Judgment [illegible]

144/70

G.P.-S. J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellant DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

THE STATE

Appellant.

versus/teen

B.S. RAMOTSE & 19 OTHERS.

Respondent.

Schurman & Honey

Appellant's Attorney A.C. (Pta) *Respondent's Attorney* F. Carlson
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate *Respondent's Advocate*
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 2-11-70
Op die rol geplaas vir verhoor op

[illegible]

9.12.70. per Ogilvie Thompson J.A.:—

The question of Law reserved is answered in the affirmative - that is to say, against the State.

C.E.N.

REGISTRAR, APPEAL COURT,
[illegible]
BLOEMFONTEIN

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the appeal of:

THE STATE ..... Appellant,

and

SAMSON NDOU AND
EIGHTEEN OTHERS ..... Respondent.

Coram: OGILVIE THOMPSON, POTGIETER, JJ.A. et MULLER, A.J.A.

Heard: 2nd November 1970. Delivered: 4th December 1970.

J U D G M E N T.

OGILVIE THOMPSON, J.A.:

This is an appeal by the State on a question of law reserved. The circumstances culminating in that reservation may be briefly stated. In December 1969 the 19 respondents were arraigned in the Transvaal Provincial Division on a charge of contravening section 11 (c) read with section 3 (1) (a) (iv) and various other stated sections of, and proclamations relating to, the Suppression of Communism

Act...../

Act No. 44 of 1950 or, alternatively, of contravening section 11 (a) read with section 11 (i) and various other stated sections of, and proclamations relating to, that Act. The respondents all pleaded not guilty and, with various adjournments, the trial proceeded before Bekker, J., until 16th February 1970. On that date, with the State's case not yet concluded, the Attorney-General of the Transvaal appeared in person and informed the court that in terms of sections 8 (1) and (2) and 169 (6) of the Code he was stopping the prosecution. Pursuant to the sections mentioned, the respondents were entitled to a verdict, and Bekker, J., accordingly found them all not guilty and discharged them. Although the trial thus terminated plainly cannot be said to have in fact established either the guilt or the innocence of the respondents in relation to the charges preferred against them in the indictment, it was - in my view, correctly - not questioned in this Court that the verdict of not guilty entered by Bekker, J., falls, in law, to be regarded as an acquittal

on...../

on the merits (vide section 169 (6) of the Code; S. v. Vorster, 1961 (4) S.A. 863 (O) at 867 B., and S. v. Mthetwa, 1970 (2) S.A. 310 (N)). It would, however, appear, although not expressly so stated in the papers before us, that the State's motive in stopping the prosecution as aforesaid was - possibly because of the discovery of further information associated with the arrest of one Benjamin Sello Ramotse hereinafter mentioned - its intention to charge the respondents under the rather more stringent provisions of the Terrorism Act No. 83 of 1967. For the 19 respondents were, together with the said Ramotse, subsequently indicted in the Transvaal Provincial Division on a charge of having participated, prior to their trial before Bekker, J., in terroristic activities in contravention of section 2 (1) of the Terrorism Act No. 83 of 1967 read together with sections 1, 2(2), 4, 5 and 9 of that Act.

At the commencement of the trial on this last-mentioned indictment before Viljoen, J., on 3rd August 1970, a postponement was granted at the request of the defence.

When..../

When the trial was resumed on 24th August 1970, the aforementioned Ramotse, No. 1 accused in the indictment, pleaded that the court had no jurisdiction to try him by reason of the circumstance that he had been arrested outside the Republic and thereafter brought within the jurisdiction of the court. Ramotse's special plea was ultimately rejected, and his case is not before us. Relying upon the verdict of not guilty pronounced by Bekker, J., on 16th February 1970, the remaining accused, the present respondents, all pleaded, in terms of section 169 (2) (d) of the Code, that they had already been acquitted of the offence with which they were now charged. This plea of autrefois acquit was upheld by Viljoen, J., who, at the request of the State, however reserved, in terms of section 366 of the Code, for the consideration of this Court the following question of law, viz:

> "Whether the court was correct in holding that the special plea in terms of sec. 169 (2) (d) of the Criminal Law and Procedure Act, No. 56 of 1955, was valid in law".

It is an essential element of the plea of

autrefois.../

autrefois acquit that the previous acquittal should have been on the merits (see S. v. Moodie, 1962 (1) S.A. 587 (A.D.) at 589 F. and 596 F. and S. v. Naidoo, 1962 (4) S.A. 348 (A.D.) at 353 E.). As explained above, the verdict entered by Bekker, J., must in law be regarded as an acquittal on the merits. It is also common cause that the first indictment was not excipiable and that the court hearing the trial on that indictment was one of competent jurisdiction. It is, therefore, clear that at the first trial all the respondents were in jeopardy in the sense referred to by Wessels, C.J., in R. v. Manasewitz, 1933 A.D. 165 at 168. That premised, it is further beyond all doubt that the respondents cannot in law be tried again for the same offence in respect of which they, in the circumstances mentioned above, obtained a verdict of acquittal from Bekker, J. See R. v. Manasewitz (supra) and Ex parte Minister of Justice in re R. v. Moseme, 1936 A.D. 52. In the latter case De Villiers, J.A., after remarking that a plea of autrefois acquit may be available to an accused who, subsequent to acquittal, is brought to trial "on a charge of another

offence...../

offence arising out of the same transaction", went on, at page 60, to say: "In order to succeed it is as a general rule essential for an accused person to show (inter alia) that he was legally in jeopardy, on his first trial, of being convicted of the offence wherewith he is charged on his second trial". It is thus settled law that, provided the constituent elements of jeopardy as stated in Manasewitz's case obtain, an accused may not be charged a second time with the same offence of which he has previously been acquitted. It is, however, also equally well established that, in this context, "the same offence" is not necessarily confined to "the identical offence". (See R. v. Constance en 'n Ander, 1960 (4) S.A. 629 (A.D.) at 635 B and 636 D). Thus, in delivering the judgment of this Court in R. v. Long, 1958 (1) S.A. 115, Schreiner, J.A. said (with mention of R. v. Manasewitz and R. v. Moseme (supra) and also of R. v. Barron, 1914 (2) K.B. 570) at p. 117 that:

> "The plea recognised by sec. 169 (2) (d) of the Criminal Code is 'that he has already been acquitted of the offence with which he is charged'. It

is...../

> is not enough to support the plea that the facts are the same in both trials. The offences charged must be the same, but substantial identity is sufficient. If the accused could have been convicted at the former trial of the offence with which he is subsequently charged there is substantial identity, since in such a case acquittal on the former charge necessarily involves acquittal on the subsequent charge. Another way of putting it is that he must legally have been in jeopardy on the first trial of being convicted of the offence with which he was charged on the second trial."

Again in O'Neill v. South African Railways and Harbours, 1958 (3) S.A. (A.D.) at 276, it was, in clarification of some remarks which had been made in Neethling v. South African Railways, 1938 A.D. 487 regarding the expression autrefois acquit, stated by the same distinguished Judge that:

> "The expression was, in my view, introduced to support the conclusion that, looking at the substance of the matter, as should be done in cases of autrefois acquit, it is not merely the names of the crime and the misconduct that matter but their real equivalence. This consideration of the substance was held to justify treating the offences as the same whenever the charge on the first was such as in law to permit a verdict of guilty on the second to be returned."

The question for decision in this appeal thus revolves around the true limits of "substantial identity" in relation to a plea of autrefois acquit.

It is common cause that participation in terroristic activities in contravention of section 2(1) of the

Terrorism Act (the charge in the second indictment) was not one of the competent verdicts which could have been returned on the first indictment without invoking the ~~prin-~~ provisions ~~ciples~~ of section 204 of the Code. An alternative argument based upon that section was - albeit somewhat tentatively - advanced before us. Having regard to the crimes respectively alleged in the two indictments, it appears to me to be very doubtful whether the provisions of section 204 could be applied in the present case (R. v. Moosa & Ors., 1960 (3) S.A. 517 A.D. at 531 et seq.). In view of the conclusion which I have reached it is, however, unnecessary to express any final opinion on the point. I shall assume, without deciding, in favour of the State that the section has no application, and accordingly proceed upon the basis that the charge in the second indictment was not one of the competent verdicts which could have been returned on the first indictment. Respondents' basic contention, which was

upheld...../

upheld in the court a quo, is that their plea of autrefois acquit is legally valid inasmuch as they have already been acquitted (by Bekker, J.) of the criminal conduct charged against them in the second indictment. In the course of his well-prepared and comprehensive argument on behalf of the State, Mr. Liebenberg, while conceding what he termed a "substantial correspondence" between the two indictments, pointed to various features which he submitted constitute vital differences in the offences - both statutory - respectively charged in the two indictments. To those features and that submission I shall advert later in this judgment. It is, however, necessary first to examine Mr. Liebenberg's main contention, founded primarily upon Schreiner, J.A.'s, above-cited statement in Long's case, but also supported by sundry judicial dicta in both our own and the English courts that, in relation to a plea of autrefois acquit, "substantial identity" comprises only such offences as

would../

would have been competent verdicts under the first indictment. In short, the State contends that a plea of autrefois acquit can, in relation to the aspect under discussion, succeed only if the offence charged in the second indictment is either (i) the identical offence of which the accused was previously acquitted or (ii) is an offence which would have been a competent verdict on the first indictment.

The first of these propositions is beyond question and requires no elaboration. In support, or apparent support, of the second proposition, various dicta may be cited from our own decisions, as well as from English decisions which preceded the decision of the House of Lords in Connelly v. Director of Public Prosecutions, 1964 A.C. 1254; 1964 (2) All E.R. 401. By way of illustration only, mention may be made of R. v. Petersen, 1910 T.P.D. 59 and R. v. Barron (supra). I here interpolate that, as regards the English law, it is as well to bear in mind the existence

of...../

offence of which he could have been properly convicted on the trial of the first indictment" and that, inasmuch as "gross indecency" was not a competent verdict at the first trial, the appellant had "never been in peril before of being convicted of gross indecency". We were, however, not referred by Mr. Liebenberg to any decision in our own courts which unequivocally affirms the second of the above-mentioned propositions contended for by him. Nor have my own researches revealed any such decision. On the contrary, that proposition is directly opposed to S. v. Davidson, 1964 (1) S.A. 192 (T), and is, in my opinion, also irreconcilable with the modern English law as laid down in Connelly v. D.P.P. (supra). To both these cases I shall refer more fully below.

As indicated earlier, it is Mr. Liebenberg's submission that R. v. Long (supra) authoritatively confined "substantial identity" to such crimes as would have been competent verdicts on the first indictment. I am unable to agree. In the first place the earlier charge - which

the prosecutor had, despite the trial Judge's invitation, declined to amend and in respect of which the accused Long was acquitted - was one of theft of shares; in the second charge, although involving mainly the same facts, it was one of ninety-five counts of fraud. Secondly, I do not read the above-cited passage from the judgment of Schreiner, J.A., in Long's case as necessarily limiting the ambit of the plea of autrefois acquit in the manner now contended by Mr. Liebenberg. The concluding sentence of that passage is merely complementary to, and, as its opening words indicate, a reformulation in different phraseology of, what is stated in the previous sentence. This latter, in my opinion, propounds a particular, and in practice very convenient, method of determining whether the requirement of substantial identity has been satisfied, without, however, declaring such method to be the sole and exclusive criterion of substantial identity. Nor, indeed, did the circumstances of Long's case, in my view, call for any such comprehensive declaration. Again, in O'Neill v. S.A.R. (supra) - which,

like...../

like Neethling's case (supra), was concerned with charges of "misconduct" in relation to sections 15 and 16 of Act 23 of 1925 - the later charge, that of failing to issue excess-fare tickets, was, although arising from the same episode, essentially different from the previous charge whereof he had been acquitted, namely, theft of monies allegedly paid to him for the tickets. The last sentence of the above-cited passage from the judgment of Schreiner, J.A. in O'Neill's case amounts, in my opinion, to no more than a reaffirmation of the principle that if what is charged in the second indictment would have been a competent verdict on the first indictment, the requirement of substantial identity will be satisfied. I am unable to regard the decision - to which I was a party - as laying down that, as contended by Mr. Liebenberg, the sole criterion of substantial identity lies in competent verdicts.

In R. v. Manasewitz (supra) Wessels, C.J., after pointing out that in English law the plea of autrefois acquit is based on the maxim nemo debet bis vexari si constat curiae quod sit pro una et eadem causa, went on to say that

this.../

this maxim is derived from the Roman law exceptio rei judicatae and that a plea of autrefois acquit "is in fact equivalent to a plea of the exceptio rei judicatae in our law". That view was reaffirmed by this Court in S. v. Moodie, 1962 (1) S.A. 587 at 595 F - 596 E. To the common law authorities there mentioned may be added Coren, Observationes No. 26. It may here not inappositely be mentioned that Spencer Bower & Turner, Res Judicata (2nd Edition), after remarking (at pp. 267-268) that the plea of autrefois acquit is one of great antiquity and is generally said to be founded on the maxim nemo debet bis vexari pro eadem causa, and while later treating fully with Connelly's case, adhere (at page 268) to the view expressed in the first edition of that work that autrefois acquit is "nothing more or less than a manifestation, in the field of criminal law, of the plea of estoppel per rem judicatam." Substantially the same approach would appear to be adopted by the law of Scotland (see Green's Encyclopaedia of Scots Law, Second Edition, Vol. X at p. 298). As is well-known, to establish a

plea...../

plea of res judicata in civil proceedings it must, inter alia, be shown that the earlier judgment was in respect of the same subject matter as that of the second, resisted, action (Digest 44-2-14, Scott's translation, Vol. 9-10, p. 40; Grotius, 3-49-2; Mitford's Executor v. Ebden's Executors & Ors., 1917 A.D. 682 at 686). Similarly, it appears to me that in the criminal law it is of the very essence of a valid plea of autrefois acquit that the conduct now averred by the State to constitute a crime, the conduct comprising the charge preferred against the accused in the second indictment, was the subject matter of previous adjudication and acquittal by a competent tribunal. It is that concept which, in my view, is embodied in section 169 (2) (d) of the Code. The wording of that section, it may be mentioned, differs from that of section 158 (4) of Ordinance 1 of 1903 (T) which applied in R. v. Petersen (supra). That last-mentioned section provided that an accused might plead:

"that..../

> "that he has already been acquitted on an indictment on which he might have been convicted of the offence with which he is charged, or has already been acquitted of an offence of which he might be convicted on the indictment."

In the Code the word "offence" is defined in section 1 as meaning "an act or omission punishable by law". Incorporating that definition, section 169 (2) (d) of the Code thus reads that an accused may plead that he "has already been acquitted of the act or omission punishable by law with which he is charged".

It can readily be appreciated that an accused who is once acquitted - even wrongly acquitted - of an offence, cannot again be charged in respect of that identical offence merely because further evidence has since been discovered. Nor is it difficult to understand that the averment of a more serious intent in the second indictment will not, by itself, defeat a plea of autrefois acquit. Those propositions are, I think, well established. (See Gardiner & Lansdown, 6th Edition, Vol. I, p. 372.) That the plea of autrefois acquit or autrefois convict (as the case may be) is not available to an accused charged with murdering A on a stated occasion notwithstanding that he has previously been acquitted or convicted.../

convicted, as the case may be, of assaulting A on that occasion - a case frequently mentioned in the books - constitutes an exception to the general rule more apparent than real. For such a case postulates that the victim only dies after the first conviction or acquittal. While it is well established that it is not enough to support a plea of autrefois acquit that the facts are the same in both trials (S. v. Long (supra)), or that there is some overlapping of evidence in the two charges, it is equally clear that - as appears from the above-cited decisions of this Court - "the application of the rule depends not upon any technical consideration ..... but upon matter of substance" (S. v. Manasewitz (supra) at 169-170), and that it is not merely the names of the respective crimes under consideration that are decisive but their "real equivalence" (O'Neill's case (supra) at 276). It is, I think, not without some interest to record that, as far back as 1819 Hume, (Commentaries on the Law of Scotland Respecting Crimes,

2nd..../

2nd Edition, Vol. 1, p. 448) dealing with the plea of having "tholed an assize" (i.e. autrefois acquit) stated - in the language of his times in which "libel" meant "charge" and "pannel" denoted the accused - that:

> "As little shall it vary the rule, that the new prosecutor chooses to alter the shape of the former charge, and lay his libel for the same facts, under a new denomination of crime; stating them as fraud perhaps instead of theft, falsehood instead of forgery, assault or riot instead of deforcement or hamesucken, or the like. The Judge will not suffer the law to be evaded on such easy pretences; but will look to the substance of the case, and the situation of the pannel, who still is prosecuted twice for the pains of the same act".

It was, indeed, upon not dissimilar principles that the plea of autrefois acquit was upheld in S. v. Davidson (supra). Upon an analysis of the facts of that case, the court came to the conclusion that "the offence of uttering charged in July was the very offence which was charged, under two different names, in October", and accordingly held that the October charges were legally incompetent. In rejecting a virtually identical submission to that now advanced by the State in the present case, Colman, J., said (Galgut, J., concurring) at page 196 that:

"Substantial.../

> "Substantial identity, it seems to me, means identity in substance, i.e. in essentials, as opposed to absolute identity, which would require that the two charges be identical in every respect.
>
> When seeking to apply the test laid down in Long's case, supra, I must, I think, go beyond the definitions of the two or more offences which fall to be considered. I must compare those offences as charged. If the offences, as charged, are identical in substance, even though they may differ in immaterial respects, the test is, in my judgment, satisfied. And I go further and say that if specific unlawful conduct is such that it may properly be described and charged as the commission of more than one crime known to our law, to charge a man with two of those crimes on those facts would be to charge him twice with the same offence, or substantially the same offence under different names."

It was submitted by Mr. Liebenberg that R. v. Davidson (supra) was wrongly decided. Colman, J., said counsel, had confused substantial similarity with substantial identity and had omitted to pay due regard to the essential ingredients of the offences charged in the respective indictments. Inasmuch as neither theft nor fraud (the second, October, charges) were competent verdicts on the earlier, July, charge, the plea of autrefois acquit should - so Mr. Liebenberg's submission concluded - have been rejected. The judgment does not, in my opinion, reveal any such confusion or omission as is suggested. But, however that may be, in thus seeking to confine the plea of autrefois acquit strictly within the ambit of verdicts which were

competent.../

competent on the first charge, Mr. Liebenberg's submission appears to me to pay insufficient regard to that identity of subject matter which underlies the exceptio rei judicatae.

Dealing with autrefois acquit and autrefois convict, Kenny's Outlines of Criminal Law, 18th Edition, para. 744 p. 591, pertinently remarks that "to determine whether the two charges are 'substantially' identical is often a subtle problem." Green's Encyclopaedia of the Law of Scotland (loc. cit.) strikingly, albeit possibly not wholly comprehensively, points the enquiry by saying that the plea is only available when "the corpus delicti charged in the second indictment is the same as that which has been the subject of the former trial". In Kerr v. Rex. (1907) 21 E.D.C. 324, the accused had - upon technical grounds following upon the disagreement of the jury - been acquitted of the murder of a woman. The evidence for the Crown tended to show that Kerr had, on the same occasion, first raped and then murdered his victim. It was held that his acquittal on the murder charge was no bar to his subsequent prosecution

on...../

on the charge of rape. In reaching that conclusion, Kotzé, J.P., with whom Graham, J., concurred, said, referring to the plea of autrefois acquit, at p. 340, that:

> "It is laid down by text-writers, and borne out by decided cases, that the true test by which the question, whether such a plea is a sufficient bar in any case, may be tried is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first (Archbold's Criminal Pleading, 22nd ed. p. 155, cf. Taylor, Evidence, sec. 1706); or, to put it in other words, the test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction. When there could, the second cannot be maintained: when there could not, it can be (Bishop, New Criminal Law, sec. 1052 (2)."

Archbold's test was criticised in R. v. Gilmore (supra) as being "neither a very clear or very accurate one". In Levi v. Rex (1906) 20 E.D.C. 272 at 274, however, Kotzé, J.P., expressed the opinion that the rule as stated by Archbold was "both common sense and good law". It is true that, as was pointed out by Mr. Liebenberg, it was said in R. v. Tonks, 1916 (1) K.B. 443, that the authority cited by Archbold (namely R. v. Clark, 1 Brod. & B. 473) did not support his proposition, and that, as appears from Flatman v. Light & Ors., 1946 (2) All E.R. 369 at 371, in Archbold's 31st edition, the test was formulated in rather different terms which support the State's contention in the present case. Such support was also to be found in

the 35th edition of ARChbold which, inter alia, stated (para. 438) that autrefois acquit "applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment". It must, however, be added that the 36th edition of Archbold deals (para. 435 et seq.) with the subject in terms of Connelly v. D.P.P. (supra). So far as our own courts are concerned, however, the test as accepted by Kotzé, J.P. in Kerr v. Rex (supra) has not, so far as I am aware, been questioned either in this Court or in the Provincial Divisions. Indeed, it was adopted in S. v. Vorster (supra) and, although not readily entirely reconcilable with his approval of R. v. Gilmore mentioned earlier in this judgment, Wessels, J., in R. v. Petersen (supra) posed the enquiry before the court thus:

> "The question we have to ask ourselves is: would the facts alleged in the second indictment have sufficed to procure some conviction on the first indictment?".

Furthermore, as I shall now indicate, the test of substantial

identity...../

identity propounded in the earlier editions of Archbold and adopted by Kotzé, J.P., in Kerr's case would appear to have been fully reinstated in English law, to which system the decisions of this Court have in the past not infrequently made reference in relation both to autrefois acquit and to res judicata.

In Connelly v. Director of Public Prosecutions (supra) the appellant Connelly had, together with others, been charged on two indictments with murder and robbery with aggravation arising out of an office robbery in the course of which an employee was killed. In accordance with accepted English practice, the murder charge was tried independently of the robbery charge. Connelly was convicted of murder, but successfully appealed against his conviction. His plea of autrefois acquit to the charge of robbery subsequently prosecuted against him failed in all courts. In the House of Lords, Lord Morris of Borth-y-Gest, whose judgment contains an exhaustive review of the English cases, including those, like R. v. Barron (supra), relied upon by

Mr...../

Mr. Liebenberg in his argument before this Court, enunciated nine propositions which he designated as "governing principles". For the present purposes it is necessary only to refer to the first four of those propositions.

Lord Morris said (1964 A.C. at 1305; 1964 (2) All E.R. at 412):

> "In my view, both principle and authority establish: (1) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted; (2) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted; (3) that the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted; (4) that one test as to whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty."

From Lord Morris's lengthy judgment I cite two passages which, in my view, clearly illustrate his reasoning, viz.:

> (i) It matters not that incidents and occasions being examined on the trial of the second indictment are precisely the same as those which were examined on the trial of the first. The court is concerned with charges of offences or crimes. The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could be a conviction. Applying to the present case the law as laid down, the question is whether

> proof that there was robbery with aggravation would support a charge of murder or manslaughter. It seems to me quite clear that it would not. The crimes are distinct. There can be robbery without killing. There can be killing without robbery.... .. That the facts in the two trials have much in common is not a true test of the availability of the plea of autrefois acquit. Nor is it of itself relevant that two separate crimes were committed at the same time so that in recounting the one there may be mention of the other".
> (1964 A.C. 1309-1310; 1964 (2) All E.R. 415).

(ii) "The test is whether the essential ingredients of the robbery charge or the evidence necessary to sustain it would suffice to prove a charge of murder or manslaughter. The answer seems to me to be clearly no."
(1964 A.C. p. 1327; 1964 (2) All E.R. 426 C.)

It is only right to add that, although all reaching the same conclusion, the other members of the Court did not express themselves in precisely the same terms as did Lord Morris. Notably, Lord Devlin took the view that:

> "The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law."
> (1964 A.C. 1339; 1964 (2) All E.R. 433 H.).

As regards substantial identity, he went on to say (ibid):

> "I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another. I have more difficulty with the idea that an offence may be substantially the same as another in its legal characteristics; legal characteristics are precise things and are either the same or not".

As I have pointed out earlier, however, the concept of

substantial.../

substantial identity in relation to a plea of autrefois acquit is well established in our law. Moreover, in the United States Government v. Atkinson, 1969 (2) All E.R. 1151, Lord Morris's judgment received the unqualified approval of two members of the Queen's Bench Division and, although the third member of the court (Bridge, J.) expressed a preference for the approach indicated in the first of the above-cited passages from Lord Devlin's judgment, he too quoted with apparent approval the third and fourth of Lord Morris's above-cited propositions. In the course of his judgment, Lord Parker (with whom Melford Stevenson, J., concurred) stated (at page 1156 E.) that the true test was succinctly put by Lord Morris in the first of the two passages which I have cited above. After setting out that passage in full, Lord Parker went on to say that the true enquiry "is not whether the actual facts examined on the trial of each of the offences are the same, but whether the facts necessary to support a conviction for each offence are the same", and

concluded...../

concluded by observing (p. 1157 C) that the validity of the plea of autrefois acquit "depends on the legal characteristics of the two offences in question, namely, whether the facts necessary to support a conviction in each case are the same, and do not depend on whether the actual facts thereafter given in evidence are the same".

I have discussed Connelly's case - the most recent authoritative decision on the subject in England - in some detail both because of Mr. Liebenberg's reliance upon earlier decisions in the English courts and of his doughty endeavours to reconcile his cardinal submission before this Court with Lord Morris's judgment in that case. In my opinion such a reconciliation is not possible. I need do no more than point out that the third of Lord Morris's above-cited propositions is plainly additional to his second proposition, and that the former proposition is fully supported by the reasoning in his judgment. Furthermore, while this Court is in no way bound by the decision in Connelly's case, it is nevertheless...../

nevertheless not without some persuasive force that the test of substantial identity, as stated in Lord Morris's fourth proposition and applied in his judgment in the manner exemplified by the two passages which I have cited above and as later reaffirmed in Atkinson's case (supra), is the same test as was, as far back as 1907, applied by Kotzé, J.P., in Rex v. Kerr (supra).

For the foregoing reasons, I come to the conclusion that, in relation to a plea of autrefois acquit, "substantial identity" is not - as contended by the State - confined to such offences as would have been competent verdicts at the previous trial. The overall enquiry is whether there exists that identity of subject matter necessary to establish the exceptio rei judicatae. Such identity is well recognised to exist when the crime charged in the second indictment would have been a competent verdict on the first indictment. In my view, however, a plea of autrefois acquit tendered in terms of section 169 (2) (d) of the Code must also be upheld if the offences charged in the two indictments..../

indictments are substantially the same, even though the offence alleged in the second indictment would not have been a competent verdict on the first indictment. In determining whether substantial identity exists, the Court must, in my opinion, consider the essential ingredients of the criminal conduct respectively charged in the two indictments and apply the test as accepted by Kotzé, J.P., in R. v. Kerr (1907) 21 E.D.C. 324, namely: whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first indictment.

I turn now to a comparison of the two indictments. These are voluminous documents which, including detailed requests for, and full replies to, further particulars, together aggregate some 130 closely typed pages. It is manifestly impracticable to set out in this judgment each and every detail of the indictments as amplified by the further particulars, but I shall cite all those portions of both indictments and the particulars which have a direct bearing upon the issue of substantial identity con-

tended...../

tended for by the respondents and contested by the State.

The first indictment read:

"The accused are guilty of the crime of:-

CONTRAVENING SECTION 11 (c) read with sections 3(1)(a)(iv), 1, 2, 11(i) and 12 of Act No. 44 of 1950, as amended, and read with section 22 of Act No. 93 of 1963, Proclamation No. 119 of 1960 and Proclamation No. 93 of 1963;

Alternatively:-

CONTRAVENING SECTION 11(a) read with sections 11(i), 1, 2 and 12 of Act No. 44 of 1950, as amended, and read with section 22 of Act No. 93 of 1963, Proclamation No. 119 of 1960 and Proclamation No. 93 of 1963.

In that during the period 1st October, 1967 to 15th June, 1969, and at or near Johannesburg, Durban, Cradock, Port Elizabeth and Umtata and places to the prosecutor unknown, the accused, being office bearers, officers, members or active supporters of the unlawful organisation, to wit, the AFRICAN NATIONAL CONGRESS, acting in concert with one another and with NELSON MANDELA, OLIVER TAMBO, PAUL JOSEPH, DUMA NOKWE, PHILLIP RALPH GOLDING, LUCAS JOHANN OPPERMAN, JOHN SCHLAPOBERSKY

did wrongfully and unlawfully take part in the activities of the said organisation, or carry on, in the direct or indirect interest of the said organisation, activities in which it was or could have been engaged during the said period, to wit:-

(1) did establish groups and committees within the said organisation;

(2) did administer and/or take the oath of the said organisation;

(3) did recruit members or encourage one another to recruit members for the said organisation;

(4) did arrange, attend or address meetings of the

said.../

said organisation;

(5) did inspect trains and railway installations at Braamfontein, Croesus, Booysens and Crown and did search for the Langeberg Ko-op, Bpk., with the object of finding suitable targets and methods for the commission of acts of sabotage;

(6) did devise means for obtaining explosives;

(7) did discuss, distribute or possess publications, issued by the overseas branches of the AFRICAN NATIONAL CONGRESS, SOUTH AFRICAN COMMUNIST PARTY and SOUTH AFRICAN INDIAN CONGRESS and did conduct correspondence with the overseas branches of the AFRICAN NATIONAL CONGRESS and/or with the aforementioned co-conspirators;

(8) did prepare, discuss, distribute, possess or conceal literature and/or correspondence of the said AFRICAN NATIONAL CONGRESS, and the correspondence mentioned in paragraph (7) above;

(9) did propagate the communist doctrine by means of discussions, speeches and lectures;

(10) did discuss matters affecting the AFRICAN NATIONAL CONGRESS with Phillip Ralph Golding and did give instructions to him in regard to his visit to the overseas branch of the AFRICAN NATIONAL CONGRESS;

(11) did discuss with Phillip Ralph Golding and/or Lucas Johann Opperman steps to raise finances for the AFRICAN NATIONAL CONGRESS;

(12) did visit or arrange visits to members of the organisation in prisons at Nylstroom and Robben Island, their dependants and ex-prisoners with the object of obtaining information and/or instructions for the organisation;

(13) did discuss the establishment of contact with guerilla fighters in the event of their arrival within the Republic;

(14) did arrange a funeral under the auspices of the AFRICAN NATIONAL CONGRESS for one Merimentsi Lekoto, the attandance of members and the delivery of speeches in furtherance of the aims of the organisation;

(15) did arrange a funeral for one Lameck Loabile, the attendance of members and the delivery of speeches in furtherance of the aims of the organisation;

(16)...../

(16) did secure and make use of post boxes and cover addresses for the delivery of mail addressed to the organisation and its members;

(17) did encourage members to listen to radio broadcasts by the AFRICAN NATIONAL CONGRESS in Tanzania;

(18) did employ measures to conceal the activities of the organisation;

(19) did encourage feelings of hostility between the European and non-European races of the Republic;

(20) did discuss the feasibility of sending certain members out of the Republic and/or did encourage certain members to leave the Republic in the interests of the organisation;

(21) did have informal discussions and did issue instructions in regard to the conducting of the affairs of the organisation;

ALTERNATIVELY:

In that during the period 1st October, 1967 to 15th June, 1969, and at Johannesburg, Durban, Cradock, Port Elizabeth and Umtata and places to the prosecutor unknown, the accused, being office bearers, officers, members or active supporters of the unlawful organisation, to wit, the AFRICAN NATIONAL CONGRESS, acting in concert with one another and with NELSON MANDELA, OLIVER TAMBO, PAUL JOSEPH, DUMA NOKWE, PHILLIP RALPH GOLDING, LUCAS JOHANN OPPERMAN, JOHN SCHLAPOBERSKY,

did wrongfully and unlawfully perform acts which were calculated to further the achievement of an object of communism, which acts are more fully set out in the main count.

The object referred to is the bringing about of political and/or industrial and/or social and/or economic changes within the Republic, by the promotion of disturbance or disorder, by unlawful acts or by the threat of such acts or by means which included the promotion of disturbance or disorder."

In...../

In response to requests from the defence in that behalf, detailed particulars were furnished by the State of the twenty-one "activities" tabulated in the main count of the indictment. It is not necessary to make express mention of any of these save to record that the State's reply to a detailed request for particulars of the allegation that the accused had acted in concert read as follows:

> "The State alleges that the accused acted in concert and with a common purpose to re-establish and build up the ANC, knowing that its ultimate aim was the violent overthrow of the State.
>
> Their participation in the said common purpose is inferred from their having taken part in the activities mentioned in the Indictment and particularised in this reply."

From the above it is apparent that the gravamen of the State's case in the first indictment was that the accused, as members of the banned African National Congress (hereinafter called the "A.N.C."), acting in concert and with knowledge that the ultimate aim of that unlawful organisation was "the violent overthrow of the State", had engaged in the unlawful activities tabulated (1) to (21) in the main count; or, alternatively, that, again as members of the A.N.C. and acting in concert with the aforementioned knowledge, the

accused had performed the acts tabulated (1) to (21) in the first count and which the State averred to be "calculated to further the achievement of an object of communism", namely, the achievement of the political and other changes mentioned in the concluding paragraph of the indictment, inter alia, "by the promotion of disturbance or disorder" and by unlawful acts.

As mentioned earlier, the aforementioned Ramotse was No. 1 accused in the second indictment, and all the remaining accused - the present nineteen respondents - charged with him had been acquitted in respect of the charges preferred against them in the first indictment. The material portions of the second indictment averred that the accused were guilty of:

> "the offence of PARTICIPATION IN TERRORISTIC ACTIVITIES in contravention of section 2(1) of Act No. 83 of 1967 and read with section 1, 2(2), 4, 5 and 9 of the said Act.
>
> In that during the period between 27th day June, 1962 and 30th May, 1970 within the Republic and elsewhere, the said accused, did wrongfully, unlawfully and with intent to endanger the maintenance of law and order within the Republic, participate in terroristic activities, to wit:-

A. did.../

A. did commit or attempt to commit one or more of the acts set out in paragraph B below;

and/or

did conspire with one another, the persons and organisations mentioned in Annexure A, to commit or to aid or procure the commission of one or more of the said acts, details of the said conspiracy being set out in paragraph C below;

the commission of which acts had or was likely to have had one or more of the results in the Republic, as contemplated in section 2(2) of the said Act.

B. DETAILS OF ACTS.

(i) (a) By undergoing training of a military nature, in guerilla warfare, in the use of firearms and in the manufacture and use of explosives, which training could be of use to any person intending to endanger the maintenance of law and order in the Republic; and

(b) by undergoing training in the theory of Communism, which training could be of use to any person intending to endanger the maintenance of law and order in the Republic;

(ii) By inciting, encouraging or procuring persons to undergo the aforesaid training, or to find qualified instructors and places where training could be given to persons;

(iii) By attempting, consenting or taking steps to undergo the aforesaid training;

(iv) After having received the said training:

(a) accused No. 1 and other trainees having entered Rhodesia, the Eastern Caprivi Zipfel or the Republic, with intent to train other persons in the art of guerilla warfare, the use of firearms and explosives and with intent, further, to foment a violent uprising against the Governments of the said States or regions;

(b)..../

supplied information to the Police or attempting to kill the said persons; and/or encouraging persons to destroy the private property of the said suspected persons;

(xiii) (a) Becoming and remaining members of the AFRICAN NATIONAL CONGRESS;

(b) Recruiting and, encouraging the recruitment of, members for the said AFRICAN NATIONAL CONGRESS;

(c) Administering the AFRICAN NATIONAL CONGRESS oath to the said members; and

(d) Establishing committees and/or branches of the said AFRICAN NATIONAL CONGRESS:

(xiv) Distributing or playing gramophone records and tape recordings containing speeches in which persons were incited or encouraged to prepare for, and take part in, a violent uprising against the State;

(xv) Inciting or procuring persons, by way of speeches, and/or consenting to take part in a violent uprising against the State.

C. CONSPIRACY TO COMMIT, AID OR PROCURE COMMISSION OF ACTS.

(1) During 1961 the African National Congress, South African Communist Party, the South African Indian Congress, South African Coloured People's Organisation, the persons mentioned in annexure A and some of the present accused formed a plan to prepare for, and to commit, acts of violence in order to bring about the overthrow of the State.

(2) This plan was put into effect in 1961 and is still in force at the present date.

(3) Every member of the African National Congress, including the accused, accepted the said plan

and..../

and worked actively towards its implementation.

(4) The plan to commit acts of violence was to be implemented in two stages. The first stage was directed at the commission of acts of sabotage on government buildings, installations, private and public property. The second stage of the conspiracy was to arrange for training of participants in the art of guerilla warfare.

(5) - (17) ..... ".

The names of only some of the individuals mentioned in the first indictment reappear among "the persons and organisations mentioned in Annexure A" in the second indictment. In order to curtail citation, I have omitted sub-paragraphs 5 - 17 (the latter alone itemises further sub-divisions lettered (a) to (o)) of paragraph C since those sub-paragraphs do not - save as regards No. 1 accused, who is not before us - add any material feature to the present enquiry and are in any event effectively covered by pages 11 - 58 of the indictment which, in respect of each accused, itemise all the specific allegations charged against him or her.

In response to a request for further particulars, it was averred by the State that:

"The.../

> "The accused joined the conspiracy on the date mentioned hereunder against his/her name by becoming a member of the A.N.C. with knowledge of its violent policy and by actively supporting the said policy by committing the acts set out in the indictment under their names and in paragraph C thereof and by remaining a member of the conspiracy until 1970" (the dates are then listed in respect of each accused).

Particularising the plan referred to in paragraphs C (1), (2), (3) and (4) of the indictment, it was further averred that:

> "Each accused manifested acceptance of the plan by committing the acts set out in the indictment under his/her name".

In response to a request that the State should indicate "which of the averments in paragraphs B and C of the indictment are alleged to constitute the specific terms of the agreement to conspire and which of the averments are alleged to constitute acts alleged to be committed by individuals pursuant to such an agreement" the following reply was furnished:

> "(1) In view of the request and the fact that the conspiracy forms the basis of liability of the accused, the State repeats in paragraph C all the acts set out in paragraph B;
>
> (2) Sub-paragraphs (1) to (4) of paragraph C constitute the terms of the conspiracy;

(3)...../

(3) In addition sub-paragraphs (1) to (4) and (5) to (17) constitute the acts committed by individuals in pursuance of the conspiracy."

Before proceeding to examine the second indictment more closely, I pause to refer briefly to two groups of decisions upon which Mr. Liebenberg also sought to place some reliance but which do not, in my opinion, further the State's contention. The first group - viz: R. v. Ngetu, 1958 (4) S.A. 175 (C); S. v. Matukani, 1961 (3) S.A. 796 (T); S. v. Siketi, 1962 (1) S.A. 493 (E) - were decisions on entirely different statutes. Ngetu's case was held in R. v. Moosa (supra) to have been wrongly decided on one point. The basis of the decision in Matukani's case was that the two sub-sections of the Liquor Act there under consideration related to liquids of different types. In neither of these cases would the evidence necessary to support the second charge have been sufficient to secure a legal conviction on the first charge. The correctness of the decision in Siketi's case may be open to question; but in any event it merely purported to follow R. v. Ngetu

and...../

and S. v. Matukani (supra). In so far as the remarks of the learned Judge in Matukani's case at page 802 E of the report imply that the ambit of a plea of autrefois acquit is restricted to competent verdicts on the earlier charge, I respectfully disagree, for the reasons stated earlier in this judgment, with that implication. The remaining two decisions referred to by Mr. Liebenberg - viz: S. v. Xoswa & Ano., 1964 (2) S.A. 459 (C) and S. v. Pokela, 1968 (4) S.A. 702 (E) - were upon statutes more nearly resembling, but nevertheless different from, those applicable in the present case. Both decisions are, however, in my opinion, readily distinguishable. In Xoswa's case the second charge, at Stellenbosch, was one of unlawfully taking part "in an activity or activities of an unlawful organisation, to wit the Pan Africanist Congress". The accused had previously been convicted at Worcester of having unlawfully become a member of the said Pan Africanist Congress. The main submission in support of the plea of

autrefois..../

autrefois convict advanced at the second, Stellenbosch, trial was (vide p. 461 E of the report) that at the previous, Worcester, trial he could have been found guilty of the offence preferred against him in the second, Stellenbosch, trial. On a construction of the provisions of the Act there under consideration, the court rejected that submission. As was pointed out by Harcourt, J., in S. v. Mbele & Ors., 1964 (4) S.A. 401 (N) at 411, the court, in rejecting Xoswa's plea of autrefois convict, took the view that the two offences respectively charged at Worcester and Stellenbosch were different offences (see p. 463 E - F of the report). In contrast, and as I shall endeavour to demonstrate below, in the present case membership of the A.N.C. is an essential feature of both indictments, and both indictments charge the same activities against the respondents. These features also serve to distinguish S. v. Pokela (supra) where "profound differences" were held by the learned Judge to exist between the two relevant indictments. It is, I think, in the light of the existence

of..../

under section 2 (1) of the Terrorism Act, that such acts were committed with intent to endanger the maintenance of law and order in the Republic. I proceed to indicate, as briefly as the circumstances permit, my reasons for the above-mentioned view.

In both indictments the criminal conduct charged by the State derives from the accused's membership of the A.N.C. and their acts committed, pursuant to a conspiracy, in the furtherance of the aims of that unlawful organisation. It is, in my view, immaterial that the first indictment merely averred that the accused acted "in concert", whereas the State expressly asserted that "the conspiracy forms the basis of liability of the accused" under the second indictment. In the context, the respective allegations amount, in my opinion, to the same thing (R. v. Leibrandt & Ors., 1944 A.D. 253 at 289 - 290; R. v. Kahn, 1955 (3) S.A. 177 (A.D.) at 184; R. v. Adams, 1959 (1) S.A. 646 (Sp. Ct.) at 654 C). In both indictments

the...../

the accused are alleged to have participated in this conspiracy by virtue of and pursuant to their membership of the A.N.C. It is thus the same single conspiracy which is alleged in both indictments. The concerted acts, the conspiratorial activities, of the accused as members of the banned A.N.C. in furtherance of the unlawful aims of that organisation constitute the criminal conduct averred against them in both indictments. That being the case, the intent averred in the second indictment - viz. to endanger the maintenance of law and order within the Republic - cannot, in my view, rightly be said to be (as was contended by Mr. Liebenberg) radically different from the intent alleged in the first indictment, namely, participating as members in the activities of the A.N.C. with full knowledge that the ultimate aim of that unlawful organisation was "the violent overthrow of the State", or even materially different from the intent, averred in the alternative charge of the first indictment, of achieving political and other changes "by

the..../

the promotion of disturbance and disorder".

Nor, in my view, is there any real substance - so far as concerns the plea of autrefois acquit - in the other main submissions advanced by Mr. Liebenberg in his endeavours to distinguish between the two indictments, namely, that the second indictment, which covers a longer period, charges some acts not included in the first indictment; and, further, that whereas the first indictment was confined to what Mr. Liebenberg termed a purely local conspiracy, the second indictment averred a much wider conspiracy involving extraterritorial activities as well. The second indictment does indeed include a few new acts not alleged in the first indictment, notably those averred in sub-paragraphs B (i)(a), B (iii) and B (iv). These, however, all relate to the activities of Ramotse, No. 1 accused, and are not particularised against any of the present respondents. Paragraph B (v) (a), concerning broadcasts from outside the Republic, is also a new allega-

tion...../

tion; but here too the charge relates to the independent actions of co-conspirators, for none of the present respondents are charged in the particulars with having arranged for these foreign broadcasts to be made. In the circumstances, the criminal responsibility of the respondents in respect of the aforementioned new acts can derive only from the very conspiracy comprehended in the acquittal on the first indictment.

The above-mentioned submission regarding extraterritorial - as distinct from purely local - activities being first raised in the second indictment is somewhat in conflict with the contents of the opening address of counsel for the State at the first trial: but, quite independently of that, the considerations last-mentioned above effectively dispose, in my opinion, of this submission. For when regard is had to the particulars of the acts alleged to have been committed by the nineteen respondents, it appears that, with the possible exception of isolated

and..../

and relatively minor participation on the part of Nos. 3 and 4, none of them actually participated in extraterritorial activities. Moreover, as already emphasised, both indictments are founded on the same single conspiracy. Postulating a valid acquittal on the first indictment, the circumstance that the State later ascertained, and in the second indictment thereafter averred, that the conspiracy had actually had somewhat wider ramifications - more particularly in that it had commenced earlier and had included the activities of extraterritorial conspirators - than the conspiracy -(the very same conspiracy)- as charged in the first indictment cannot, in my view, by itself operate to defeat the plea of autrefois acquit. The actual acts and activities particularised against the nineteen respondents in the second indictment do not commence earlier than October 1967, the commencement of the period covered by the first indictment. As to the circumstance that, whereas the terminal date of the first indictment was 15th June 1969, the period covered by the second indictment extended...../

tended as far as 30th May 1970, it is common cause that all the present respondents were continuously in custody after May or June 1969. Assuming, without deciding, that the respondents, notwithstanding such custody, are technically not free of criminal responsibility for the criminal acts of co-conspirators committed after June 1969, I nevertheless entertain no doubt that in determining the validity of the plea of autrefois acquit - which, it has been said (vide R. v. Manasewitz (supra) at 178), derives in large measure from considerations of natural equity - the Court should not, in the circumstances, regard the alleged acts of co-conspirators after June 1969 as vitiating that plea.

As mentioned above, pages 11 to 58 of the second indictment itemise all the specific allegations charged against the present respondents. All these relate to the carrying on of A.N.C. activities with the intent, and in pursuance of the conspiracy, discussed above. In amplification, it was further averred in response to a request for particulars, that:

"The...../

> "The State intends holding the accused responsible for the acts set out in pages 11 to 58, and also for the acts set out in paragraph C 1 to 17 committed by the accused personally, by co-accused and by the named co-conspirators, from the time when each accused joined the said conspiracy".

I have referred above to the allegations against the co-accused Ramotse and, in general terms, to the "named conspirators" thus mentioned. A detailed analysis was placed before the Court by respondents' counsel of the individual acts of the present respondents as alleged in pages 11 to 58. This analysis, which was not disputed by Mr. Liebenberg, reveals that virtually everyone of those acts is a repetition, sometimes with immaterial alteration in wording, of the individual acts charged in the first indictment against the present respondents. The few allegations against the present respondents which can be said to be new, are reflected in the aforementioned analysis. They were, I consider, effectively disposed of by the learned Judge a quo and need not be detailed here. Most of them are more in the nature of incidents tending to support the averment of activity in pursuance of the

major.../

major charge of conspiracy rather than actions which are in themselves of any particular gravity. But, however that may be, their total number represents less than 4 per cent of the 500 individual allegations made against the nineteen respondents in the second indictment. That is to say, more than 96 per cent of the individual allegations made against the present respondents in the second indictment are repetitions of the allegations made against them in the first indictment. This last-mentioned feature may fairly be said to afford, as it were, a mathematical demonstration of the existence of substantial identity between the two indictments: but the matter does not end there. The aforementioned analysis, considered against the background of the same single conspiracy common to both indictments, strikingly reveals, in my opinion, that the essential ingredients of the criminal conduct charged in the second indictment do not materially differ from those of the criminal conduct charged in the first indictment. The

essential.../

essential subject matter of the two indictments is, in my view, thus sufficiently the same to support the exceptio rei judicatae. There appears to me to be no escape from the conclusion that conviction of the respondents on the charges preferred against them in the second indictment would in effect constitute a reversal of their previous acquittal on the first indictment.

The cumulative effect of the various considerations I have mentioned is such as, in my opinion, conclusively to establish that proof by the State of the allegations in the second indictment would automatically have proved that the respondents were guilty of one or both of the offences charged in the first indictment. Putting the matter in another way and applying the test accepted in R. v. Kerr (supra), the evidence necessary to support the second indictment would, in my view, unquestionably have been sufficient to procure a legal conviction upon the first indictment. I accordingly come to the conclusion that the learned Judge a quo correctly held that

there.../

there existed in the present case the substantial identity necessary to support a plea of autrefois acquit, and that the respondents' special plea was therefore rightly sustained by him.

For the foregoing reasons, the question of law reserved is answered in the affirmative - that is to say, against the State.

N. Gilmour Thompson

POTGIETER, J.A.) Concur.
MULLER, A.J.A.)