A case of bad law

Ann Colvin

ANN COLVIN has undertaken to report on the Treason Trial of 16 leaders of the UDF and its affiliates, the Natal Indian Congress (NIC), the Transvaal Indian Congress (TIC), the Release Mandela Committee (RMC) and the SA Allied Workers Union (SAAWU) at Pietermaritzburg's Supreme Court.

In this first article she describes the successful struggle of the judiciary to rest power from the State in an area which is traditionally determined by the courts, that is, the question of bail. Section 30(1) of the Internal Security Act of 1982 gives the attorney general the power to withhold bail for certain categories of political prisoners.

The protracted legal wrangle over the issue of bail has already silenced and immobilised the 16 leaders of the black community for a period of some ten months. Furthermore, legal opinion offers little hope for a speedy conclusion to this trial, the success of which is crucial for the future legality of extra-parliamentary opposition in South Africa.

The crux of the long-drawn-out dispute over bail was a 'certificate' which the Attorney General in Natal, Mr Imber, handed in to the Magistrate's Court on December 10, 1984. It prevented eight of the accused named on the certificate from being released on bail. Under the Internal Security Act of 1982, a certificate drawn up by the attorney general can be presented to the magist ate to prevent a bail application.

Advocate Ismail Mahomed SC, acting for the accused, challenged the attorney general's arbitrary use of this legal power. But, in spite of the force of his argument, Magistrate Odendaal refused to countenance any reversal of the attorney general's decision in respect of the eight trialists who appeared before him. The defence then referred the matter to a Full Bench on appeal in the Supreme Court in Pietermaritzburg.

The Full Bench, Mr Justice Friedman sitting with Mr Justice Galgut and Mr Justice Booysen on April 24 1985, ruled that the necessary precondition for the issue of a certificate, viz the arrest of the accused 'upon a charge' had not been fulfilled. At the time when Mr Imber issued the certificate no charges against the accused had yet been formulated. They had simply been informed that they were to be charged with 'treason' without any indication as to the acts alleged to constitute treason. The certificate was therefore invalid.

It was a courageous judgement. In it, Mr Justice Friedman had this to say: 'It is a complete anathema that an attorney general should be, in a manner of speaking, a judge in his own cause. He is not an independent officer . . . he does not exercise his powers free of executive control' (ie, independent of control by the Minister of Justice.)

Before the next hearing for bail reached the courts again, the 16 accused were summoned to appear in the Durban Magistrate's court on April 30. This was the day *on which the full indictment was, for the first time, pre*sented in court. Magistrate Blunden presided.

Forty-eight volumes of indictment, stacked in piles, cluttered Prosecutor Gey van Pittius' legal desk!

Opening the afternoon's proceedings, Advocate van Pittius requested that each of the defendants be served with three volumes. The 587 pages of charges in them related mainly to platform speeches allegedly delivered in and around the country dating back to the beginning of 1980.

This attempt by the prosecution to, as Advocate Mahomed put it, 'jump the queue', was transparent and clumsy. Clearly, it was intended to forestall any reference to the Friedman judgement in particular and a pursuance of the whole matter in general.

Magistrate Blunden upheld the defence's argument that the court had first to consider the still outstanding question of bail in the light of Justice Friedman's all-important judgement. He also accepted Advocate Mahomed's plea for urgency in view of the timespan already consumed by prolonged deliberation and the unnecessary stress this had caused.

In accepting the importance of the Friedman judgement, Magistrate Blunden gave the accused the option of having their bail application heard in either the Magistrate's Court or of returning to the Supreme Court for a final decision. Given certain directives by the court and their defence advocate, the trialists unanimously chose to refer the matter back to the Supreme Court.

(Their choice followed a brief adjournment actually granted on behest of Prosecutor van Pittius. After showing signs of physical unsteadiness, he appeared to faint and then collapse. An ironic touch to this minor courtroom drama was the readiness with which Dr Essop Jassat, one of the trialists, emerged swiftly from the dock and offered medical assistance!)

The Supreme Court hearing to settle the question of bail was set down for Friday May 3 before Mr Justice Milne. At stake was not only the personal liberty, in the circumstances, of the 16 trialists involved, but also the traditional independence and impartiality of South Africa's judiciary — an independence into which the law had made such undesirable inroads.

Justice Milne's momentous judgement in helping arrest this erosion will hopefully prove a watershed in the annals of South Africa's judicial history.

From the start, the judge made it clear that since the legislature is free to pass such laws as it deems fit, the courts will, he said, interpret such laws as liberally as possible if they interfere with the court's powers and the individual's right to approach the courts.

The present instance was, he suggested, just such a case in point:

While the attorney general had the legal right to issue a 'certificate' withholding bail, such a certificate would only be declared valid if, as an absolute requisite, the attorney general could satisfy the court that his grounds

for issuing it were good.

And herein lies the distinction that Mr Justice Milne saw as central: the need to satisfy the *court* and *not* that of satisfying only the attorney general himself, on the vague and secretive grounds that are, as the Act states, not 'in the interests of the security of the State and the maintenance of law and order.'

Attorney General Imber, sensing the improbability of succeeding with his bail refusal in the Supreme Court, asked for an adjournment which was granted. He then withdrew the, at that stage, 16 'certificates'.

When the court reconstituted, Advocate Mahomed formally applied for bail on behalf of all 16 accused in the normal way. The defence and the prosecution agreed on a set of conditions for bail. For example, the trialists have to be in a specified residence by 9 pm. They must surrender their passports. They must report to a police station twice daily. They must refrain from any activity in any of the organisations mentioned in the indictment. They are not permitted to attend any gatherings of those organisations. The court accepted these conditions and they were made an order by the judge. As restrictive as the bail conditions are, they at least free the trialists from the harsh conditions of prison life. They also give some recognition to the legal principle that an accused is innocent until proven guilty.

Rather than have the prisoners serve a further two days of incarceration, Mr Justice Milne said he was prepared to remain until all the lengthy negotiations and arrangements for bail were completed. It was a gesture of understanding and independence not evident in those lesser mortals under 'executive control'.

Then in an unprecedented move by a presiding judge, Mr Justice Milne went on to strongly condemn a law that could so diminish the authority of the courts, and he called for its repeal.

It was, as Advocate Mahomed said, 'bad law', the motivation behind its promulgation being, in the light of Mr Justice Didcott's word's, little different from the rationale that he, in criticising a certain Act, described as 'a deliberate and determined strategy to harness and control the courts'.

Finally, at around 10 pm on Friday May 3, the last of the R170 000 bail money was secured — in hard cash. Sixteen exhausted but happy ex-prisoners of state intrigue were released and, for the first time in months, reunited with their long deprived families — victims also of the same 'bad law'.

The trialists all returned to Pietermaritzburg for the next session of their trial on July 11. And then came another very interesting development. Mr Justice Milne, still presiding, of his own accord and in anticipation of objections to be lodged by the defence, raised various problems which he had himself encountered with the charges. He sought clarity as to what the State meant by 'hostile intent' and what is meant when it alleged that the accused intended to overthrow the State 'by means which envisage violence.'

The answers to these questions are of interest to us all. The State is due to answer them at the next session of the trial on August 5.

photo: Gaby Shapiro

In the centre of Simonstown there stands a commemorative cairn bearing the inscription:

To the memory of generations of our fellow citizens who dwelt here in peace and harmony until removed by edict of 1967.

Erected by their fellow citizens

The minister responsible for that edict was PW Botha. Yet 18 years later on February 22 this year, the town council decided to honour Mr Botha with the Freedom of Simonstown. The occasion was the celebration of the 150th anniversary of the town's existence as a municipality.

A few hours before this insensitive public ceremony, 11 members of the False Bay Black Sash gathered round the monument. The chairman read its inscription aloud. The gathering observed a minute's silence and laid a wreath.

Members of the displaced community now live at Ocean View. They and residents of Simonstown placed flowers around the monument. Their touching comments indicated that this injustice has not been forgotten.

The van in the photograph belongs to the police who observed this small ceremony. It was gratifying that they did not interfere with the proceedings.

Muriel Crewe