IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO.82/87

In the matter of

REX

vs

PHILLIP M. DACRE

PHILEMON D. HLATSHWAYO

EUGENE F. BIDWELL

SWAZILAND PRINTING & PUBLISHING CO.

MICHAEL L. DUPLOCH

CORAM:	HANNAH, C.J.
FOR THE CROWN:	MR. A. TWALA
FOR THE DEFENCE:	MR. KUNY. S.C. FOR ACCUSED NO.1 TO 3
	MR. FLYNN " " 4 & 5

JUDGMENT

(12/10/87)

Hannah, C.J.

The five accused have pleaded not guilty to an indictment which charges each of them with committing the offence of sedition contrary to section 4(c) of the Sedition and Subversive Activities Act, 1938 (as amended) and the first two accused have pleaded not guilty to a further count in the indictment which charges them alone with the common law offence of crimen injuria.

The Roman Dutch common law offence of sedition is defined in Hunt's South African Criminal Law and Procedure (Vol.11) at page 45 as follows:

"Sedition consists in unlawfully gathering, together with a number of people, with the intention of impairing the majestas of the State by defying or subverting the authority of its Government, but without the intention of overthrowing or coercing the Government."

This definition is in marked contrast to the offence of sedition known to the English common law. As was pointed out by Innes. C.J. in R v Viljoen and Others 1923 AD 20 at page 92:

"One's idea of sedition is apt to be unduly coloured by association with the word sedition as used in English Law. Words or acts spoken or done with a seditious intention were by franswaal Ordinance No.38 of 1902 made specially punishable. Seditious intention was defined in the English sense, which generally speaking implies a desire to bring the Government or the Sovereign into hatred or contempt, or to excite disaffection among the people. That enactment has now been repealed; but its provision affords an

instance of terminology which is in common use, but which has none but the remotest bearing upon the nature of sedition as a distinct crime in our law."

I mention this because the crime of sedition created by the Sedition and Subversive Activities Act, 1938, probably in line with the repealed Transvaal ordinance referred to by Innes C.J., is plainly a statutory enactment of parts of the English common law crime of sedition as it stood at the turn of the century. Thus one finds section 3(1) of the Act defining a seditious intention as an intention to -

"(a) bring into hatred or contempt or to excite disaffection against the person of His Majesty the King, His Heirs or successors, or the Government of Swaziland as by law established; or

(b) excite His Majesty's subjects or inhabitants of Swaziland to attempt to procure the alteration, otherwise than by lawful means, of any matter in Swaziland as by law established; or

(c) bring into hatred or contempt or to excite disaffection against the administration of justice in Swaziland; or

(d) raise discontent or disaffection amongst His Majesty's subjects or the inhabitants of Swaziland: or

(e) promote feelings of ill-will and hostility between different classes of the population of Swaziland.

This follows very closely the definition of a seditious intention as given by Stephen J. in Article 93 of his Digest of the English Criminal Law which is conveniently set out in Smith and Hogan on Criminal Law (4th ed) at page 803 and which reads as follows:

"..... an intention to bring into hatred or contempt, or to excite disaffection against the person of, Her Majesty, her heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst

Her Majesty's subjects. or to promote feelings of ill-will and hostility between different classes of such subjects."

This is not of mere historical interest for it means that the English authorities may be looked to as a rich source of material when it comes to the question of construing a statute which is in essence a coadification of an English common law offence. This is of particular importance, in my view, when it comes to the proper construction to be placed on section 3(3) of the Act That subsection reads:

"(3) In determining whether the intention with which any act was done, any words spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted. himself."

This subsection follows almost exactly Article 94 of Stephen's Digest which reads:

In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

This is described by Smith and Hogan (supra) at page 803 as laying down an objective test "which would require no more mens rea than an intention to publish the words which were published."

and for my part, taking the words literally, I find it impossible to see how any different interpretation can be placed upon them. While it is true that in later years the English courts moved away from such a test holding that nothing less than a positive desire would suffice (see« R v Caunt (1947) (unreported)) what this Court is concerned with is the effect of the words as they appear in the Act.

Mr. Kuny for the first three accused submits, and it is a submission adopted by Mr. Flynn on behalf of the other two accused, that the words contained in section 3(3) should not be given their literal meaning. Mr. Kuny's first submission is that when section 3(1) is read with section 3(3) it becomes abundantly clear that the Legislature intended to create no more than a rebuttable presumption. The first subsection speaks of "seditious intention" and defines what such intention is and it is incomprehensible, submits Mr. Kuny, that in the very next breath in the very same section the Legislature should insist that the Courts should apply an artificial test of what the intention is and disregard the genuine intention altogether. Mr. Kuny contends, in other words, that section 3(3) should be read as if the words "unless the contrary be proved" or similar such words appear at the end. Alternatively, or perhaps to lend force to his first submission, Mr. Kuny contends that to construe section 3(3) in any other way would lead to absurdities and it must be taken that the Legislature could never have intended such absurdities.

Mr. Kuny cites as an example the distribution of a seditious

document by the Post Office. If section 3(3) is regarded as creating an irrebuttable presumption then, says Mr. Kuny, the Post Office and its officials would be guilty of sedition even if they were unaware of the contents of the document which they were distributing.

I have already said what I consider to be the plain and unambiguous meaning of the words in section 3(3) and, turning to matters of principle, it must therefore be for Mr. Kuny to show that this is one of those exceptional cases in which a court of law would be justified in "modifying" or "cutting down" or "varying" the actual language of the statute. He must show that the case falls within the rule of R v Venter 1907 TS 915 which is that where the language of a statute is unambiguous, and its meaning is clear, the Court may only depart from such meaning "if it leads to absurdity so glaring that it could never have been contemplated by the legislature, or if it leads to a result contrary to the intention of parliament as shown by the context or by such other considerations as the Court is justified in taking into account."

I have given very careful consideration to Mr. Kuny's first submission but I am unable to see any contradiction of the Legislature's intention when reading section 3 as a whole. The first subsection sets out what is meant by "seditious intention" whereas the third subsection deals with the proof of that intention. If the Legislature chooses to enact that proof that a person did an act the natural consequences of which is to bring the King into hatred or contempt is conclusive proof that such person intended those consequences then it seems to me that that is the prerogative of the Legislature. Once a distinction is drawn between the

intention as defined and proof of that intention there is nothing inconsistent in the enactment. It may, of course, be criticised as introducing a legal fiction but the Legislature must be presumed to have had good reason for introducing such a fiction. Certainly the Legislature enjoys good company in this respect because not only was this for many years considered to be the legal position in England in cases of sedition but until the enactment of the Criminal Justice Act, 1967 there was high authority in that country for the proposition that there is an irrebuttable presumption of law that a person foresees and intends the natural consequences of his acts. (See DPP v Smith 1960 (3) All E.R. 161). If my conclusion offends principles of Roman Dutch common law, as Mr. Kuny. seems to suggest it would, then I must point out

that this Court is not concerned in this particular exercise with the application of those principles but with the interpretation of an Act of Parliament which, as I have already pointed out, imports the law of another system into this country.

I now turn to the second limb of Mr. Kuny's submission. If section 3(3) is held to lay down an objective test and the Court is required to disregard the accused's real and genuine intention does this create absurdities so glaring that it could never have been contemplated by the Legislature? Mr. Kuny gave one illustration which I have already briefly referred to. A seditious publication bringing the King into hatred or contempt is sealed in an envelope and posted. The Post Office delivers the envelope and its contents to the addressee and can therefore be said to have distributed a seditious publication. Mr. Kuny submits that if section 3(3) is held to lay down an objective test the Post Office would be guilty of an offence. He further submits that this would be absurd and with

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that part of his submission I agree. However, the question is whether Mr. Kuny is correct in his submission that the Post Office would be guilty of an offence. If section 3(3) were to do away with intention altogether it certainly would but that, in my opinion, is clearly not its effect. It deems that whatever a person's true intention may be he shall be regarded as intending the natural consequences of his act and in my view it follows from this that he must have some means of knowing or appreciating what the natural consequences of his act will be. In the illustration of the Post Office the officials concerned would have no means of knowing the nature of the publication being delivered and accordingly the Post Office would not be guilty of an offence.

In my view, section 3(3) introduces an objective test, namely the test of what a reasonable man would contemplate as the natural consequences of his acts, and, therefore, would intend. It matters not what the accused himself in fact contemplated as the probable result or how honest and laudable his ulterior object may be or whether he ever contemplated at all. It may be said that this is a draconian provision but it is not for the courts to give an erroneous interpretation of the statute on that ground. Parliament in its wisdom has seen fit to enact the provision and it must be assumed that it saw good reason to do so. It may well be that Parliament regarded the danger inherent in the dissemination of seditious material so great that it saw fit to strike at the effect of such material rather than the ulterior objective of the author, speaker or publisher. In my opinion, insufficient grounds exist either in "absurdity" or "contradiction of intention" to justify this Court in adding to section 3(3) the words "unless the contrary be proved."

In reaching the foregoing conclusion I have taken full account of what was said by Nathan C.J. in R v Shub 1979/81 SLR 321 at page 323 but with great respect I am not persuaded that the learned

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Chief Justice was correct when he said of section 3(3):

"it appears to me to cast upon the accused the obligation to rebut the presumption that is raised by the subsection."

The learned Chief Justice gave no reason for so holding and it does not appear that the matter was argued or, if it was, fully argued. As for the case of Kinnear v R 1963/69 SIR 38, which was also cited in argument, I do not understand Milne A.J. to have dealt with the particular point under consideration.

Count one of the indictment charges the accused with contra-vening section 4(c) of the Act (as amended)

"in that during the months of April and May 1987 at Mbabane in the district of Hhohho each or all of them did unlawfully print, publish, distribute and reproduce seditious articles to wit "Incwala: Sex Orgie, (sic) Witchcraft or Tradition" and "Incwala: Kulalana, Tinyanga, nome Emasiko" in the magazine "Jesus is Alive" volume 3 and No.5 May 1987."

I should mention here that although there is reference to two articles the second is simply a translation from English into SiSwati of the first.

Section 4 of the Act as amended reads: "4. Any person who -

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;

(b) utters any seditious words;

(c) prints, publishes, sells offers for sale

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distributes or reproduces any seditious publication; or

(d) imports any seditious publication, unless he has no reason to believe that it is seditious;

(e) without lawful excuse has in his possession any seditious publication shall be guilty of an offence and liable on conviction to imprisonment not exceeding twenty years or to a fine not exceeding E20,000 and any seditious publication relating to an offence under this section shall be forfeited to the Government."

"Seditious publication" is defined in section 2 as meaning "any publication containing any word, sign or visible presentation expressive of a seditious intention.

It may readily be seen from the manner in which the first count is pleaded that the prosecution sought to cast its not very wide alleging against each accused the act of printing, publishing, distributing and reproducing the offending article. Not surprisingly all accused asked for further particulars of precisely what it was alleged they had done. In the case of the first three accused the further particulars provided by the prosecution merely repeated the original allegation with the addition of the words "or caused" in respect of each act. In the case of the fourth accused the further particulars read:

"No.4 is a Company carrying the business of printing and publishing. No.4 during the course of its business printed the seditious publications and allowed it to be distributed by accused 1, 2 and 3 despite the warning by its employees that the publications were Seditious."

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As I understand this the allegation against the fourth accused is that it printed the publication and was party to its distribution.

In the case of the fifth accused the further particulars read: "No.5 received the order from the customer and processed it for printing. He read the seditious publications before publication. He allowed it to be published by No.4 when the employees of No.4 warned him about the publication he did not take steps to stop its publication or printing. He also allowed the document to be distributed. No.5 is charged both as representative of No.4 and in his personal capacity."

I have considerable difficulty in extracting from these particulars precisely what the allegation against the fifth accused is but doing the best I can I understand the Crown to allege that he was a party to. publishing the article and publishing it.

I must confess to being disturbed as to the manner in which count one has been pleaded and particularised and I was concerned to know at the outset of the trial whether the accused or any of them considered themselves unfairly prejudiced as a result. However, their respective counsel took the view that they were not and the indictment was therefore put as it stands.

What does the Crown have to prove in order to bring home the charge laid in count one? Firstly, it has to establish beyond reasonable doubt that the article, and I shall refer only to the English article, is a seditious publication; or, in other words, is a publication which contains words expressive of a seditious intention. The Crown case in this respect is that the article contains words expressive of an intention by its author, the first accused, to bring into hatred or contempt the person of His Majesty

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the King. Secondly, the Crown must prove to the same high degree of proof in the case of each accused the respective acts alleged. Thirdly, although there may be some doubt about this having regard to the wording of section 4(c) when compared with that of 4(a) (b) (d) and (e), that the act of each accused was done with the appropriate intent and in this regard the Crown can invoke the provisions of section 3(3).

Turning to the evidence it is convenient to start with that of Dr. J. S. M. Matsebula who is Chief Executive Officer of the Swaziland National Trust Commission and who for many years worked closely with King Sobhuza II first as the King's liaison officer and later as the King's private secretary. Dr. Matsebula is also one of this country's leading historians and a writer. He described the Incwala ceremony which takes place towards the end of each year except during a period of regency.

Incwala is a uniquely Swazi ceremony which has been celebrated towards the end of each year for centuries. Dr. Matsebula says that it is as old as the Swazi Nation itself. It existed long before missionaries introduced Christianity to the Swazis and is not therefore a Christian ceremony but Dr. Matsebula and two members of the clergy from two Christian sects who have churches established here said that there was nothing un-Christian involved in the ceremony. The ceremony is spread over several weeks and consists of a number of linked phases commencing with the fetching of water from the sea. Its culmination is Incwala Day itself when the Swazi people converge on Lobamba, described by Dr. Matsebula as their spiritual headquarters, and thanks are offered to Mvelinchanti, the Creator, for having safely kept them during the year just past and for bringing them to the beginning of a new year. A bull is killed by young men, roots are dug and the fruit of a particular shrub is plucked.

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The King plays the leading role and it is he who performs the ritual of eating the first fruit of the coming year and publicly cleanses himself with a mixture of sea water, roots and berries. The ceremony is described by Dr. Matsebula as the culmination of Swazi unity and stability and is of tremendous importance and significance. Part of the ceremony is held in secret in an inner enclosure where the King retires with his attendants and the royal priests. Dr. Matsebula said that males only were involved. It may be assumed, I think, that if a person with Dr. Matsebula's wealth of knowledge and close links with the Royal family is not acquainted with that part of the ceremony then it is a very closely guarded secret. Secrets, of course, often lead to rumour and speculation and the relevance of that will become clear when I come to the article which lies at the heart of this prosecution.

The first accused is the pastor of the Rhema Church here in Swaziland which, as I understand it, is an evangelical church having its roots in the United States of America but with a substantial following in Southern Africa. The church first became established in Swaziland in 1983 and when the first accused was ordained in May 1984 following attendance at a course at the church's Bible School in Johannesburg he came here as its pastor. The church has congregations in various parts of Swaziland and a Bible Training Centre situated in Mbabane of which the third accused is the dean. Church members total about one thousand but it has a mailing list of about three thousand persons to whom it sends its monthly magazine "Jesus is Alive". The magazine is sent free of charge and it is reasonable to assume that its readership is in excess of three thousand. Additional copies are available at a bookstall in the training centre.

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The cover of the May 1987 edition of the magazine bears the title "INCWALA! Sex Orgie, Witchcraft or Tradition?" and the same banner heading is blazed across the top of the centre page spread. An article written by the first accused then follows. A few pages later the article is repeated in siSwati the translation having been done by the second accused who is a member of the church and employed by it as a translator and counsellor.

I now come to the article itself. It commences innocuously enough giving a brief description of Incwala as the "first fruits" ceremony and it then comments on the difficulty of obtaining information because of the dearth of written material. However, despite this it then sets out what it describes as "some of the constant facts". The first so-called fact is that the King has to have sexual intercourse with a virgin on the night of Incwala. The next is that ancestral spirits are called upon, water with which the King has washed is thrown over the "deflowered virgin" who"becomes possessed in a fashion". Next, it is stated that spirits are called upon in the dead of night and "the royal witchdoctors" are called upon to bless the ceremony. Muti is distributed to ensure that demon spirits are present. Writing of the Incwala Ceremony as a whole the article refers to the fetching of water from the sea and the collection of roots and berries and adds, for good measure, that the Bible calls the ceremonies in which these are used "sorcery or witchcraft". It also describes the death of the bull which is slaughtered in lurid terms.

There then follows a commentary. The point is made that anyone who commits fornication will never enter the Kingdom of God and then, in what can only be a reference to the King, states "deflowering a virgin is fornication and those who practise this will never enter the Kingdom of God." The question is then posed

"What should we as Christians do? The first piece of advice tendered is to pray against the ceremony. "Bind the power of the devil that rules this ceremony. Destroy the strongholds of the devil in it and set them free". The next piece of advice is that the readers should voice their opinion that the ceremony "is not only wrong but ungodly, immoral and causing the country to get cursed." Next, the readership is exhorted to "Cast the devil out of those who have been involved in this ceremony because they have put themselves under demon control." The last piece of advice is that the readers should discourage the ceremony in whatever way possible. In a final comment the article states "whenever traditions bring in an anti-Christ as with the Incwala ceremony, in the form of immorality and witchcraft, then satan takes occasion to destroy the whole nation ...."

In a case of sedition the Court is not concerned with the truth or falsity of the publication save, perhaps, to the extent that that may shed some light on the intention of the author. However, while this is not an issue in this case I would say in passing that the first accused's sources of information were of the flimsiest possible kind. One was a Miss Ncongwane, a non-Swazi woman of about thirty, who, said the first accused, came to him in a very distressed condition and who claimed to know someone who had been to the ceremony. The other was his assistant pastor in Manzini who had told him that the King had to take a bride at every ceremony. How anyone, least of all a pastor of a church, could decide to rely on such information as being factual and then use it as the basis for an article completely baffles me. Although the first accused maintained that he regarded the information as factually true and that he had no reason to doubt it, the truth of the matter is, in my view, that the first accused was simply looking for a platform upon which to preach his particular version of the Gospels and the speculative information he received about Incwala presented a convenient platform regardless of whether

it was true or not.

The Director of Public Prosecutions in presenting the case for the Crown made repeated attempts to introduce evidence of what various witnesses themselves thought of the article and the effect it had on them. It is quite plain that such evidence is not admissible save, perhaps, in very exceptional circumstances as the question whether the article comes within the prohibition of the Act is an issue entirely for the Court to determine. (See for example, R v Stanford 1972 2 All E.R. 427). It is bad enough

when counsel fail to acquaint themselves with the rules of evidence but it is particularly irksome not to say distracting, when counsel persistently ignore the Court's ruling and the Court is obliged to call "offside" time and time again. I trust that these words will be taken to heart.

What then does this article amount to? Mr. Kuny contended at the close of the Crown case that it merely contains strong criticism of the Incwala ceremony and cannot be said to have the effect or tendency of bringing His Majesty the King into hatred or contempt. When the first accused went into the witness box his evidence was to similar effect. The article was merely expressing what he saw as evil in the ceremony, namely, the practice of witchcraft, calling on ancestral spirits and the practice of polygamy. The Courts are, of course, concerned to protect freedom of speech and if all this article does is to express views on the evil of such matters then, even if such views are regarded by many as offensive, the article would not be unlawful. However, in my view the article goes far beyond that. It is an outright attack on Incwala and incorporated in that attack are charges levelled against the King's role in the ceremony. Reading the article as a whole I find it impossible to escape the conclusion that not only does it

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charge the King with immorality and un-Christian behaviour but with the practice of witchcraft and fornication. The author, not content with the role of accuser alone, then sets himself up as judge and jury and finds the charges proved.

In my opinion, there can be no reasonable doubt that the tendency of the words used is to bring the King into hatred and contempt especially when the nature of the readership at which the article was principally aimed is taken into account.

This leads me to the important question of intention and I will deal with the case of each accused in turn. The first accused's chosen vocation is to preach the word of God and I have no real doubt that he believes fervently in all that he does. However, from what I saw of and heard from him in the witness box it seems to me that his fervour goes beyond the norm. He struck me as a religious zealot and I say this not as an offensive remark but because when judging the mind of a person - and that is what is involved when considering the question of intention - it is necessary to attempt to understand the kind of person one is dealing with. The first accused claims that he wrote the article not with the intention of bringing the King into hatred or contempt but that his intention was quite the reverse, namely, his love of the King and the country. He saw what he considered to be certain evils and his intention was to rid the country of those evils by exhorting his congregation to prayer. He quoted the Bible as saying that a country will receive blessings or curses depending on whether it follows the word of God and his objective was, he said, to exhort Christians to pray so that people's hearts may change. His church has regular prayer meetings where prayers are offered up for the King and the Nation. To bring the King into hatred and contempt would, he said, be against everything Christianity stands for. The New Testament teaches Christians to hold authority in respect and he would never intentionally dishonour or show disrespect for

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the King.

I have already explained my view of the tendency of the words used in the article and if the Court were dealing with any ordinary reasonable man it would be impossible to escape the conclusion that the author of those words must have intended to bring the King into hatred and contempt. However, as I have said, the Court is not dealing with an ordinary reasonable person but with a person whom I have described as a religious zealot; and much as I have pondered the matter I cannot help but think that the mind of the first accused may be so indelibly focused on what he sees as his mission in life that he really did not see the article in the way nearly any other person would. A message was passed to him that employees of the printer were concerned about the article and the second accused, a member of his congregation, told him that he regarded it as sensitive but the first accused brushed these warnings aside without any real consideration. This does not seem to me to be the action of an entirely rational person. In the case of the first accused at the end of the day I am not completely certain what was going oft. in his mind and in

these circumstances it is necessary to invoke the provisions of section 3(3). Applying the objective test provided for in section 3(3) it is clear that whatever the first accused's genuine intention may have been he cannot escape conviction. The consequences which would naturally follow from publishing the article would be to bring the King into hatred and contempt by those who read it and for the reasons I have given earlier in this judgment the first accused must be deemed to have intended such consequences. Indeed, in my view that subsection was inserted in the Act with this very kind of case in mind. As the first accused admits not only authorship of the article but to being responsible for causing it to be published and distributed he must be found guilty on count one. As

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for the second count alleging crimen injuria I entertain doubts as to the legal propriety of including this as a substantive count as it overlaps almost completely with the first count. However, for the reasons I have already given I am in some doubt whether the Crown has proved the intention alleged and on this count the first accused is entitled to be acquitted.

The second accused admitted that it was he who translated or, in terms of section 4(a), reproduced the article into the siSwati language. He is a Swazi and seemed to me much more down to earth than the first accused. He admitted that when he first read the article he had recognised its contents as "sensitive" and before translating it had mentioned this to the first accused and to an Assistant Pastor in Manzini. The first accused's reaction was to tell him to go on with the translation work which he did. He said it was not his intention in doing so to bring the King into hatred or contempt or to insult or injure His Majesty.

He was not an impressive witness and appeared to me to have something to hide. When asked what he had meant when he had told the first accused that it was sensitive he said that he had meant that he had not seen anyone writing of Incwala before which I consider to be an unsatisfactory and evasive answer. He accepted that had someone alleged of himself that he associated with people possessed by demons he would feel insulted. After due consideration my conclusion is that he knew perfectly well that the effect of the words was, at very least, to bring the King into contempt. Yet despite this he carried on with the translation presumably because he did not have sufficient backbone to stand up to his superior and refuse. In my judgment, the second accused had the intent alleged by the prosecution both in the sense of foresight of the consequences of what he was doing and in the deemed sense. In his case the correct verdict, in my view, is one of guilty on both counts of indictment.

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The third accused falls into a somewhat different category. He has been charged because on his own admission he was the person in the Rhema church organisation responsible for distribution of its monthly magazine. It was he who took delivery of the May magazine from the printers, who organised the rolling of each magazine into a tube for posting, who took the final product to the post office for posting. He had received a message for the first accused that certain workers at the printers were concerned about the centre page article and when he passed this message on the first accused simply told him to carry on. Despite that message and despite the fact that he had seen the heading on the magazine's cover "INCWALA: Sex Orgie, Witchcraft or Tradition?" he claimed that he was not even sufficiently curious to open the magazine and look at the article. He said that he was not alarmed by the message as there had been previous complaints from the printers about the magazine but was unable to give any satisfactory explanation for his apparent total lack of interest in the article itself.

I do not believe the third accused when he says that he was totally unaware of the contents of the article. I find it inconceivable that he would have ignored the article in the way he says he did. He was himself a contributor to the magazine from time to time, he was dean of the training centre where the magazine was available to be read by those who attended and who presumably might be expected to ask questions about its contents, he was specifically alerted to the fact that the article was causing concern, his wife was responsible for typing it and he had seen the heading which in itself would surely arouse the curiosity of anyone picking up a religious magazine. In my judgment, the third accused was not being honest with the Court when he said that he was unaware of the contents of the article. In my judgment he was well aware

of what had been written and is now attempting to distance himself

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from it because he now realises that it was wrong to have participated in its distribution. In my view, while it may be that it would be unsafe to convict him on the basis of a positive intent he is plainly guilty on the first count on the basis of the presumption contained in section 3(3).

I now come to the printers. Although the indictment does not refer to the fourth accused as a registered limited company, as I understand it it is accepted that this is in fact the position. There is no doubt that the magazine in which the offending article was published was printed by the fourth accused and that at the time the fifth accused was its Acting General Manager. The evidence is that the original material was delivered to the fourth accused in "camera ready" art form. Although it would have been possible for one of the fourth accused's employees to have read the material before photographing it and making a printing plate there was no obligation on the fourth accused's staff to read or check what was to be printed and there is no evidence that anyone did read it prior to it being printed. However, while the magazine was being bound and made ready for despatch to the customer Mr. Kunene, the fourth accused's work manager, picked up a copy and read it. It "did not appeal" to him, he said, and he took it to the fifth accused and told him he was worried about the centre page spread., At first the fifth accused said he saw nothing wrong but Mr. Kunene asked him to give himself more time to read it. He agreed to this and after about fifteen minutes the fifth accused telephoned Kunene and said that although he realised that the article was in bad taste he did not see how they, the printers, could be accused of anything as they were only the printers, not the author. However, he did say he would telephone the customer.

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The fifth accused accepted that Kunene brought a copy of the magazine to him and his recollection was that Kunene told him that some of the matters referred to were incorrect. He thought his first reaction or response was that if there was anything illegal the company was covered by its standard conditions which provide, amongst other things, that "The printer shall be indemnified by the customer in respect of any claims, costs and expenses arising out of any illegal or defamatory matter printed for the customer ...." This, of course, does not give the company any protection against civil or criminal proceedings but merely a right of recourse to the customer should it be sued or prosecuted. I should have thought a manager in a printing company the size of the fourth accused would readily have understood this to be the position.

The fifth accused, who had only been in the country for about six months, said he had a "quick read" and told Kunene that as it was about the customs and traditions of his, Kunene's, country he was not in a position to pass any opinion on it. Kunene asked him to read it more closely, which he did, but he still maintained he was unable to form any opinion. It was, he said, beyond his understanding. However, he undertook to pass a message to the customer expressing their concern and saying that the customer would have to bear the responsibility. A message came back, he said, to the effect that the third accused had said that the Rhema church would accept responsibility. Someone from the customer then came and collected the magazine and that was that.

Looking at the further particulars of the indictment supplied by the Crown to the fourth and fifth accused it seems to me that apart from the allegations that they were responsible for the printing of this seditious article the prosecution is not at all sure what its case is. Reference is made to what the fifth accused failed to do but the crime of sedition does not consist of ommissions

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but of a positive act.

Dealing with the matter I hope realistically all that can be said of the fourth and fifth accused is that the fourth accused printed the article without any of its employees or directors knowing what was being printed and that once the attention of management was brought to the article nothing was done to stop

the customer taking delivery. Although a more responsible attitude could, and, in my view, should, have been adopted by the fifth accused I do not consider that in the case of these two accused the Crown has made out the charge laid. Section 3(3) cannot be invoked because the company and its employees were unaware of the contents of the article when it was printed.

To summarise, the first accused is convicted on the first count but acquitted on the second. The second accused is convicted on both counts. The third accused is convicted on the first count. The fourth and fifth accused are acquitted and discharged. It is further ordered that all copies of the magazine "Jesus is Alive" Vol.3 No.5 dated May 1987 are forfeited to the Government in terms of section 4 of the Act.

N.R. HANNAH

CHIEF JUSTICE

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SENTENCE

Phillip Dacre, Philemon Hlatshwayo and Eugene Bidwell, you have all been convicted of sedition contrary to section 4(c) of the Sedition and Subversive Activities Act, 1938 as amended by the Sedition and Subversive Activities (Amenedment) Act, 1983. One important amendment affected by the latter Act is that the maximum sentence for sedition was increased from two years imprisonment or a fine of E200 to twenty years imprisonment or a fine of E20,000. The Legislature clearly intended that sedition should be' regarded in a serious light.

Having said that, however, the point must be made that the extent of the seriousness of the offence will vary from case to case. In some cases a long sentence of imprisonment will be inevitable: in others a financial penalty will suffice. The Court has to look not only at the nature of the seditious material itself but also at the intention with which it was published. If, for example, the words used have a tendency to incite public disorder that makes the offence all the more serious. If they do not then a more lenient view can be taken. If the offender has a positive seditious intent that again makes the offence more serious. If he has no such positive intent that is an important mitigating factor.

You, Dacre, are the principal in this matter. I accept that in all probability you possess no personal feelings of hatred or contempt for His Majesty, the King; but nevertheless you blindly wrote and published an article the effect of which on many of the Christian readers to whom it was addressed would have been to bring the King into hatred and contempt. I know little about the church which you represent but I hope you are not typical of

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its pastors. I do not see how this wretched little article which you wrote can possible be said to represent Christian teaching and, as I see it, you were using the Incwala ceremony merely as an excuse for sounding off some personal obsession with sex and demons.

If that is the way you see your role in life so be it; but if you intend to remain a church pastor I suggest you heed the wise words uttered in the last century by the Archbishop of Dublin, Richard Whately:

"Preach not because you have to say something, but because you have something to say."

As a church pastor you occupy a special position in that you no doubt exercise considerable influence over your flock. But you abused that position and acted in a thoroughly irresponsible and potentially denagerous manner. I find it appalling that a foreign preacher should come to this country and in the guise of preaching the tenets of the Christian faith should instead engage in spreading sedition and rumour. While you have shown some penitence by writing a letter of apology to His Majesty you strike me as being basically an obdurate man and I strongly recommend to the Minister responsible for Immigration

that consideration be given to deporting you.

As for the sentence, you have spent some months in detention by Executive Order and I will assume that such order was connected with the matter with which this Court is now concerned. I also take into account that you are a man of previous good character and that the article which you wrote was not of a kind which would necessarily incite public disorder. The article does, however, have the effect of undermining the monarchy and I have seriously considered whether it would not be appropriate to pass a sentence of imprisonment. After some hesitation, however, I have decided that the offence which you committed would best be met by a

substantial financial penalty.

In determining the amount of that penalty I cannot lose sight of the fact that the article was written on behalf of your church and it would appear that it is a church which is not without financial resources. I note, for example, that it can afford to spend upwards of E5,000 per annum on the publication and posting of its monthly magazine which is distributed free of charge to its readers. In your case there will be a fine of E5,000 or eighteen months imprisonment in default of payment.

Turning to you, Hlatshwayo, in one sense your culpability is greater in that you realised how offensive this article was but in another sense it was less in that you were following the commands of your superior. I regard you as the faithful sheep meekly following its shepherd wherever he may lead. In your case I will treat both offences as one for the purposes of sentence and there will be a fine of E500 or six months imprisonment in default.

Bidwell, you were in charge of the distribution and must bear some responsibility. However, I do not think it right to treat you differently from Hlatshwayo and in your case there will also be a fine of E500 or six months imprisonment in default.

To summarise, therefore, the first accused is fined E5,000 or eighteen months imprisonment in default; the second accused is fined E500 or six months imprisonment in default; and the third accused is also fined E500 or six months imprisonment in default. I also direct that a copy of this judgment be sent to the Minister for Interior and Immigration.

N.R. HANNAH

CHIEF JUSTICE