

Writing the South African Treason Trial

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Abstract

The Treason Trial (1956-61) was the longest and most complex political trial of the century in South Africa. Beginning with 156 accused, it ended with the acquittal of every one. As much as the trial was a triumph in legal terms for the defence team, it was also a triumph of narrative. With an initial script written by the prosecution, the task of the defence was to rewrite the trial while it was under way. This they did with tremendous clarity, combining design and improvisation. They rewrote the frame and the plot of the trial; they succeeded in characterising key figures, including witnesses for the prosecution and defence, and even the judges themselves. They established the trial's hermeneutic codes, and became its secret authors, inverting the normal juridical hierarchy. Ultimately character, plot and theme all became of a piece until the trial could reach what appeared to be its only possible denouement.

Keywords: Treason Trial; writing; script; characterisation; narrative

If the South African Treason Trial (1956-61) had been a novel, what kind of novel would it have been? The question may seem a superficial one, even impertinent, for the trial was clearly not a work of fiction. Instead, it was the longest of all political trials in South Africa, the most complex, and it had tremendously weighty implications. When it began in December 1956, with the preparatory examination, a total of 156 accused were charged with High Treason, a matter which could ultimately bring sentences of death. The trial lasted more than four years; at the preparatory exam, some 12,000 documents were submitted by the prosecution; the record of the trial proper (which began in August 1958) ran to some 9,500,000 words in some 36,000 pages. Returning to those records induces a feeling of dizzying immensity as one follows the various phases of the proceedings: the quashing of the first indictment; the application to quash the second; the paring down of the charges; the whittling down of the numbers of the accused – first to ninety,

separated into different ‘strings’ – and then ultimately to thirty. It was a trial that produced long stretches of enormous tedium, yet also moments of drama: the Sharpeville massacre and State of Emergency which had a direct bearing on the proceedings; evidence of a speech in which an ANC leader appeared to induce his followers to “murder, murder – that is all”. Sometimes the drama was inseparable from a certain comic relief, as the court debated the nature of communism, or whether a certain Mr S N Krushev was the same Krushev who led the Soviet Union, or decided whether documents were actually what they purported to be. It is a difficult trial to see clearly in its various dimensions, even with the distance and benefit of hindsight.¹

How much more so, then, at the time? For everyone involved in the case – but particularly perhaps for the defence team – there was the tremendous task of understanding the trial, right in the midst of its proceedings. For the defence the stakes were high – as high as they could possibly be – and the burden therefore all the more grave. And this is where my analogy returns. The defence team were like characters in a trial scripted by someone else; to that extent they were like the accused, working out their roles, their forms – in quite literal terms in a legal setting – of representation. Yet their struggle was to become not so much improved characters in the eyes of the court, but the secret authors of the trial. They had to shape it, understand it, rewrite it, as it were, so that it could come to only one appointed conclusion – a conclusion they would determine. As much as they were lawyers, so the idea runs, the defence team was engaged in the long and taxing process of writing a trial while it was under way. While showing due deference to the court and its proceedings, their shift was from character to author in the narrative which engaged them, determining major themes, major codes of reading, dominant perspectives and points of view; they had to characterise others – the accused, prosecution witnesses, the prosecution team, and even the judges themselves. Not least, they had to design the inner structure of the trial itself. They were writing the South African Treason Trial.

The script

Of course, the initial script, based on a tendentious reading of the past decade of South African history, had been set by others. We could say that it was, in itself, a work of reading and translation. The South African state, alarmed at a gathering swell of resistance politics through the 1950s, including the Defiance Campaign and the Congress of the People, felt a compelling need to counteract and – literally – delegitimise it. There was also

the backdrop of the Cold War, against which it would be quite convenient to prove a controlling communist hand; such a script would in turn legitimise the South African state and its policy of apartheid. If this was a work of interpretation, it had to be translated into a legal accusation, and the form the government chose was that of treason. So it was in the first moments of the preparatory, when the prosecution – in theory representing the Queen of England, the Crown – formulated the ambit of its allegations. The prosecutor drew a picture of a vast conspiracy under the direction of a putative entity called the National Liberation Movement, comprising most of the major and many of the minor anti-apartheid groupings of the era, ranging from the African National Congress to the ‘Congress of Mothers’, and linked to international communism. As the prosecutor put it, “The case of the high treason charge will be the incitement and preparation for the overthrow of the existing State by revolutionary methods involving violence and the establishment of [a] so-called People’s Democracy on the basis of the Eastern European Communist Satellite States, and China”.²

These were charges that may have appeared serious and ludicrous all at once, as if, to say the least, much had been lost in translation. Such an impression would only have been underlined in the most ominous way by the opening spectacle of the proceedings at the Drill Hall in Johannesburg, where the accused were caged – “like wild beasts” as their defence counsel put it – behind a cage of wire mesh: the “treason cage”, as it came to be known.³ Right away, without much time for formulation, a decision had to be made on the nature and shape of the defence – a countervailing script, so to speak, even a countervailing theatre. At that stage, the defence was led by Vernon Berrangé, himself a dramatic figure in court, and a former member of the Communist Party, and almost as if by instinct he gave notice of what was in essence a political approach. The accused, he maintained, had at all times striven to bring the various racial groups in South Africa together; they believed in the brotherhood of man; in the international setting their objective was world peace, achieved through negotiation. As for the current trial, the defence would contend that it arose “out of a political plot of the type which characterised the period of the Inquisition and the Reichstag fire trial. We believe that, in the result, this trial will be answered in the right way by history”.⁴

Alleged plot (by the accused) versus alleged plot (by the State), in some degree emerging from and to be wholly resolved by history: this was the shape of the trial at the start. But it was not the shape as it continued. When

the preparatory came to an end and the accused were committed for trial more than eighteen months later, there was a new defence team in place, marshalled by the attorney Michael Parkington and led by Adv. I A (Isie) Maisels, Q. C. Later Maisels recalled that at first he was regarded with some suspicion by the accused, because he had no political résumé, no intrinsic connections with them.⁵ With the exception of Bram Fischer, the same would have been true of others in the team, including Sidney Kentridge, H C Nicholas, and Rex Welsh.⁶ Later, Kentridge's view was that the defence approach during the trial was "very much more sophisticated" than had been possible during the preparatory.⁷ If this was true, it had much to do with Maisels's understanding and insistence. As he saw it, the defence case had to be run on legal and not political grounds; it needed to be a *legal* and not political defence.⁸ Adopting such a perspective might have seemed counterintuitive in what was so far the major political trial of the century in South Africa. But it was also a perspective based on a certain reading and an intention to author the trial. The allegations were already a text – but the question was, did the prosecution understand the legal implications of its own narrative? For the defence, the task would be turning that account into a different kind of narrative, seen through a different frame, a script that would govern the trial and its continuing development.

We can think of it this way: a political script might get repetitive and redundant and would hardly be effective in a court not inclined to believe it. It might also miss some tremendous opportunities which are not of an immediately political nature. A legal script, on the other hand, based on a certain analytic or perspective, allows for twists and turns, sharpness and nimbleness; it permits a story to unfold; it provides the overall optic for a trial, and underlying principles for improvisation as well as strategy. It allows for a work of art to evolve, much in the way that a good novel or drama-, while perhaps engaged with the political, allows for a transformative depth by not simply propagating a message. The deeper politics is in the art itself, and the Treason Trial was nothing if not a legal work of art.

The frame

The first and most crucial step for the defence was establishing a frame for understanding the nature of the trial. This was of course a legal matter, contesting and defining what was at stake in juridical terms, but it was also a matter of narrative, because this frame, like all frames, would help determine the meaning of everything inside it, from plot, to character, to the meaning

of terms or actions, to the hermeneutic codes for interpreting them. Where this took place pre-eminently was in the struggle over the indictments, the very forms in which the allegations had been charged.

From the start the defence was resolute and relentless. The first indictment was horribly vague and loose, and the defence set out (at some length) why. The accused could not tell from the indictment exactly what charges they had to meet; the indictment alleged that they had acted with common purpose, yet the particulars supplied by the Crown appeared to disavow that. As Maisels indicated, the use of the words ‘and/or’ in the various paragraphs of the indictment ultimately meant a total of some 498,015 charges in all – this without taking into account the additional term ‘inter alia’, which made the number infinite.⁹ In response to this, the judges quashed one of the alternative charges under the Suppression of Communism Act, and in due course the prosecution dropped the second alternative charge under the Act as well. Oswald Pirow, leading for the Crown, offered what he saw as the essential point of the case. “The Crown”, he remarked, “stands or falls by conspiracy. If the Crown fails to prove a conspiracy, then all the accused go free”.¹⁰ But Maisels objected to this as well: this was not the way the indictment was framed, and the accused had to answer the charges in the indictment, not in Pirow’s interpretation. The prosecution withdrew the first indictment in October 1958.

In taking this line, the defence could not foresee the outcome; like any other writers they did not wholly control the story they had to tell. In more mundane terms, they were surely taking things one piece at a time, fighting every step of the way. But underlying this was the shaping design – offensive and defensive at the same time. For instance, both now and in the application to quash the second indictment – which the defence regarded as equally flawed – they zeroed in on certain key terms, certain key definitions. In this way, though the judges ultimately rejected the application, they succeeded in imposing their own reading on the way the indictment was understood. One of the key terms was the notion of conspiracy itself, and its meaning. On this the defence was insistent: conspiracy could only mean an agreement to take a certain course of action, and each of the accused would have to have knowledge of such an agreement. From early to late, they harried the Crown on this point. As Sidney Kentridge pointed out later, the question was, what brought all these accused into the conspiracy, each with the others? Could the Crown say how and why accused number one was in conspiracy with accused number thirty, and vice versa, and both of them

with accused number fifteen – not to mention all the others? This would be very difficult to prove. Ultimately, as the defence shaped the case, they insisted that the only kind of conspiracy that could be argued was an *organisational conspiracy*: that the ANC and its allies were conspiring to overthrow the government, and that merely by being a member of one or more of these organisations the accused had joined the conspiracy.¹¹ But as the trial developed, this produced other insuperable difficulties for the Crown. How could they prove knowledge of a conspiracy for anyone who joined the ANC or the other organisations? More to the point, could they prove that the ANC and its allies were actively involved in a plot to overthrow the state by violence? This was the conspiracy that was alleged, but there was virtually nothing in the vast proportion of the evidence presented to the court that suggested anything like such a conspiracy. The defence had both cajoled and tempted the prosecution into a foundational definition, and much in the case followed from that. An allegation of conspiracy defined in these terms was one the defence was quite happy to contest. In other words, the defence had helped shape the charges against the accused; with some audacity, this was how the trial was written early on.

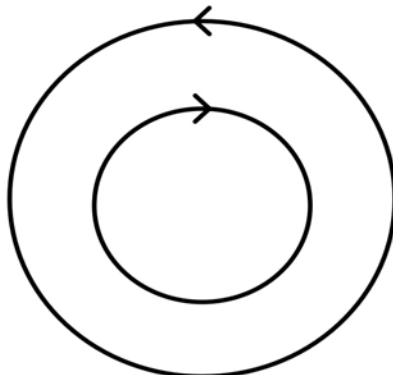
From that point of view, the question of violence was the crucial one, because it was not by any means given that it would be the central issue of the trial. In the early stages, versions of the conspiracy appeared in a number of forms, which had to be distinguished and excised. For instance, the charges under the Suppression of Communism Act required proof only of policies directed towards the establishment of an alternative form of government in South Africa, which might have been easy for the prosecution to substantiate. Yet these were the charges that were dropped at the first indictment stage. More particularly, the second indictment alleged specifically that the accused had acted “unlawfully and with hostile intent against the State”. Yet, what did “hostile intent” mean? On this question, Nicholas presented what Sidney Kentridge later called “the most brilliant and persuasive legal argument I’ve ever heard in a court”, going into the Roman Dutch authorities, English law, and South African cases to indicate that it had to involve violence. Hostile came from the Latin *hostis*, an enemy, and Nicholas showed that when it came to treason the meaning was not metaphorical.¹² As Nicholas argued, violence was *essential* to treason, and in the event the entire course of the trial followed this definition. Again, it was a definition which hobbled the prosecution at every step of the way, because it was one the evidence could not substantiate. The defence team was gaining control

of the text as well as its tests for meaning.

There were other aspects in the overall drive to shape the narrative. For instance, by the time the second indictment was framed, the prosecution had clearly taken the bait regarding the allegation of violence and – because of its own larger narrative drive – linked it intrinsically with communism. Part B of the indictment alleged that the accused had conspired “to subvert and overthrow the State by violence, and to substitute therefor a Communist State, or some other State”. It also alleged that they had promoted the implementation in South Africa “of the Marxist-Leninist doctrine in which doctrine there is inherent the establishing a Communist state by violence”.¹³ This most clearly connected communism with violence and violence with communism; again, it was a connection the defence was quite content to see, because it meant the Crown would have to show violence to show communism, or a communist conspiracy to show violence. But this was precisely what the evidence would be unable to show – in either direction. As if to accentuate the point, when the Crown opened its case in August 1959, the defence willingly offered a wide range of admissions, including the fact that the ANC and its allies had deliberately contravened certain laws (for instance, during the Defiance Campaign), had carried out extra-parliamentary activity, and had “demanded the substitution of a new and radically different government” in South Africa based on universal adult suffrage.¹⁴ They made these admissions not only to shorten the case but to reinforce its shape, its meanings, and its codes – the underlying and defining matrix of its narrative. Illegal activities, demands and campaigns, even for a different form of state, were not treasonable. Only a conspiracy to overthrow the state by violence was treasonable, and the defence now had an indictment and a sanctioned interpretation to affirm that.

The question of the frame is worth contemplating further from a narrative perspective. The defence now had a frame – a counter-frame, as it were – surrounding the frame supplied by the prosecution. The prosecution’s frame alleged a plot (quite literally, on the part of the accused), but the defence had re-plotted the trial at a meta-level, so that its story took a different course. There was now a plot within the plot, a frame within the frame, but it was one in which the evidence would work relentlessly against the indictment. If the inner frame-narrative – the plot regarding the accused – was a circle tending in a certain direction—the outer frame, by redefining its meanings and significance, worked in the opposite direction. Every rotation of the inner circle of the prosecution case produced a counter-

rotation in the view of the court. This was not only a script, it was a mechanism, almost a kind of gear. As for the prosecution in this narrative, they were like characters who had once believed themselves in charge but now could only follow their natures in framing a story that worked against them.



The Frame-Gear

The characters

Novelists may not be wholly in control of their characters, but they are still, in some sense, their own invention. In a court, the characters are a given – in themselves, who they are, their inner signatures, predispositions and habits. But still, those characters can be read as a matter of strategy; or certain parts of their characterisation can be brought to the fore. And they can also, despite themselves, be scripted. Like the true artist, however, good lawyers will look for those moments when characters write themselves in ways that illuminate what might otherwise not be illuminated. This concerns witnesses for both defence and prosecution; counsel for defence and prosecution; and even the judges themselves.

The prime example of this for the defence was paradoxically the first witness for the prosecution, the so-called expert on communism, Professor A. H. Murray of the University of Cape Town. Murray's field was philosophy, and one angle of attack was to show how little of an expert on communism he was: for instance, he had no professional writings in the field, had read only a passing amount in the Marxist classics, and had published on communism mainly in the Afrikaans magazine, *Die Huisgenoot*. On the other hand, for complex reasons, the defence did not wish to undermine him

entirely, for it was Murray who supplied the prosecution with its key definition that communism was connected with violence and vice versa – a definition the defence had little desire to destabilise. There was one exception to this – a moment when Sidney Kentridge got Murray to agree that communism did not necessarily entail violence.¹⁵ But this, remarked Kentridge later, was really a fall-back position in case other options fell through.¹⁶ For the most part the defence was happy to let Murray’s definition provide the test the evidence could not meet.

How to work with him was then the question. Here again the method during the trial proper differed from that at the preparatory examination. At the preparatory, Vernon Berrangé, for the defence, had been devastating. Time and again, where Murray had provided his expert opinion to indicate that the wording in certain documents ‘proved’ their communism, Berrangé demolished him by reading to him from a series of sources which seemed to meet his various tests, only to reveal that their authors ranged from Woodrow Wilson, to Franklin D Roosevelt, to the leader of South Africa’s National Party, Dr. Malan. At one point, Berrangé read Murray a passage written in classic Marxist form on the exploitative nature of capitalism, only to reveal – when Murray could not identify the author – that it had been written by Murray himself.¹⁷ This elicited laughter in the court, and a rebuke for Berrangé from the magistrate. But this was where the method in the trial proper differed. Berrangé’s approach had been, in essence, to trick Murray, making him look ridiculous and completely unreliable. In the trial, however, the defence wanted him to look unreliable *only in certain respects*: not in terms of his central definition of communism, but rather in terms of his *reading* of it in any given instance – or where he set tests for communism that were, on the face of it, absurd.

This was how the defence proceeded. Certainly they were unremitting. Maisels read to Murray from the (by now) standard range of sources, including Pope Pius XI’s encyclical *Quadragesimo Anno* of 1931, the Universal Declaration of Human Rights, the Magna Carta, and the constitution of the United States, among many others. He did not, however, proceed through trickery. Maisels would say what his sources were as he read them—and his aim, primarily, was to show that the ANC’s Freedom Charter, far from being communist, had much in common with these impeccable authorities on human values and freedoms. (The ultimate aim in this respect was to indicate that the Freedom Charter represented a kind of bourgeois socialism rather than any communist vision.) To be sure, there were moments of derision:

Murray had maintained that any use of the word fascist that went beyond a characterisation of the Italian corporatist state under Mussolini was a sign of communist ideology – to which Maisels asked him whether the British Union of Fascists was composed “of Italian émigrés”.¹⁸ Yet by and large, Maisels – whom Kentridge described as “the most aggressive cross-examiner” – was courteous, eliciting yes or no answers, wearing down Murray’s credibility on the facts, till finally, for instance, he would agree that the use of the word fascist was in no way indicative of communist belief or adherence.¹⁹

To this extent, the defence was using Murray as part of its case, and Kentridge observed that he was much better than any witnesses they could have called themselves.²⁰ The key thing here, however, is that the defence worked, perhaps felicitously, through Murray’s character as much as through the nature of his evidence – a character they helped write as they went along. If there was frustration, in other words, there was also opportunity. In Murray, Kentridge saw someone who was well-spoken and articulate in giving his evidence-in-chief, yet who, as a partisan witness, revealed a profound intellectual and logical weakness. Murray, according to Kentridge, was always looking for communism, even in impossible places: “[H]e never seemed to come to grips with the fact that people or organisations with differing political aims could have some aims in common”.²¹ So, if communists advocated equal pay for women, in Murray’s view any such advocacy would have been communist. Yet where Kentridge saw a certain vanity, and where there was an undoubted stubbornness, it is clear from the extensive cross-examinations of Murray that he also had a certain modesty, and even honesty. If he did not know the author of a text, he would say so (to Berrangé); when faced with one of his own contradictions, he would – ultimately – admit it. Which did not stop him, because of that same vanity and stubbornness, from going on to the next contradiction. From this point of view he was the perfect character, driven by his nature to repeat (and then admit) the faults that made him suit the defence team so well.

It was like setting a character in motion and watching him do your work for you. There was something quite rare about this, and somehow the personal characteristics which made Murray repeatedly self-destruct in the witness box had their own bearing on the trial. For, while crediting Murray on one level, how could the judges really *credit* him without embarrassing themselves? Ultimately it was this doubleness, fully exploited by the defence, that was successful. At the end of the trial, while the judges

accepted Murray's key definition on the link between communism and violence, it was in part that very linkage that made it impossible for them to find the ANC guilty of either communism or violence. And since this was the conspiracy the prosecution was tied to in the indictment, the judges were unable to find that as well. The definition stood, the evidence did not, and Professor Murray had played his part, written into his role and allowed to come into character – a character that suited them quite agreeably – by the defence.

If a prosecution witness could be an asset, a defence witness could be a liability. This was at least potentially the case with Robert Resha. Resha had been Transvaal President of the ANC, and was on the National Executives of the ANC as well as the ANC Youth League. In November 1956, he had given a speech at ANC headquarters which a hidden police tape machine – though faulty up to that point – had duly recorded. In his speech Resha outlined the duties of the volunteers who were to resist the removals the government had initiated in Sophiatown and elsewhere. As he put it, “A volunteer is a person who is disciplined ... When you are disciplined and you are told by the organisation not to be violent, you must not be violent. If you are a true volunteer and you are called upon to be violent, you must be absolutely violent, you must murder! Murder! That is all!”²² In theory, the speech was about discipline, and the example of violence merely an illustration, but that was not how it sounded when replayed in court, with Resha's rising register of exhortation and the responding clamour of his audience. The speech became known as the “murder, murder” speech, and it was intrinsically dangerous to a defence which rested on the predominantly peaceful methods of the anti-apartheid movements. For the prosecution, of course, it was a godsend – the primary example of the violent intentions and plans of its foes. At a more subliminal level, it fed a white imagination bred on notions of blacks ready to kill in a frenzy.

It was significant then that the defence examination of Resha fell to Bram Fischer. He was the most political of the defence advocates – a known former communist (and an unknown current one, for the South African Communist Party had by then been declared illegal and gone underground) – and yet, in his own way, one of the most gentle. He too was a character in the court – a former Rhodes Scholar, son of the former Judge-President of the Orange Free State, an Afrikaner of impeccable credentials, and someone universally respected, even among those who would have vilified his politics. His approach, if anything, was to let Resha be Resha, while quietly guiding him

through his evidence. He asked Resha about the Sophiatown removals, and the destruction he had witnessed. He questioned him on ANC policy, to which Resha responded that it was one of non-violence, something he had both accepted and preached. He asked Resha whether he had ever departed from that policy, and Resha said he had. When Fischer asked him why, Resha spoke of the brutal and inhuman methods of the government, saying “sometimes I too feel we have the right to use this violence at times”. This was an important statement, if only for establishing Resha’s honesty as well as the emotions he felt. But when Fischer followed by asking what Resha thought when he took the time to ponder ANC policy, the reply was unambiguous: “When I sit down calmly and consider the African National Congress policy, I realise that the only wise policy is the policy of non-violence”. Fischer asked him whether he could reconcile his ‘murder, murder’ speech with that policy, and again the answer was clear: “The example I used in that speech cannot be reconciled with the policy of the African National Congress”.²³

Everything mattered here: the tone, the style, the mood. If Resha had been led to be defensive, or to insist that his example was only about discipline, something important might have been lost. More to the point, if he had been shown as prevaricating, it would have been a disaster. The moment was not only a legal one, it was one of characterisation, because it was crucial that the court would believe Resha – both his hot-headedness in one particular episode and his composed reflection on ANC policy. To say this was a performance is not to say it was inauthentic; rather, a particular kind of authenticity was performed in the courtroom. It was, then, a moment that came to define ANC policy by its negative – an episode in which that policy had been breached, but also recovered. Here again writing was involved: this was character, theme, plot, frame – all in one.

Such moments were reinforced by other defence witnesses such as Albert Luthuli (one of the accused) and Professor Z K Matthews, both figures of long and high standing in the ANC. These were men of undoubted stature – calm, resilient, independent, of impeccable integrity – and nothing could have impressed the court more than their demeanour and their presence. When Adv. Trengove, for the prosecution, asked Luthuli about Resha, saying that as Volunteer-in-Chief he would surely have known the duties of a volunteer, Luthuli – ill at the time, and cross-examined for twenty-eight days in court – remarked that a general could depart from policy: “If Resha as a general departs, he departs as Resha. It has nothing to do with the policy

of the ANC”.²⁴ Trengove put it to Luthuli that the ANC never expected that the government would accede to its demands, and Luthuli’s reply was straightforward: “My Lords, I wouldn’t be in Congress if I did not believe that White South Africa would some day reconsider. That is my honest belief. When, my Lords, I cannot say”.²⁵ Matthews, questioned on the prospects of ANC policy, said “We think it will work. The whites are human”.²⁶ When Adv. Hoexter suggested that ANC policy was irresponsible, given what he termed the lower level of education and civilisation of its constituents (a continuing theme for the prosecution), Matthews said there was no scientific basis for any such view, and that to his mind so-called more civilised groups, subjected to the same conditions as Africans, would react *more* violently.²⁷ Isie Maisels recalled that when Hoexter asked Matthews what he thought of Resha’s speech, he replied, “Just words” – to which Hoexter said, “You know, I think you’re right”.²⁸

Characters such as Luthuli and Matthews did not have to be written; indeed, it was from them that a fair amount of the defence case could be scripted, understood as a matter of principle and policy. Yet, with a view to such opportunities, the defence was able to write important moments in the trial. This occurred even in relation to the most unlikely of sources, sometimes the police witnesses themselves. On one occasion Bram Fischer, in (again) a quiet and courteous cross-examination of a policeman named Truter on the policy of the Natal Indian Congress, helped establish some rather critical points. Truter volunteered that at the many meetings he had attended, he had never heard anyone advocate violence. Fischer took him further in an extended series of questions, finally asking if it would be fair to say that “one would have heard non-violence preached from almost every platform” – to which Truter’s answer was “I think it would be correct to say that”. Fischer’s wife Molly, writing about this in a letter, noted that Truter had been in the police force for twenty-six years, and that some of the older policemen were still prepared to tell the truth.²⁹ Truter’s observation was crucial, and one might say that in such a moment Fischer was inviting a particular policeman’s character to emerge in a way that produced the required evidence for the defence.

Writing the court

Writing the witnesses is one thing, and it is hard enough. But how does one write one’s antagonists – the opposing team – or the very court in which one is sitting? If the argument is a frame-narrative for the evidence, the court

itself is the widest frame of all, presided over by the judges. Here, to extend the analogy, the defence team are like characters writing the figures who are the ultimate authority in the court, and its ultimate readers. Or, to put it another way: if the judges are the authors of a judgement at the end, the task is to make them only apparent or implied narrators, while the defence team in effect authorises them. How is this achieved? The answer seems to be through a mixture of tact and prodding, shaping and provoking, not only providing what is ultimately an inevitable script, but turning both prosecution and judges into characters only imperfectly under their own control. This, through a certain degree of daring and hazard was what the defence in the Treason Trial achieved.

To begin with, of course, in any trial the prosecution has the upper hand. They are the ones to frame the narrative, level the charges. They arrive with a passionate, probative zeal; they characterise the accused, and become would-be authors of the latter's fate and destiny. Such was the case at the Treason Trial, both in the preparatory examination and in the trial proper. During the trial, the key figure was Oswald Pirow, the leader of the Crown team. Prior to the war, he had been Minister of Justice, as well as head of the fascist organisation the New Order (at one point Bram Fischer had been to hear him give a talk on his meeting with Hitler), and he therefore appeared in Court with a certain aura. According to Isie Maisels, Pirow was "regarded generally speaking as being a Nazi, but he was a very gallant and feared opponent", adding that "no fellow could behave better in court".³⁰ To Kentridge, Pirow was a great orator, though not much one for the facts: "He was more of a politician than anyone on our side."³¹ Yet Kentridge remembered Pirow's opening speech as "brilliant", and this was where he had painted his picture of a vast conspiracy, both national and international – a speech the defence had to counteract. We have seen how they did so, through their onslaught on the indictments – the first, till it was withdrawn, and then the second, which they used to shape the trial.

In doing this, it may be fair to say that they drew on Pirow's grandiosity. When Pirow declared that the Crown stood or fell by conspiracy – "If the Crown fails to prove a conspiracy, then all the accused go free" – the defence were no doubt happy to hear it, but that did not prevent them from insisting that the indictment should be framed in that form. At the first indictment stage, one key aspect had been the dropping of the two alternative charges under the Suppression of Communism Act – charges which might well have brought convictions. But the judges cancelled the one, and Pirow was

prepared to abandon the other. When Maisels asked him why there were no alternative charges in the second indictment, his answer was revealing – both of his character and his case: “You don’t charge parking offences”.³² Pirow, one might say, had been tempted – tempted by what the defence had held out to him in their attack on the indictments: the central allegations of violence and conspiracy. With some grandeur, these were what he felt he could prove on both a South African and international stage. There is a word for acceding to such a temptation, and the word is *hubris*. It was a classic instance – even the hubris of hubris, because someone like Pirow would have known all about it; but that may after all be the classic form. Either way, the moral-literary term is fitting, and in Pirow’s case it had the usual results, bringing about, from his point of view, a duly tragic result when judgement in the case was handed down. At least, it would have been his point of view had he not died during the course of the trial, in October 1959; though the moment might have seemed symbolic, taking it as one of the regular consequences of hubris would be going too far – unless the Greek gods really were involved.

After Pirow’s death, the prosecution was led by Adv. De Vos, but if the former had grand illusions, the latter was more straightforwardly incompetent. It was under his direction that, in the later stages of the trial, the prosecution argument began to shift perceptibly towards one of what Maisels termed ‘contingent retaliation’ – that even if the ANC and its allies had not overtly planned any violent overthrow of the state, they knew that their policies would provoke violence on the part of the government, and hence violent resistance on the part of their constituencies. The defence was vigilant as ever in objecting to this line, insisting that the prosecution could attempt to prove only what was in the indictment, and the judges upheld their position. But it also, to this extent, became clear that the prosecution – and De Vos in particular – never understood the nature of its case, or what it meant in the context of the trial. When Sidney Kentridge gave a remarkable presentation on what was called the two-witness rule in the law of treason – in effect showing that the prosecution required two distinct chains of evidence for each of the thirty accused – the prosecution was dumbfounded: they had never thought of this aspect themselves.³³ When De Vos began his closing argument, the judges were deeply annoyed with him, sending him back to improve things. Kentridge remarked of Rumpff that “[h]e was ruder to De Vos than I’ve ever heard a judge be to counsel”.³⁴ It would be a mistake in this, however, simply to blame De Vos. He had been nailed to an impossible

indictment by Pirow; but Pirow had been tempted to construct it by the defence, and they had even instructed him on the design.

But what of the court, and the judges themselves? Here too the defence was involved in a constant process of writing and rewriting. To begin with, the scenario was not altogether propitious. In complex circumstances, the Minister of Justice had appointed a special criminal court, to be presided over by Mr Justice Rumpff. The onomatopoeically named Rumpff had been in charge of the Defiance Campaign trial; he had also acted for Oswald Pirow in 1947 when the latter was charged with incitement to commit public violence. Justice Ludorf was closely associated with the National Party, and had once acted for the police in a case which would now form part of the evidence he would have to hear. Justice Kennedy had, as recently as 1957, sentenced twenty-one Africans to death in a mass-murder trial. In this setting, the first thing Maisels and his team did was to apply for the recusal of two of the judges: Ludorf on the two grounds just indicated; Rumpff because the Minister of Justice had claimed in Parliament that Rumpff had advised him on which judges to select for the court. In the event, Ludorf rejected the first ground for his recusal, but accepted the second and stepped down, to be replaced by Mr Justice Bekker. Rumpff insisted he had never advised the Minister of Justice on the makeup of the court, and refused to recuse himself; the defence was prepared to accept that if anyone had lied about the matter, it wasn't Rumpff.

These were early days, but the court had been put on notice of a certain attention on the part of the defence. Yet it was also clear, at least in the case of Rumpff, that to some extent they would have to get him to read the evidence and the proceedings against the inclinations of his own ideology. It was in this setting that other elements of the defence strategy began to emerge. For instance, at the preparatory examination, the prosecution had simply handed in to the court the many thousands of documents it presented as evidence of a conspiracy. At the trial, the defence insisted that each and every document the prosecution wished to use be read into the record. This produced an amazing amount of tedium, but also an exasperation on the part of the judges, for whom the import of these documents as evidence was not always clear. When the judges asked whether the prosecution could omit certain passages or certain documents, Pirow demurred, and it became apparent that he was taking a jig-saw puzzle approach: throwing in as many pieces as possible in the hope that a picture would emerge. The defence for its part objected both that there were too many documents *and* too few to

represent accurately the policies of the Congress movements. As for the judges, their impatience was evident. Kennedy remarked, “If they are going to read all the documents out *in extenso*, you’ve heard the old popular song, ‘Forever and ever’?”³⁵ Rumpff asked the prosecutor whether the criminal code said anything about “the quality of proof being dependent on the quantity of paper.”³⁶ Here the prosecutors needed no help in writing themselves, but the defence was able to characterise them – and help write the judges into a certain approach as readers of the trial.

Later, this became even more acute. In March 1960, the defence case was just opening with the examination of its witnesses when the Sharpeville massacre occurred: police had opened fire on pass protesters at a small township near Vereeniging, killing sixty-nine and wounding 187. In response to this, as well as to a gathering state of turmoil in the country, the government had declared a State of Emergency – something which affected the accused directly. A number of them were arrested; all had their bail revoked. Maisels, learning that Chief Luthuli had been not only arrested but assaulted, wanted an adjournment of the trial, but after some consideration the judges insisted the case must proceed. At that stage, the accused instructed their defence to withdraw from the trial. There were genuine reasons for this; as Maisels pointed out, by declaring a State of Emergency and arresting some of the accused, the government had already cast judgement on the case. But later he suggested that the defence withdrawal was also “a tactic to some extent”.³⁷ It was a way of conspicuously delegitimising the trial, and of making the judges and the court uncomfortable as the accused now began to lead one another’s evidence or stand up to the cross-examination of the prosecution.

As it happened, the tactic did not seem to have much effect, at least in Rumpff’s case. When Helen Joseph took the stand, he more or less took over for the prosecution, grilling her on questions both factual and hypothetical. She, with remarkable resilience, stood up to it very well. But the tone was unquestionably unpleasant and ominous. Some months later, when the Emergency was over and the defence took up its role once again, Rumpff continued with the pattern to which he had now become accustomed. But this led to one of the great turning points in the trial. When Rumpff began to question Robert Resha, in essence riding roughshod over Bram Fischer’s examination, the defence decided to take a stand. Fischer announced “with great regret and great reluctance” that he was asking the court to make a special entry on the grounds that the judge had thrown his weight behind

the prosecution in cross-examining a prisoner. A few days later this became a full-fledged application, as the defence cited some 119 passages taken from the questioning of the defence witnesses, all of which had given rise “to a reasonable fear in the minds of the accused that they are not obtaining a fair trial”.³⁸ The application caused instant consternation. De Vos argued that such an allegation could only be grounds for a recusal, not a special entry; Rumpff himself wondered how, if the judges allowed the entry, the court could possibly go ahead without recusing itself. The defence then took the next step, applying for Rumpff’s recusal.

Ultimately, it was an application that failed, as Rumpff rejected any fear on the part of the accused as unreasonable and unfounded – to which the defence again asked for a special entry which they might take on appeal in the case of convictions. In legal terms, it may have looked like a defeat. But in terms of writing the trial and the judges, it was something of a triumph. For after that, as the defence lawyers noted, Rumpff was much more circumspect in his handling of the accused. And he also knew that if the accused were convicted, one of the grounds of appeal would be his own conduct in the trial. It may not have been what made him find the accused not guilty, but it would have been an incentive. The defence team had succeeded in writing both the court and the behaviour – even the character – of Rumpff; and they helped determine his role as a reader as well.

The denouement

As the trial approached its appointed end, all its major themes came towards closure. The narrative frame the defence had established at the outset was decisive, as it became the governing template in both establishing and reading the defects of the prosecution case. As to the alleged ‘plot’ with which the accused were charged, it had been displaced by a different kind of plot: the narrative of the trial itself, and the incapacity of the Crown to argue or prove its allegations. The plot within the plot, in other words, was entirely subsumed, indeed resolved within the workings of the outer frame. Characters had been written, whether witnesses for the prosecution or defence, or members of the court itself, and as far as the defence case was concerned, character, plot, theme were all of a piece – all working towards one kind of reading. This was true even if it was a *negative* reading insofar as the judges only had to find the case unproven and the accused not guilty.

All of this became apparent as the trial drew towards a close. The prosecution argument opened in November 1960, when its case began to

shift towards one of contingent retaliation. This too was when the members of the bench criticised De Vos mercilessly, pointing out many of the inadequacies in his presentation: that if the Freedom Charter was alleged to be communist, the prosecution would have to show the accused's *knowledge* of it; that there was no evidence that the ANC wanted its volunteers to commit violence during the period covered by the indictment; that the prosecution would have to prove that ANC policies derived from the Communist Party if they wished to maintain such an argument; that they would have to show the accused's knowledge of any intrinsic link between communism and violence.³⁹ In response, the defence closing – which began some four months later – was both sustained and to the point, argued in the very terms in which the indictment had been shaped. Here, beginning with Maisels, the defence argued that contingent retaliation was not a charge the accused had to answer; that of the 10,000 speeches made during the period of the indictment, the prosecution had brought only a fraction to court; that if the conspiracy had been nationwide, the Crown had been unable to produce one direct piece of evidence for its existence. Where the prosecution had attempted to say there could be treason without violence, Maisels drew the comment from Justice Bekker that in terms of the indictment it was on the contrary “wedded to violence”.⁴⁰ Nicholas argued on the law of treason and conspiracy, Kentridge on questions of inference and – his *pièce de résistance* – the two-witness rule. Bram Fischer was just beginning to argue on the facts when the judges interrupted the proceedings to say they were adjourning to consider whether there were some aspects of the case they did not need to hear. A week later, on 29 March, they announced their unanimous verdict, acquitting all the accused.

This ending too could be interpreted through the lenses of narrative, drama, and perhaps a hint of the mythological. If earlier there had been *hubris*, this was its inevitable result. In these closing phases, there had been moments of *anagnorisis* – not least when the prosecution rose once again, just before the judges gave their verdict, to say that if there was a variance between the allegations and the indictment, they would offer to amend the indictment one more time. If for the prosecution the outcome was tragedy, for the defence it was in the broadest sense a comedy – a drama of regeneration and renewal based on the absurdity of the state case as much as its qualities of evil.⁴¹ To say this is not to underestimate the suffering endured by the accused, the people they represented, and also to some extent – in an unbelievably long trial – by the defence. And that too meant

this was *catharsis*: a moment of release and purgation, of transcendence and renewed promise filled with the significance of an experience whose result could well have been otherwise. This was why, at the end of the trial, Isie Maisels and Bram Fischer were lifted on the shoulders of the accused.

If we return to the question with which I began, as to what kind of novel the Treason Trial might have been, we can now see some intriguing answers. It was, in the main, a realist novel, governed by the laws of evidence and logic of realism. But for its wayward and even anarchic dimensions, it might have been written in the nineteenth century by George Eliot, with a magisterial, even epic quality, and a vast moral sweep. Or perhaps it was more precisely twentieth-century, post-war – with a knowledge of the evils so recently witnessed, and a last attempt, at least in the South African judicial context, to redeem qualities of progress and reason. Wit and humour had played a part, and undoubted intelligence and artistry; but it was a baggy monster of a trial nonetheless. The defence had understood the rules and sequences of a particular kind of game, and worked them to near perfection. Though improvisation had played a role, it was improvisation based on a guiding legal calculus, which generated all the right moves. Especially from the defence perspective this was, if anything, a *structuralist* trial, in which virtually every element helped establish the meaning and significance of every other, and which had to be approached structurally.

It was for this reason that, subsequent to the Treason Trial, the South African state changed the rules of the game. The trial was, in any case, obsolete by the time it ended. After the State of Emergency and the banning of the opposition movements, those movements had gone underground and adopted a version of the armed struggle they had been accused of. After this, realism would not be the kind of novel the South African setting would permit. Now the police state took hold in earnest; information was to be extracted by extended detention and torture; laws would be manipulated to suit political needs, and evidence produced in terms of those laws. If this was not quite a post-structural reality, it was one in which terms and meanings did not necessarily coincide. From that point of view, the South African state had changed the narrative, changed the frame, and so had the South African resistance. Some of this was registered in the Rivonia Trial, held just three years later, in which the accused offered a political rather than legal defence. The shift was symptomatic: this was the changed logic, the changed narrative of the time.

Yet, if South Africa had now entered a darker phase, written by Beckett

and Kafka as much as Marx, the Treason Trial had its own longer-term result. During the trial, Chief Luthuli had offered his belief that one day whites would reconsider, though he could not say when. He could not have known that his ‘when’ would be sealed in 1994, with the induction of one of his fellow accused as President of South Africa. This then became an even larger narrative – yet another frame – reconnecting with the intrinsic prophecy of the Treason Trial, that peace and transformation were compatible. It was a confirmation of the trial’s realism – with its promise of reason and morality – together with its underlying redemptive modes. Now, as South Africa has entered yet a further phase – post-apartheid, post-national, perhaps post-illusion – it remains to be seen just what kind of novel will be written in its future. As always, that will be a different kind of trial, and we will have to wait to see its unfolding story.

Notes

1. It is worth noting that I have written about the Treason Trial before, in my biography of Bram Fischer (Clingman 1998). Though I have gone back to some of the same material for this essay, my purposes here are evidently different.
2. University of Witwatersrand Library, Historical Papers (UWL), AD 1812, [Political Trials] Treason Trial, A.1.a, *Preparatory Examination in the matter of Regina vs 153 Individuals on an allegation of high treason*, p. 72.
3. For these opening scenes, see Clingman (1998: 235-6); also Sampson (1958: ch. 2).
4. UWL AD 1812, A.1.b, Preparatory Examination, *Regina vs Farrid Adams and Others*, vol.1, p. 93.
5. Interview with Adv. IA Maisels, S.C., Johannesburg, 23 April 1985, tape.
6. For the full list and description of the defence team, see Maisels (1998: 139-42). Only Berrangé was retained from the preparatory team, in particular to cross-examine policemen, who regarded him with fear.
7. Interview, Sidney Kentridge, S.C., Johannesburg, 8 December 1988, tape.
8. Maisels interview.
9. UWL AD 1812, C.2, *Treason Trial Defence Fund Press Summary*, no. 2, 18 August 1958. The *Summary* is referred to in further notes as TTDF PS.
10. TTDF PS, no. 5, December 1958, p.1.
11. These perspectives: Kentridge interview.
12. These comments: Kentridge interview.
13. For the full text of the second indictment, see Karis (1965: 51-4).

14. For the defence admissions see Karis (1965: 64-7).
15. TTDF PS no. 23, 17-24 November 1959, p.5.
16. Kentridge interview.
17. UWL AD 1812, A.1.b, vol. 31, pp.6198-9.
18. UWL AD 1812 A10, p.43.
19. Maisels as cross-examiner: Kentridge interview. Murray's concession on fascism: UWL AD 1812 A10, p.118.
20. Kentridge interview. For Kentridge this would have applied especially to current or former communists inclined to uphold the idea that communism did not entail violence – a contention that might have been demolished in the witness box. Besides, one might add, such a contention did not suit the defence case.
21. These views on Murray: Kentridge interview.
22. UWL AD 1812 F13, Court Record vol. 41, p.8152. A transcript of Resha's speech is also given in Maisels (1998: 163-6).
23. This sequence in Fischer's cross-examination of Resha: UWL AD 1812 F25, vol. 78, pp.16571-3.
24. TTDF PS no. 34, 17-26 May 1960, p.8.
25. TTDF PS no. 34, 17-26 May 1960, p.14.
26. TTDF PS no. 43, 3-7 October 1960, p.6.
27. TTDF PS no. 43, 3-7 Oct 1960.
28. Maisels interview.
29. Molly Fischer to Ella Fischer, 6 September 1959. For an extended transcript of Truter's evidence, see Clingman (1998: 248-9).
30. Maisels interview.
31. Kentridge interview.
32. Maisels interview; in slightly different wording in Maisels (1998: 151).
33. The two-witness rule was based on English statute going back to 1693 as well as South African precedents. It held that a conviction required two witnesses to an overt act of treason, or alternatively, one separate witness to each of at least two overt acts. The idea was to prevent a conviction based on the testimony of only one witness, and Kentridge's genius was in applying the resultant permutations to the circumstances of thirty individuals. For more on this sequence in the trial, see Clingman (1998: 258-9).
34. Kentridge interview.
35. UWL AD 1812 F1, vol. 3, p.541.
36. UWL AD 1812 F1, vol. 5, p.807.

37. Maisels interview.
38. This sequence: UWL AD 1812 F 25, vol. 78, pp.16435-510.
39. The Crown closing argument lasted from 7 November 1960 to 6 March 1961. My sources for this sequence were mainly the TTDF PS, nos.44-55.
40. UWL AD 1812 F37, vol. 135, pp.23663-4.
41. Northrop Frye (1971: 167) makes the point that comedy opposes not “the villainous but the absurd”. In the South African setting there was a more than adequate supply of villainy.

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