

THE CHURCH

AND

POLITICS

Record of Court Proceedings against Fr. A. D. Scholten, OP, Secretary General of the Southern African Catholic Bishops' Conference

The question of whether or not the Church should concern itself with politics was raised during the trial at the Pretoria Regional Court on July 11 and 12, 1977 of Very Rev. A. D. Scholten, OP, Secretary General of the General Secretariate of the Southern African Bishops' Conference.

Father Scholten pleaded not guilty on three charges of contravening sections of the Publications Act by having in his possession and distributing by post publications deemed to be undesirable, prohibition of which had been made known by notice in the Government Gazette.

The first charge was that on or about April 21, 1977 he had in his possession a publication, "South Africa – A Police State", the prohibition of which had been published in the Government Gazette dated September 29, 1976.

The second charge was that on or about May 10, 1977, he had wrongfully distributed by post a publication, "The Voice", deemed to be undesirable in terms of a decision by the committee made known by notice in the Government Gazette dated May 6, 1977.

The third charge was that on or about April 18, 1977, he distributed a publication, "Torture in South Africa", the prohibition of which was published in the Government Gazette dated April 13, 1977.

"The Voice" was sent to a couple at Louvain, Belgium, the man being a post graduate student from South Africa doing his master's degree in philosophy, and "Torture in South Africa" going to clerics and layman in charge of an organisation concerning itself with helping people with projects in developing countries. All three were sent to Holland. All were described by Fr. Scholten as being on his list of persons who regularly received relevant information.

The first witness called by the Public Prosecutor, Mr. J. M. van den Heever, was Lieut. Andre van Heerden Beukes, of the S. A. Security Police, who had assisted with the investigation. He told the court that the copy of "The Voice" had been posted rolled in a copy of the Weekend World and placed with a calendar in a carton holder.

A typed letter signed by Fr. Scholten accompanied the copy of "Torture in South Africa" addressed to Very Rev. Fr. Robben, OP, in Nijmegen, Holland.

"South Africa – A Police State", which was found in Fr. Scholten's possession was described as having been compiled by the Christian Institute of South Africa and dealing with such subjects as the security laws, various racial disturbances, major trials, people who had died in prison, the laws on terrorism, and similar matters.

"The Voice", published by the S.A. Council of Churches, dealt with Thornhill, various forms of suffering under the present system, people under house arrest, Black education.

Lieut. Beukes stated that Fr. Scholten claimed to have had no ulterior motive in sending publications abroad. His only concern was to enlighten his correspondents about local conditions.

The postage cancellation dates on the various packages being close to the date of publication of the bannings in the Government Gazette, the witnesses on the first day were concerned with the question of whether or not there could have been any delay in the cancellation of the stamps. There was also the question of delays in delivery and it was stated by Senior Council for the Defence, Mr. D. Williamson, that it was not unusual for the Government Gazette to take seven to ten days after posting to be delivered to an address in Pretoria.

Three members of the staff of the Central Post Office in Pretoria testified that letters posted on any day had their stamps cancelled on the same day. Various details were given to explain why there was little or no margin for error.

Most of the second day was spent with Fr. Scholten himself in the witness box. Questioned by Mr. Williamson he told of his training, background and his career of 19 years of priestly work in South Africa. He studied in Nejmegen, Holland, was ordained in 1957 and came to South Africa at the end of 1959, after which he studied the Zulu language, Bantu Administration and Hebrew at the Stellenbosch University. He explained that the Dominican Order, of which he was a member, liked to prepare their priests for the task they were going to fulfil, seeing the ramifications the Bible had in the life of the people.

Fr. Scholten explained that this was followed by a year's work in an African township at Welkom in the Free State. He was concerned with the pastoral ministry for the mine workers in that area. He was then sent to Lesotho to learn the language and from 1962 to 1963 he taught at a high school in that country, also acting as chaplain to a hospital near Roma and trying to become proficient in the Sesotho language. Transferred to Johannesburg, he stayed there for two years and was engaged part-time in work for the Bishops' Conference, working in Soweto at the weekends. For most of the time until 1970 he was occupied as secretary for ecumenical affairs for the Bishops' Conference. At the same time he was asked to draw the attention of the people in his Church to the need for special attention to Afrikaans and he assisted with bringing out the paper "Die Brug", which tried to build a bridge between the English and Afrikaans-speaking people in this country. He also did much translation work. Later he was privileged to be present at the Vatican Council devoted to renewal inside the Church. He was able to see problems in perspective and to realise that various problems in South Africa were problems all over the world.

From the beginning of 1971 he was rector at the Major Seminary, Hammanskraal and in 1976 he was asked to serve as Secretary General of the Bishops' Conference in Pretoria where he was working at present. He explained the composition of the Bishops' Conference which was concerned with the spiritual and human welfare of 1 900 000 Christians.

In his position of Secretary General he was responsible to the president, Archbishop J. P. Fitzgerald, OMI, in the task of trying to co-ordinate the work of the various commissions and also to feed information on the material which is dealt with by these commissions, as well as keeping the bishops' informed on matters considered of vital importance in South Africa. Also when some or other point arose it was his task to be the bishops' spokesman.

He explained that there was a library at the Secretariate at the disposal of those who worked there and those who visited there to help them with their work.

Questioned about the pamphlet "South Africa – A Police State", which had been found in his office when visited by the police on April 21, Fr. Scholten explained that it came to be in his possession as many other publications came, destined to be part of the reference library of the Bishops' Secretariate. It came to be on his desk because at that particular time of development of the Church in South Africa this very problem of the role of the police in South Africa was the very special concern of the Bishops' Conference, and obviously in his capacity of information officer and spokesman of the Bishops' Conference he needed to have at hand whatever was relevant to this problem. "This is a problem not only in South Africa, but it is almost a world problem. The situation is similar to Brazil, in Hungary, in Poland and in various parts of Africa. It is also our problem and the bishops' problem."

Fr. Scholten went on to explain that the bishops' had this very year made a statement on the role of the police in our country. He read out a paragraph from the Bishops' Declaration of Commitment: "We realise that a situation of violence breeds atrocities on both sides, but we are speaking of seemingly systematic beatings and unjustifiable shootings during disturbances and of cold-blooded torture of detained persons."

He went on: "I had been asked to study the problem which occupies us all and to try and find a solution. Our bishops' committed themselves to do all they could towards solving this particular problem. My sole reason was to have at hand whatever was needed in this task of assisting the Church in my role as information officer."

Fr. Scholten explained that every day quite a bit of literature was received, half of which went into the waste paper basket and half went on the desk. Publications were received from various organisations for some of which they had standing subscriptions, while some were purchased individually. This one, like others from the Christian Institute, was sent to the Secretariate as a body serving the Church and they usually went to the library.

To indicate the scope of the task of the Church in the modern world, Fr. Scholten went on to explain that the Bishops' Conference had a wide interest covering the general well-being of the people in their human as well as their religious problems. He exhibited to the court various publications emanating from the Bishops' Conference – "Declaration of Commitment", "A Call to Conscience", "Justice and Reconciliation in South Africa", "World Bishops' Meet", "Evangelisation in the Modern World" and "Pastoral Letters".

Council for the Defence remarked that these publications indicated in a broad sense the concern of the Church for the people of South Africa. He went on to say: "It is often said that the Church should not concern itself with politics. What do you understand by this statement?"

Fr. Scholten replied: "If someone said the Church should not concern itself with politics I would say that the Church has no task to involve itself with party politics. In no case, it seems to me, should the Church involve itself with party political matters, but it should concern itself with human society. If the moral code, as applied by some politicians, is violated, as the Church sees it, then the Church can do nothing else than to take up its prophetic role by trying to put a finger on the wounds in this particular society. It can do this not by starting another political party criticising only those on one side, but by trying to be fair to all and to take up a role as a reconciler in a society that had been violated – a healing role.

Asked whether in his view the pamphlet he was charged with being in possession of was of a bona fide religious character, Fr. Scholten replied that the very fact that this publication came to him from the Christian Institute indicated that it had a religious dimension.

It was a strong argument for him that it dealt with society in such a religious dimension. The purpose was to draw the attention of the community at large to what the editor saw as needing to be rectified in our society. "We see in it the record of suffering, the suffering which the universal church has to endure for justice – a document to highlight what is happening in our society and try and bring to the fore what so many people are suffering in this context."

Fr. Scholten said there was a strong religious dimension in this effort to build up an atmosphere of compassion for the people who are suffering under unjust rules. The document did not only pinpoint the wrongs, however; it allowed other opinions to be heard. Therefore, it was not a one-sided document, but a helpful one.

Questioned on the other two documents in the case – "The Voice" and "Torture in South Africa", Fr. Scholten said that he studied them carefully. "The Voice" was a practical application for a wider public, drawing attention to the concern of the Church for social injustice and its implications for society as seen by the Church. Its approach was popular and this it would help a wider public to become familiar with the vital concern of the Church in Southern Africa. It was a useful instrument for making these views known. It was edited by clergymen of four churches and sponsored by the United Congregational Church, the Presbyterian Church, the Methodist Church, the Church of the Province of South Africa and two African branches of the Presbyterian Church. It had an obviously religious character, dealing not only with problems in a political dimension but with practical works of mercy.

"Torture in South Africa" was of almost the same nature as "South Africa – A Police State". When this reached the Secretariate it contained a covering letter signed by a member of the Christian Institute recommending it for its religious significance.

Fr. Scholten then emphasised that all three documents had a religious character – a view expressed in the light of his qualifications and years of experience.

Asked whether the Church operated in the open and did not hide its work, Fr. Scholten replied that it was part of the task of the Church to work openly. He admitted that any publication was always liable to be interpreted in various ways according to the mind of the person who read them. But to his mind the three publications in question set out in objective manner the difficulties of our society in the present time. What appears in these publications has already appeared in the Press and he believed no harm could be done; by giving these views wider publicity.

Asked whether he had been aware that “South Africa – A Police State” was a banned publication, Fr. Scholten said he was not aware at the time of the police visit that this particular publication was prohibited. He decided on March 21, 1977, to obtain the Government Gazette in order to get first-hand information about “this type of thing – especially literature”. He paid a subscription for a year and asked for the Gazette to be sent to the General Secretariate. It usually reached his desk between seven and ten days after the publication date marked on the Gazette itself. On July 11, for instance, he received the issue dated July 1 and also the issue dated June 29.

Fr. Scholten was then questioned about the people to whom he had sent the publications “The Voice” and “Torture in South Africa”. He had not known at the time of posting that they were prohibited publications but he had sent them only to responsible people who needed information relevant to the situation in South Africa.

Questioned by the Public Prosecutor, Mr. J. M. van den Heever, on the position of the Church as far as the stated and its laws is concerned, Fr. Scholten said there was need to carefully distinguish between the positive law and the divine law. It was impossible to do what the Church and Divine Law forbade. Referring to the Publications Act he said that if a law is passed by the Government and appears in the Government Gazette, he would have no hesitation in obeying the law. He personally might have reservations about a law, but the State allowed representations to be made. He admitted that there was nothing to prevent his obeying this particular law. The Public Prosecutor : “If you had known when you found in possession of the publication that it was banned, you would have got rid of it? Did you at that stage regard this publication as one of a bona fide religious character? What do you understand by that?”

Fr. Scholten: “I consider any document which has bearing on the work and the task of the Church at large as a religious publication. I would like to refer to this particular document as one with moral implications for the State and the Church at large.”

The Public Prosecutor then recalled the evidence Lieut. Beukes had given about the documents and suggested that if that evidence were heard alone there would be no suggestion of any religious context. They would then be regarded as political documents covering only political matters. Thus those documents could not be regarded as of a bona fide religious character. Fr. Scholten said that if politics was seen as a general arrangement of life, then it could not be separated from religion.

On the question of the accused’s claim not to be aware of the bannings, the Public Prosecutor said that ignorance of the law was no excuse. Having ordered his Government Gazette and found that delivery by mail took so long, he should have made arrangements to have it collected from the Government Printer’s office where it was published. After his arrest he should have been extra careful not to run the risk of letting it happen again.

Fr. Scholten said that he had taken what he considered normal precautions.

The Public Prosecutor said that if precautions proved ineffectual extra precautions had to be taken. “You were found with a publication in your possession that had been banned and instead of taking extra precautions you sent out other publications without being careful to be sure that they had not been banned.”

Asked whether he considered his arrest in connection with publications a serious matter Fr. Scholten agreed that from the point of view of law it must be seen as serious, “but I myself because of the way in which I see the matter, don’t regard it as all that serious.”

Counsel for the Defence pointed out that it had been suggested that if the documents were looked at by themselves – i.e. without relating them to anything – the emphasis appears to be on the political aspect.

“Consider the Bible, particularly the Old Testament, are there many chapters dealing with wars and all sorts of scurrilous activities that make no mention of God or any religious activity?”

Fr. Scholten: “Yes, particularly in the historical books... They need to be seen in their context of life and in relation to the other books.”

Fr. Scholten explained that the Bible had come into being as a gradual process. It told of the sufferings of the people, of their pilgrimage in their journey towards liberation and redemption at the time of Christ.

Asked by the Counsel for Defence whether he had changed his point of view on those documents as a result of the questions put to him, Fr. Scholten said he would like to confirm what he said.

Counsel: “Do you consider they are important to you in your work and that you should have access to them and that people of like mind should also have access to them?”

Fr. Scholten: “I do”.

Asked by the Magistrate, Mr. C. J. Strydom how he used them in his work, Fr. Scholten said mainly as information. As an information officer he found it helpful to have a factual picture of the situation.

Magistrate: “What do you consider the central theme of “Torture in South Africa?”

Fr. Scholten: “People being tortured in detention and allegations made in connection with that matter.”

Magistrate: “What do you consider the central theme of “South Africa – A Police State?”

Fr. Scholten: “The central allegation is the attitude of the police in the context of our problems in South Africa, especially by listing the security legislation in force and its repercussions on the community at large. And accounts of people banned and in prison.”

Asked about the central theme of “The Voice”, Fr. Scholten said that it was general information about happenings in and around Christian life in South Africa, but of a more popular nature.”

The Magistrate then asked Fr. Scholten about each publication in turn, whether he would agree that the publication is prejudicial to the safety of the State, its general welfare, peace and good order. In each case Fr. Scholten replied in the negative. Did he then not agree with the committee, which finds all three of these publications undesirable? He did not.

On the third day of the trial, Senior Counsel for Defence, Mr. D. Williamson, made references to the need, on all accounts, for **mens rea** i.e. the requirement that the accused, before he can be convicted of a crime, must be shown to have had some intention of recklessness in relation to the prohibition, the act alone not constituting guilt unless there is also a guilty mind.

He submitted that this requirement had not been proved by the State, whatever test was adopted. If negligence was the requirement, there was no possible negligence on the part of the accused. The accused did not know of the unlawfulness of – on Count One – having the publication on his desk until it was pointed out to him by the police when they took it away. He was not given a reasonable opportunity to discontinue an act, which until a certain moment had been lawful.

“There must be tens of thousands of people in this country who have banned publications in their libraries without being aware of it. It is unreal to expect the ordinary man to go running to the Government Printer each week to check. Here we have a man of the Church working on a document for legitimate Church purposes with no idea that it was banned.”

On the question of the religious character of the document, the Act meant that if the publication as originally done had a bona fide religious character, it did not thereafter lose that character. If the Christian Institute had published this pamphlet for a religious purpose then that character would not subsequently be lost. Furthermore, if a person claimed possession of such literature for primarily religious purposes then the original character likewise became unimportant. One might find a person

who did a study of the Church in this country without religious motivation. Nevertheless, it was a useful study. If that material was subsequently used by the Church for a religious purpose it acquired a religious character.

On all counts mens rea was an essential element and the State had not proved its presence, whereas the accused has disproved culpa (negligence).

Counsel held that on Count Two there had been no distribution, the publication having been sent to only one person and not a number.

The claim was made that on all counts the documents were being used for religious purposes and Council made the point that one must not look so much to the document itself; the test was the use to which the accused had put it. Manifestly it was being put to a religious use.

At the start of his summing up, Counsel said that the duty on the part of a person charged to be circumspect applied to people who had had a banning notice served on them and to whom special legislation applied. In this particular case, where the accused was a member of the general public and was not carrying out a particular type of business, this special obligation to be circumspect did not arise.

“It is to be proved: did he have a knowledge that what he was doing was not permitted, was a breach of law? We submit that cannot be proved. The innocence or otherwise of a person’s mind is of prime importance.

“Ignorance of the law being no excuse is not a principle of general application. It has become so watered down in practise that one will find many exceptions to the law, particularly in cases where **mens rea** is an essential element. The plea of ignorance must prevail and it is up to the State to prove otherwise.”

Must the accused have known that his act was unlawful? Exceptions were frequently admitted. A large number of cases went both ways in this matter: there was no clear demarcation.

In this case a person was freely able to buy a certain publication in a bookshop until a certain moment when a committee came to a decision which was published in the Government Gazette and now to own such a publication is an offence. But before there could be a conviction of contravention of this particular law, it must be proved that the person knew that from a certain moment the publication in his possession was unlawful.

On the question of the exemption, in section 82 of the Act, in the case of matter of a bona fide religious character, Counsel recalled the case of the banning of the record “Jesus Christ Superstar”. It was found to be a bona fide religious character and therefore not subject to prohibition if the publication was intended to be used for certain specified purposes. The purpose for which any publication was to be used seemed to be the ground for exempting the publication from being prohibited. You do not just look at the document to decide whether it is of a religious character or not: the test is the purpose for which you are going to use it. The document in this case could be used purely in a political context, but it could be used by others – the Church, for instance – for purposes which were germane and relevant to its work in the world. “Then it is used for religious purposes and has a religious character. The touchstone in this case is the purpose for which the document was used. The work of the Church in the world is concerned with the human condition and suffering of the people.”

The accused had used the pamphlet in this way for his work for the Church in keeping the bishops informed. This information was being used by the bishops because they regarded it as important in the Church.

“The Church is not just concerned with the way a man says his prayers or with a simplistic approach to religion, but with the whole man and his human condition in the here and now world.”

These documents must be looked at in their context and in the context in which they were being used. This showed an over-riding religious concern for informing the Church on the condition of people in South Africa.

On Count Two it was important to notice that distribution implied the spreading or scattering abroad to numbers and could not be applied to the sending of a pamphlet to one couple. The sending of one copy could not in law be distribution and only distribution was prohibited. On the third count the pamphlet was in fact sent to three different people.

Counsel again pointed out that it was of considerable legal importance that the accused was not given a reasonable opportunity of finding out about the banning. In one case the pamphlet had been banned on May 6th and it was found in the post on Tuesday, May 10th. This could have been posted on the Friday, Saturday or Monday – that is, on the day of the banning, the following day or the third day thereafter. It was clear from the evidence that the accused did not know of the banning at this stage.

The State published the Government Gazette and we were meant to use the means of the State used – its own post office. This was the reasonable thing and one could not be called unreasonable for relying on the post office. It would be a reasonable proposition to allow the accused a reasonable opportunity of discovering what the law was. It was applicable on all counts that a reasonable time should be allowed for the discovery of the prohibition.

“On all these considerations the State case must fail on each and everyone of the grounds which we have submitted.”

As he presented his arguments, Counsel for the Defence quoted in support, from various cases in South Africa law dealing with **mens rea** and other relevant legal points.

In his reply, the Public Prosecutor, Mr. J. M. van den Heever, said that it remained his contention that **mens rea** was in evidence. However, it was also his contention that law, as far as this particular expedient was concerned, was in the desert, whether it was *dolus* or *culpa* (intent or negligence). Whatever test the court applied as far as **mens rea** was concerned, the State had satisfied all tests.

He suggested that man of the accused intelligence and knowledge must, in these circumstances, have foreseen the possibility that he was sending off publications, which might be already banned. On one count he was already on bail when he sent off the publications. To continue in the same way suggested recklessness. The accused was aware of the fact that the possibility existed but he nevertheless continued with his act and was reckless in spite of his knowledge.

On the claim that Count Two could not be regarded as distribution, he pointed out that it had been sent out to a couple – more than one person.

Having regard to the evidence given by the accused on the subject of the documents being of bona fide religious character, he recalled that the accused had admitted that he had not early on been aware of this exemption.

The Public Prosecutor submitted that the documents were not of any religious connotation. “If it is a question of purpose, then anything at all can be said to be used for a religious purpose – even pornography”. He submitted that the Court could not go beyond the meaning of the Act.

During the court case, His Grace Archbishop J.P. Fitzgerald, OMI, President of the Southern African Bishops’ Conference was present together with the Provincial of the Dominican Order in South Africa, Very Rev. Fr. A. Nolan, OP. Also present throughout were Miss M. Aitken of the Grail, member of the Bishops’ Open School team and Rev. Fr. J. Haan, CSsR, member of the Staff of the General Secretariate of the Bishops’ Conference.