevents it being heard, can it complain?

BY THE PUBLIC PROSECUTOR:

No, I have not gone into that aspect Your Worship, but it would seem at first blush that he has no right to complain.

By/.....

BY THE COURT:

You are diffident in other words about applying formally for a separation of trials in terms of Section 155?

BY THE PUBLIC PROSECUTOR:

Yes, Sir. I would submit that the procedure has the effect of a separation, because what ultimately transpires is this. There is no procedure in the Code authorizing the Crown, should accused No. 3 perhaps return five witnesses hence to say "Well all right, now we are going to recall all these witnesses and lead their evidence in chief again and make them again available for cross-examination". There is no procedure for that, and so once No. 3 accused falls out of the picture it is virtually a separation.

BY THE COURT:

I have not had the opportunity of going into this position, but I do not think that it is necessary in view of what has just been stated, because whether the Prosecutor or the Defence formally apply for a separation of trials or not, a separation of trials has by the circumstances been forced on the Court. The Prosecutor made it quite clear that ^{if} accused No. 3 is ever arrested he will be charged afresh before another Court. That amounts to a separation of trials, and as I see it the Crown's intention now is simply to proceed against the accused before the Court until the conclusion of this case.

BY MR. UNTERHALTER:

Your Worship, as I said earlier I can assure the Court that I don't wish to create any difficulties, but may I just, as I said earlier, put the special difficulties as they affect people when I represent. It does seem to be a curious position that has arisen. There seems to be, it would appear, something lacking in the Code, and if I may just say this/....

this as an aside Your Worship, it is probably very necessary that Parliament should do something to prevent the course of justice being obstructed by a situation such as this, and also if I may add Your Worship, to prevent the embarrassment of the Court which has occurred from time to time when people had to stay away. It is true the Court has given indulgence and so on due to illness, but it would appear that Parliament in passing Section 156 bis and 156 ter were contemplating certain situation I believe, Your Worship, that the provisions had special reference to the Treason Trial which has just concluded, but Sir, be that as it may, my difficulties, in representing the people for whom I appear here, are twofold. The one is that although it is remote, it is possible that if at any time No. 3 accused should show any further interest in these proceedings by coming back to the country and taking up any steps, a suggestion could be made of this having been irregular because of the peremptory provisions of the Code, that it must be in the presence of the accused, and he remains an accused until he is either separated or there has been a withdrawal against him, and that the rest of us might be put to expense in regard to that. As I say Your Worship it is remote and I don't press it.

The other difficulty, however, is this. My learned friend makes a request to the Court that this trial proceeds notwithstanding the terms of Section 156, which in the ordinary course would seem to be quite a commonsense request for him to make to the Court, but there is the possibility of - in fact there is the prejudice to us at this particular moment, in that the following has happened. A man has stood charged before this Court joined with a number of others. He was joined, Your Worship, despite objection taken at the beginning, but/....

but Your Worship will recollect the judgment that Your Worship gave, that on the construction of the charge sheet it was obviously the intention of the Crown to charge for all the acts over all that period, and therefore ex facie the papers it was clearly no case, it was joinder. Well be that as it may, they are all joined. Evidence has been led over a lengthy period; Your Worship has listened to it, and Your Worship will have learnt of the part that had been played in these proceedings by the third accused, and will also have been able at least as far as the Crown's side is concerned to assess the parts played by the others.

Now Your Worship, one of the matters, one of the rights that has accrued to the accused when I represent and arising out of this, is the right, if this should ever arise, to cross-examine the third accused as a person who, if he gives evidence, has been involved in these proceedings. He has absented himself and he is no longer available; he is certainly not available today to give evidence in his defence, and we of course, or myself rather, is deprived of the opportunity to cross-examine him, which might in the circumstances accrue to the benefit of the accused in a way quite different to the way it might accrue if he was called as a witness and only led, which would be the case in other circumstances. By reason of my learned friend saying to the Court, without applying formally for a separation, "I am asking that this trial proceeds with this man's name on the roll as one of the people who are accused, and yet when we know and realise will not be here". I, on behalf of the people I represent, am, if I don't mention these things to Your Worship, being a party to a procedure where I would acquiesce in allowing this trial to proceed without the/....

the right to cross-examine this man, which I submit is a right in all the circumstances that may be very valuable having regard to the part that he played.

New Your Worship, it is a difficult position. It is not free of complication at all, but it does seem with the greatest of respect that all the proceedings in this Court are governed by provisions as laid down in the Code. If Parliament had sought to qualify this peremptory provision that the trial must proceed in the presence of the accused, if it has done so it has done so because it wants to make certain exceptions in certain cases. It has done so in terms of Section 156 bis. If it has not done so in other cases the Court with respect should ask itself "Why has it not done so?", and it would seem Sir, having regard to these earlier authorities that are quoted in this text book, that it has not done so because it does not wish a trial to proceed in the absence of any accused other than those who appear to have been present at a preparatory examination, and therefore Sir, it would seem that if the Code regulates procedure then the Code should be followed, and if the Code says that a trial should not proceed then by some means we must co-operate together to try to solve this problem, but with great respect to my learned friend it does not seem to be the correct way to solve it.

BY THE PUBLIC PROSECUTOR:

Your Worship, regarding Section 156, I think it is quite clear there that in these cases a preparatory examination had been held, and I think what Parliament might have been trying to avoid by making it all-embracing... we have not yet reached the advancement of the French Courts where we can try a man in his absence altogether and when he comes back he

merely/....

merely serves his sentence. For my part I would welcome something like that, but I think there is that safeguard. Lots of irregularities could take place if a trial was to take place in the absence of an accused person, whereas we have the safeguard of a preparatory examination first having been held; there is at least some record of testimony under oath, but that is besides the point.....

BY THE COURT:

But the peculiar position is the accused need not even be present at the preparatory examination. That is where he can be granted leave of absence for instance, and then he can be tried in his absence afterwards again, so a preparatory examination must have been held, and it must be the kind of case where there is more than one accused.

BY THE PUBLIC PROSECUTOR:

Yes Sir. Your Worship, my learned friend, in his argument, by advancing the submission that there might be a possibility of prejudice.... In other words, the point that arises is this. Supposing the Crown were to make an application, a formal application.... Assuming No. 3 was present and for some reason or other the Crown were to make an application for the separation of accused No. 3, then he has the right to oppose that and to say "I would like a joint trial", that No. 3 should be here

BY THE COURT:

But apparently he does not like a joint trial, Mr. Prosecutor; he stayed away.

BY THE PUBLIC PROSECUTOR:

Your Worship, there is still the question of the prejudice arising to my learned friend. Whichever way it goes/.....

it goes, whether a formal application was made, or whether no formal application was made, the test still arises "Is there any prejudice to the accused when Mr. Unterhalter represents?", and if that is so is it going to invalidate the whole proceedings. In other words, must we now just sit back because one man has left the jurisdiction of the Court, and release everybody.

BY THE COURT:

I don't think that is quite Mr. Unterhalter's suggestion. He is more or less sounding a note of warning and trying to help the Court to avoid the commission of a possible irregularity. Is that not so?

I really cannot see much difference, for the purposes of today's proceedings, between the present case and the case where one of a number of accused has died. Now, surely in such cases a trial has in the very recent past proceeded in the absence of that person against the other accused only, and it seems to me that that is what I am going to have now. I am now going to have a trial proceeding against the persons who are present in Court today only. From this stage onwards they are the accused before the Court. At the appropriate stage I may have to give a ruling or decide on the question as to whether or not common purpose or ^aconspiracy have been established perhaps between No. 3 accused, the absent man, and the others or some of the other accused, but that will have to be considered at the appropriate stage of the proceedings. I might have to consider what evidence that I have heard as affecting the absent man only is evidence against the others or is not evidence against the other accused. I think it is trite law that when persons alleged to have conspired to do something/....

something or who are acting in common purpose, are tried, all the persons taking part in the common purpose or the conspiracy need not necessarily be before the Court. I will have to watch that position.

In regard to the prejudice which the other accused may suffer due to the absence of No. 3, i.e. if they are not granted the opportunity of say cross-examining him or hearing his evidence, his evidence may be in their favour or they may wish to cross-examine him to bring out things, or if they were to destroy anything he may say against any of the others... Well, that is prejudice certainly, but that is the sort of prejudice that arises, and it could arise even if he was here, because he is not compelled to give evidence. He can decide to call witnesses only, or to keep quiet and say nothing, in which case they cannot cross-examine him. The same position would have arisen if he had died. It is the sort of prejudice which is present but which has to be met by the other side.

Now, I think the proceedings should now proceed against the accused persons before me. The Prosecutor has made it quite clear that in so far as No. 3 accused is concerned he is no longer an accused before this Court.

Mr. Prosecutor, I cannot put it any other way. The position virtually amounts to a separation of trials. For all practical purposes there has now been a separation of trials.

COURT ADJOURNS.

HOF HERVAT:

Die Publieke Aanklaer roep:

WILLEM PETHUS BURGER, beëdig, verklaar:

VERHOOR DEUR DIE PUBLIEKE AANKLAER:

Mr. Burger, is u 'n Hoofkonstabel in diens van die Suid-Afrikaanse Polisie en verbode aan die plaaslike vingerafdrukkantoor, Johannesburg? — Dit is reg. Op die 6de Maart van hierdie jaar het ek bewysstukke 81 en 96, asook 'n stel vingerafdrukke van ene Thaddeus Ntoampe, van Kaptein van der Berg op kantoor ontvang, met die versoek om vas te stel of die vingerafdrukke agterop bewysstukke 81 en 96 identies is met die vingerafdrukke op die stel vingerafdrukke van die genoemde persoon. Ek het die vingerafdrukke op bewysstukke 81 en 96 vergelyk en dit identies gevind. Ek het verder gegaan en ek het die afdrukke agterop bewysstukke 81 en 96 vergelyk met die afdrukke op bewysstuk 112. Ek handig laasgenoemde nou in as bewysstuk 112. Ek het gevind dat die linker duimafdruk op bewysstuk 112 identies is met die afdrukke agterop bewysstukke 81 en 96. Ek handig nou hofkaarte in. Die eerste een is bewysstuk 113. Nr. 1 op bewysstuk 113 is die afdruk agterop bewysstuk 81. Dit is 'n fotografiese vergroting van die afdruk agterop bewysstuk 81, terwyl nr. 2 op bewysstuk 113 'n fotografiese vergroting is van die linker duimafdruk op bewysstuk 112. Ek het nege kenbare punte uitgemerk, waarvan 7 genoeg sou gewees het om identiteit te bewys buite enige redelike twyfel.

Mr. Burger, as u wou kon u meer as nege punte van identiteit uitgewys het? — Dit is so. Ek handig nou 'n verdere hofkaart in as bewysstuk 114. Nr. 1 op bewysstuk 114 is/....

is 'n fotografiese vergroting van die afdruk agterop bewysstuk 96, terwyl nr. 2 op bewysstuk 114 'n fotografiese vergroting is van die linker duimafdruk op bewysstuk 112. Ek het nege kenbare punte uitgemerk, terwyl sewe punte van identiteit genoem is om identiteit vas te stel buite enige redelike twyfel.

Kon u meer as nege uitgewys het as u wou? --- Ek kon. Dit sal my getuienis wees, Edelaagbare.

Ek het geen verdere vrae nie, Edelaagbare.

KRUISVERHOOR DEUR MNR. UNTERHALTER:

Mr. Burger, the thumb prints on Exhibits 81 and 96, or rather the prints on Exhibits 81 and 96, are not necessarily thumb prints of the left hand? They are just a form of fingerprint? Would that be correct? --- Ja, as jy dit so vat is dit so, maar nadat ek my vergelyking getref het het ek gevind dat dit wel die linker duimafdruk is, d.i. nadat ek dit vergelyk het met bewysstuk 112.

Now Mr. Burger, I am not sure if you can answer this question. Is every finger-print, irrespective of whether it is a thumb or a fingerprint, according to the science that you follow, unique, or can it ever happen that a mark say on the centre finger of one hand in one person could correspond with the marks of say the ring-finger of some other person in the world? Do you understand my question? --- Ja, ek verstaan. Dit is heeltemal onmoontlik. Die wetenskap het dit sover bewys dat jy kry in een persoon se hand nie twee vingers wat identies is nie, en ook verder dat die natuur hom nie self herhaal nie.

Perhaps I did not make myself clear. I did not mean in respect of the same person? --- Ja, ek verstaan heeltemal/....

heeltemal die vraag, Edelagbare; ek verstaan heeltemal die vraag.

In other words, if person A has got a particular finger-print mark on his thumb, can anybody else in the whole wide world have that particular pattern on any other finger except the thumb? --- Jy sal die patroon miskien dieselfde kry, maar nie die punte van identiteit nie.

No further questions, Your Wership.

NO CROSS-EXAMINATION BY ACCUSED NOS. 1, 4, 8, 38 AND 39.

VERHOOR DEUR DIE PUBLIEKE AANKLAER:

Wat bedeel u by patroen mr. Burger? --- Ons het vier of vyf basiese patrone wat jy kry in die klassifisering van vingerafdrukke.

Is dit "walls" en "loops" en daardie soort van dinge?

--- Ja, dit is die boog, die amper-beeg, die tent-boog, die is, en dan die "war-tipes". Nou, jy kry daardie patrone wat dit dieselfde tipe patroon is, maar die identiese punte of ooreenstemmende punte kry jy nie.

O, ek sien. Dit is al dankie, Edelagbare.

VERHOOR DEUR DIE PUBLIEKE AANKLAER:

Edelagbare, ek vra dat Bantoe Speurderkonstabel Malakia Mnoteng herreep word.

Malakia/....

MALAKIA MMOTONG, duly sworn, states: (Interpreted).

EXAMINED BY THE PUBLIC PROSECUTOR:

Are you a Bantu Detective Constable in the South African Police stationed at Vereeniging? --- That is correct.

And you have already given evidence in this trial? --- That is correct.

Will you have a look at Exhibit 112? Whose signature is that at the bottom of Exhibit 112? --- That is my signature. I signed it.

Does that mean that that is the signature of the person who took the finger-prints? --- That is so.

Did you take the finger-prints appearing on that form, Exhibit 112? --- Yes.

The date that is given there is the 22nd March, 1960. Is that the date you took the fingerprints? At the bottom of the form you will see the date. --- Yes, it is the 22nd March, 1960.

Whose finger-prints are those that you took on Exhibit 112? --- Thaddeus Ntoampe's.

Will you be able to point out Thaddeus Ntoampe? --- Yes, I will be able to point him out.

Will you stand down and have a look through the court room to see if Thaddeus Ntoampe is present here today? --- (Witness stands down and points out accused No. 2).

Thank you, Your Worship.

NO CROSS-EXAMINATION BY MR. UNTERHALTER.

NO CROSS-EXAMINATION BY ACCUSED NOS. 1, 4, 8, 38 AND 39.

By/....

2,958.

BY THE PUBLIC PROSECUTOR:

Your Worship, I have regrettably no more witnesses for today. My very important witness, Brigadier Els, was unable to be here today by virtue of a previous engagement which he was unable to put off. He will be here tomorrow.

Mr. Unterhalter, as well as the undefended accused, have no objection to a postponement of the hearing until tomorrow morning, the 12th April.

HEARING POSTPONED TO 12.4.1961.

12 APRIL 1961.HOF HERVAT : VERSKYNINGS SOOS VOORHEEN.

Die Publieke Aanklaer roep:

CORNELIUS JOHANNES ELS, beëdig, verklaar:VERHOOR DEUR DIE PUBLIEKE AANKLAER:

U is 'n Brigadier in die Suid-Afrikaanse Polisie en ook Assistent-Kommissaris van die Polisie te Pretoria? ---

Ek is.

Brigadier, ons het 'n storie gehoor hier dat op die 21ste van Maart 1960 'n hooggeplaaste beampte of offisier sou om twee-uur n.m. by die Sharpeville Polisie-stasie die skare kon toespreek het in verband met passangeleentheid. Weet u enigiets daarvan af? --- Ek dra geen kennis daarvan nie.

Ek verstaan u het self na Sharpeville Polisie-stasie gekom daardie dag? --- Ek het.

Nou, onder watter omstandighede? Hoe het dit gebeur dat u hierheen gekom het? --- Gedurende daardie more het die Adjunk-Kommissaris, Kolonel Lemmer, my op verskillende geleenthede geskakel en die posisie op die Rand aan my rapporteer. Ek kan nie die tyd juis onthou nie, maar dit was seker so om en by nege-uur, tussen nege en tien, dat hy weer vir my gesê het dat sy inligting is dat daar plus-minus 20,000 mense in Sharpeville bymekaar was, en dat die posisie op Sharpeville baie kritiek was. Ek het gevra of hy versterkings benodig en die antwoord was ja. Ek het toe gereël vir versterkings, ook addisionele Saracens, ensovoorts, en toe ek verwittig was dat hulle op die punt was om te vertrek, binne 'n halfuur na 'n

uur/....

uur, het ek beslis besluit op daardie stadium om self na Sharpeville te kom om die posisie dop te hou en te kyk wat hier gebeur.

Het u direk na Sharpeville gekom of eers na die ander plekke soos Evaton en Vanderbijlpark gegaan? --- Ek het direk na Sharpeville gekom, want my inligting was dat die posisie hier meer kritiek was as op enige van die ander plekke.

En hoe laat het u hier aangekom? --- Ek het Pretoria plus-minus half-twaalf verlaat. Ek het direk na die Vereeniging-aanklagkantoor gegaan, en probeer 'n offisier kontak.

Is dit by Vereeniging? --- By Vereeniging Polisie-stasie.

Die afstand vanaf Pretoria na Vereeniging is omtrent plus-minus 70, 75 myl? --- Plus-minus 70 myl.

En het u vinnig gery of nie? --- Ek het redelik vinnig gery, want ek was angstig ^{om} hier op Sharpeville te kom so gou moontlik.

Hoe lank het dit u gevat om hier te kom? --- Ek was voor halftwee hier - seker kwart-oor-een was ek by die aanklagkantoor op Vereeniging.

En het u enige offisiere by die Vereeniging aanklagkantoor gekry? --- Nee.

Daarnaas waarheen is u toe? --- Ek het toe uiteindelik probeer om die Sharpeville aanklagkantoor te kontak. Die Sersant wat net op diens gekom het by Vereeniging het probeer om my deur te kry, maar ons kon nie deurkom na Sharpeville aanklagkantoor toe nie.

Is dit per telefoon? --- Per telefoon. Uiteindelik het hy wel per telefoon deurgekom na die Munisipale kantore by Sharpeville, en daar het ek Majoor van Zijk ^{2y1} gekontak.

Het/....

Het u self, nadat u die gesprek met Majoor van Zyl gehad het, na die Munisipale kantore gegaan? --- Onmiddellik.

Waar was u tydens die skietery wat plaasgevind het by die Sharpeville Polisiestasie? --- Ek moes toe nog by die Vereeniging aanklagkantoor of op pad gewees het.

Het enige persoon gewet dat u was op pad hiernatoo?
--- Nee, dit was 'n beslissing wat ek skielik geneem het daar toe ek verneem het wat die toestande hier op Sharpeville was. Ek het my persoonlike Stafoffisier en destyds Kolonel Wessels gesê dat ek ry nou en ek gaan na Sharpeville toe.

DEUR DIE HOF:

Met ander woorde, offisiere in Pretoria het wel gewet u kom hierheen, maar het iemand hier gewet? --- Edelaagbare, ek het later uitgevind dat sekere van die offisiere in Pretoria moes met Johannesburg per telefoon gepraat het en gesê het dat ek deurkom.

(Geen verdere vrae deur die Publieke Aanklaer nie).

CROSS-EXAMINED BY MR. UNTERHALTER:

Brigadier, when you arrived at the Sharpeville Municipal offices did it appear to you that the people there had been expecting you? --- Ja, Majoor van Zyl het my gesê dat die Adjunk-Kommissaris, Witwatersrand, hom geskakel het en hom gevra het om my te vra om hom te skakel alverens ek in Sharpeville ingaan.

That being Colonel Lemmer? --- Ja.

You don't know Brigadier if an impression might have been conveyed in any conversation that Colonel Lemmer had with Major van Zyl that you were coming to address people at Sharpeville? --- Nee.

Did/....

Did you have any discussion with anybody at all about the addressing of the crowd at Sharpeville? --- Nee.

I will tell you why I put that question to you, Brigadier. Evidence has been given by Mr. Smuts, who is the Bantu Commissioner for the Witwatersrand as you no doubt know, and his evidence is somewhat to the effect that there was a discussion. Let me just find the place. This is what Mr. Smuts said in answer to a question put to him by my learned friend in the course of this trial. „Nou, afgesien van Majoor van Zyl en Luitenant van Eeden and Majoor Bayman, was enige ander Polisie-amptenare in kennis gestel van u plan om die Bantoes toe te spreek hier by Vereeniging veral?" and his reply is „Ja, nadat Brigadier Els aangekom het het ek vir hom dit gesê maar dit was toe te laat gewees". Do you have any recollection of anything like that? --- Ja, toe ek Majoor van Zyl ontmoet het en toe ek hom vra „Wat is die posisie hier?" toe sê hy vir my - die eerste wat hy vir my gesê het was dat Kolonel Lemmer wil met my praat. Toe sê ek „Ja, maar ek verlang dat u my moet sê wat is die posisie binnekant", en toe sê hy vir my hy het nou net skote gehoor, net voordat ek daar aangekom het. Ek het toe dadelik na 'n Saracoen wat daar gestaan het en wat radioverbinding het gegaan, en toe het hulle my verwittig van Sharpeville Polisiestasie dat hulle wel geskiet het. Toe het ek omgedraai na die kantoor toe om my telefoonoproep na Kolonel Lemmer te maak. Toe het ek mnr. Smuts daar gesien. Nadat ek my telefoonoproep gemaak het het ek aan Majoor van Zyl gesê ek gaan nou in Sharpeville in. Mnr. Smuts het toe vir my gevra of hy kan saamry want hy wil graag die Bantoes toespreek.

Have you finished? --- Yes.

You did not convey to him in these discussions an intention yourself of having wished to talk to the African crowd/....

crowd? --- Nee.

Did you perhaps say to him that it was too late to talk now? --- Na ons by die Polisiestasie gekom het en verslae aan my gedoen is en ek sekere stappe geneem het, het Mnr. Smuts aan my gesê dat hy wil maar dan teruggaan want daar is niemand wat hy nou kan toespreek nie.

Did you make any comment on that, Brigadier? --- Edelagbare nee, sover ek kan onthou het ek net gesê "Ja goed Mnr. Smuts, sal jy regkom om met jou eie kar uit te kom of kan ek jou 'n "escort" gee om uit te kom?"

You see, in his evidence he conveyed to His Worship that you had made that remark. Just let me read to you what he said. I questioned him and I said "Now, Brigadier Els and yourself had a conversation after the shooting?" He said "After the shooting yes". "Did Brigadier Els perhaps say to you that he had had the same idea as yourself to come and talk to the crowd and try to quieten them?" "No, he did not say anything like that. He said it was too late to talk now". Would he be mistaken when he says that? --- Ek glo nie ek sou die woorde gebruik het "Dit is te laat om te praat nie" want daar was niemand wat ek kon toespreek nie.

There was not anything that you yourself said or that might have come through from various messages that you personally know of that would justify him in having the idea that you were going to be associated with him and other officers in addressing the crowd? --- Definitief nie.

I would like to read to you his replies to questions I put to him on this aspect. I said "Now Mr. Smuts, apropos of what did he say it was too late to talk?" Apropos of his plans to have spoken if he had had the chance, or apropos of your plans, or apropos of both your plans?" He said "I think

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it was both our plans". "Did you gather from that that he had made a journey to Vereeniging for a similar purpose to yourself?" "Well, that is from the message I received, that he was coming for the purpose that the two of us should go in together. Actually the message was to the effect that Brigadier Els and Colonel Lemmer were coming along, and I should not go to the Police Station to speak to the Bantus until they arrived. Colonel Lemmer never arrived". "Did you gather from that that they did not want you alone, to be the senior man addressing the crowd, but that they as senior people wanted to be present with you at the time of addressing the crowd?" "That is what I thought yes, that they would like to be with me". Now, I wonder if there is any comment on that? --- Edlagbare nce, ek dra geen kennis van enige reëlings met mr. Smuts nie.

Evidence has been given that one of the members of the Police Force at Sharpeville, Lieutenant Visser, was seen in conversation with one of the former accused in this case, a man by the name of Michael Tsolo, and that shortly after the conversation or the apparent conversation between these two people this man Tsolo spoke to the crowd and the crowd understood from what he said that at two o'clock a highly placed officer or official would be addressing the crowd in connection with passes. Now, I take it that you know nothing of Lieutenant Visser's possible communication - I don't say that there was any communication - to this effect? --- Edlagbare nce, ek dra geen kennis daarvan nie.

And nothing has come to your attention in the subsequent months that could cast light on this to assist the Court on this particular aspect? --- Nee.

There/....

There has also been evidence at one stage in this trial that certain men in plain clothes were heard to say in the streets of Sharpeville at about eleven o'clock in the morning, that the inhabitants should go to the Police Station because such an address would be given, and it appears from the evidence of this witness that it was spoken in the presence of African Policemen who were nearby, and that these African Policemen themselves were telling the inhabitants to go in the direction of the Police Station. I take it you know nothing of that either? --- Nee.

You came to Sharpeville dressed in uniform I take it? --- Ek was in uniform.

And en route you passed through Vereeniging, and would you say that your arrival here was observed or noticed by any people who might have been around? --- Ja, seer sekerlik Edelagbare. Ek sien dat almal wat my gesien het in die kar - baie mense ken my en almal kon sien dit is 'n Polisie-offisier.

A highly placed officer? --- Ja, ek sien so aan.

And at that time telephone communication had apparently been established between Vereeniging and Sharpeville? That would be roundabout a quarter past one? --- Nee, ek weet nie die tyd wat die kommunikasies herstel was nie. Die Sersant by Vereeniging kon my nie deurskry na Sharpeville toe nie.

DEUR DIE HOF:

Hy kon u gladnie deursit na Sharpeville Polisie-stasie toe nie? --- Hy kon nie deurskry toe. Na Sharpeville Polisie-stasie kon hy nie deurskry toe.

Maar later wel na die Munisipale kantore? --- Na die Munisipale kantore.

(Geen verdere vrae deur mnr. Unterhalter nie).

Geen/....

GEEN KRUISVERHOOR DEUR BESKULDIGDES NRS. 1, 4, 8, 38 EN 39 NIEHERVERHOOR DEUR DIE PUBLIEKE AANKLAER:

Het u te enige tyd op die 21ste Maart verlede jaar 'n plan gehad om die Bantoes toe te spreek? --- Nee.

DEUR DIE HOF:

Was dit ooit in u gedagte om die Bantoes toe te spreek daardie dag? --- Edelagbare, dit hang af van wat 'n mens vind in sulke moeilikhede. Ek het byvoorbeeld met die moeilikheid in Natal, en selfs die Witwatersrand terwyl ek daar gestasioneer gewees het, gevind dat in baie gevalle kon jy hulle toespreek, en in ander gevalle moes jy onmiddellik optree om lewens en vaste en onvaste eiendom te red.

En op die besondere dag, kan u my sê wat in u gedagte aangegaan het, en of u soos u nou gery het gemeen het....? --- Ja Edelagbare, ek het gedink wel as daar nie oorgegaan gewees het tot geweld nie, dan het die moontlikheid bestaan dat ek met hulle kon redeneer het.

Dit is 'n moontlikheid wat u altyd in u gedagte het? --- Ja, want dit is gebruikelik met sulke skares vir 'n Senior Polisie-offisier om alles in sy vermoë te doen om hulle vreedzaam uitmekaar uit te kry alverens daar oorgegaan word tot verdere stappe.

Dankie Brigadier Els. U kan maar afstaan.

SAAK VIR DIE KROON.

By/....

BY MR. UNTERHALTER:

Your Worship, I make an application for a postponement until Monday. This record is 2,918 pages apart from the proceedings of yesterday and today, and I have spent very much of the intervening period in preparation of an analysis which I hope will be of assistance to the Court in plotting its way between the various facts and the various witnesses. I have only a few concluding aspects to prepare, but I would be very grateful if I could just have the opportunity of these couple of days in order to present an argument to Your Worship in support of an application for discharge which I hope to address to the Court on Monday if the Court will grant a postponement until then.

BY THE COURT:

Are you not ready to address me then in connection with your application for discharge?

BY THE PUBLIC PROSECUTOR:

No, I am not ready this morning, Sir.

BY THE COURT:

Is it going to assist me perhaps if I grant you this postponement?

BY MR. UNTERHALTER:

I should imagine so, Your Worship; I am ready on the facts, but it appears to me that it would be helpful to the Court if I could at the same time place certain submissions of law in regard to aspects of public violence and particularly in regard to the second count, on the Criminal Law Amendment Act before the Court. There are certain recent decisions which may perhaps even at this stage help the Court in coming to a conclusion, and it is for that reason that I would like to qualify/....

qualify myself adequately.

The undefended accused have no objection to a postponement being granted.

BY THE PUBLIC PROSECUTOR:

Your Worship, being a Public Servant I have not been able to devote as much time to the case in the intervening period as my learned friend. I have a few matters which I would like to finish, Sir; I am almost completed.

BY THE COURT:

I am going to, in the circumstances of this case, grant this postponement, but I am today going to try and explain to the undefended accused now before me, i.e. Nos. 1, 4, 8, 38 and 39, what their rights are.

Explain to them Mr. Interpreter that Mr. Unterhalter is going to apply for the discharge of his clients. The submission that he is going to make very roughly in support of an application like that is that there is no evidence before the Court to prove that they committed the charges set out in the indictment. Now, these accused may adopt the same attitude if they wish to. I would advise them to listen first to what Mr. Unterhalter has to say and they can tell me what they think about the matter then. Of course Mr. Unterhalter primarily - I don't know what he is going to say - is interested in his particular clients only, but what he says may affect them and therefore they should pay full attention to his argument, and tell me whether, when they have heard it, they wish to join in that argument or not.

Now, that is the first thing an accused person may do when the Crown closes its case. An accused person may tell

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the Court or submit to the Court that there is no case for him to meet, and the ground is that there is no evidence before the Court to prove that he has committed the offence or offences set out in the charge sheet.

The Court may grant that application and acquit the accused straight away, or the Court in its discretion may refuse that application; just simply refuse to discharge the accused at that stage of the proceedings. Then an accused must decide what he is going to do. He has the right firstly to call Defence witnesses. You being on bail, if you wish to call Defence witnesses, are apparently in a position to arrange for these witnesses to come to Court yourself. There may be a little difficulty if any Defence witnesses are officials or persons in custody or in a gaol somewhere. If you have witnesses of that nature I am sure the Public Prosecutor and the Clerk of the Court will be able to tell you what to do, and how to set about getting them here. If a person who is wanted as a witness is actually in gaol, then the Court must authorize the Prisons Department to have him brought here if the Court is satisfied that he can give evidence of value in the case. The first thing you may do then is to call Defence witnesses, i.e. if you wish to. If you wish to you can close your case without calling any evidence. You may call witnesses, and then an accused person himself must decide what he is going to do personally. He has the right to do one of three things. He personally can say "I don't wish to say anything". No accused person is ever compelled to say anything in Court in his case, and if he does it he does it of his own free will. If an accused wishes to say something to the Court he must elect one of two courses. The one course is to go into the witness box like all

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the witnesses in the case have done. Now, that I may say is the proper way to try to prove something to a Court. The accused, if he goes into the witness box, will naturally have an oath administered to him, and he can speak under oath. By virtue of his having gone into the witness box and speaking under oath, any other party to the case against whom he may say something, is usually allowed to cross-examine him. I am talking now of the accused amongst themselves. If accused No. 1 would go into the witness box and say something intending to prove the guilt of accused No. 4 or No. 8, then that party can cross-examine him; the Court usually allows him to cross-examine the person. Now, the one person who naturally will want to cross-examine an accused person who gives evidence is the Public Prosecutor. You are undefended and what the Public Prosecutor tries to do in cross-examination is to test whether you have spoken the truth in your evidence-in-chief or he tries to prove his case out of your own mouths. The Court has the right to put questions to an accused person who gives evidence, and the Court usually does so to clear up anything that is not quite clear to the Court, and I think I can put the Court's powers as being a little wider. The Court can put any questions which it considers should be put in the interests of justice. That is what an accused person may do, or on the other hand he may make an unsworn statement. Now, as he is an accused person he is allowed to make an unsworn statement, in which case he is naturally not questioned by anybody. He must just say what he wants to, and that unsworn statement is regarded as part of the evidential matter before the Court, and the Court must listen to it and must give consideration to it. It is given full consideration by the Court, and/....

and the Court attaches such value to it as is indicated by the circumstances of the particular case, but it is naturally not of as much value as evidence under oath tested by cross-examination, confirmed by the oath. The accused is free to choose which of these two methods he wishes to employ if he wants to say anything to the Court, i.e. if he wishes to say anything to the Court as part of the evidence to be placed before the Court. Apart from all that, when all the evidence has been concluded, he has the right to address argument to the Court and make any submissions he wants to, criticize the witnesses, analyse the evidence. That is an address or argument after all the evidential matter has been heard.

Now, will you give undefended men think over what I have said, so that if we go on on Monday you are ready and you will have decided what you are going to do. Is it clear to you, or is there perhaps anything which is not clear to any of you five?

Accused Nos. 1, 4, 8 and 38 state that everything is clear to them and they understand the position.

BY ACCUSED NO. 39:

Your Worship, I have a complaint to make. The trial has been very long and the record is very long. I am asking the Court whether it is not possible that we, the undefended accused, be given the record of the proceedings, so that we can read it over, and then when it comes to making an application to Court for our acquittal we would be in a better position to do it. That is all, Your Worship.

BY THE COURT:

Are you able to pay for a copy of the record? It
cents/....

costs a lot of money.

BY ACCUSED NO. 39:

I want to know how much it is, Your Worship?

BY THE COURT:

I don't know either, but it will be quite a large sum I think. I think roughly something like £300.

BY ACCUSED No. 39:

Then if that is the position, YourWorship, I am unable to pay for a copy because I am not working.

BY THE COURT:

What about your co-accused, Nos. 1, 4, 8 and 38?

BY ACCUSED NO. 39:

They have no money; they are not working.

BY THE COURT:

It is perhaps a pity that you did not raise this matter at a much earlier stage of the proceedings. I will have to go into that. I can perhaps after a short adjournment tell you what the position is.

BY MR. UNTERHALTER:

Your Worship, I may possibly be able to assist the accused and perhaps the Court as well. At the time when I set about doing the analysis of the implication of the people whom I represent, I thought I might at the same time paginate the record in so far as the implication of the unrepresented accused is concerned. I have it and subject to some kind of assistance from my attorney who possibly may make it available, it might be possible to place in the hands of the unrepresented accused an analysis of the evidence in so far as they are implicated, which they could then perhaps study and see how it assists them.

By/....

BY THE COURT:

Yes, I will still give the matter some short consideration and find out what the position is. It is a point that is constantly creeping up. If one copy were to be available for the five undefended accused, how would that be? One for each of the five accused is already out of the question; they can forget about that.

BY ACCUSED NO. 39:

Your Worship, what we are in fact interested in is for example the evidence of the Superintendent, Mr. Labuschagne, and perhaps Mr. Malakia Mnetong, the detective, so that we can see from their evidence what to take and what to omit.

BY THE COURT:

Yes, but you will find little bits of evidence right throughout the whole record affecting each of you individually.

COURT ADJOURNS.

COURT RESUMES:

BY THE COURT:

Accused No. 39, during the adjournment now I was present at and part of informal discussions, and the five of you, i.e. the undefended accused, then said that you were satisfied with the offer made by Mr. Unterhalter, who is going to analyse the evidence in some detail, and he will allow you access to his notes of the evidence affecting each of you individually, and you expressed your satisfaction with that. I am expressing appreciation to Mr. Unterhalter for that offer to you, because it will assist you and it will assist me ultimately, but in regard to a copy of the evidence the position/....

position is that if any person wants a copy of a Court record he must pay the prescribed fee for it. The only other thing any person can do is to go to the Clerk of the Court and inspect the official record during office hours and under the supervision of the Clerk of the Court without using the record, without taking it away; if you want it to take away then the prescribed fee must be paid, but if in the future, in the course of this case, I or the Prosecutor should be requested to assist in any way of any kind in regard to any part of the record, we will certainly do the very best we can. The hearing of this case is now postponed until 9.30 a.m. on Monday, the 17th April, 1961. Your bail is extended on the existing conditions until that time and that date.

HEARING POSTPONED TO 17.4.1961.

BY THE COURT:

Yes, I will attend

ACQUAINTED NO. 39:

BY THE COURT:

COURT RESUMES:

BY THE COURT:

Accused No

present at and part of

you, i.e. the defendant

ried with the officer

analyse the evidence

access to his notes

individually, and you

I am expressing my

to you, because the

ultimately, but in