

COURT RESUMES ON 11 FEBRUARY 2015 (at 11:21)

PROSECUTOR: Case number 14/985/2013, state v Phumeza Mlungwana and 20 other. The presiding officer magistrate Fredericks; state N Rajab(?); all the accused being
5 represented by advocate Bishop; the interpreter Ms Balati. The matter is on the roll today for the purpose of judgment.

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J U D G M E N T

Right then, case number 14/985/2013, state v Phumeza
10 Mlungwana and 20 others. All accused before are adult persons represented by advocate Bishop. The accused are charged with one main count in that on about 11 September 2013 at or near the Civic Centre in Cape Town in the district of the Cape the accused unlawfully and intentionally convened a
15 gathering in protest against sanitation services without giving the relevant municipal authority any notice that such gathering would take place. The alternative count is that on the same date and place the accused also mention previously unlawfully and intentionally attended a gathering in protest against poor
20 sanitation services without notice and the required permission from the relevant authority.

Now all 21 accused pleaded not guilty. Admissions were made in terms of section 220 of Act 51 of 1977 and admitted in terms of the exhibit that was handed in, Exhibit A. The state
25 called two witnesses, Noel da Silva and Jacob Petersen. Noel

14/985/2013

da Silva, he told the court that he is a representative at the City of Cape Town and issues permits for gatherings. He also told court that on the said date of 9 September 2013 he did not receive an application for the gathering. He initially spoke of
5 an application procedure, but later during cross-examination told the court that a notice is what ought to have been given. He also told the court that if notice was given and the parties received no response, that that would mean the action could go ahead. He, himself, did not observe the event of the day.

10 Jacob Petersen, he testified that he is a warrant officer for Public Order Policing stationed at Corrie(?). He arrived with a captain Prins on 11 September 2013 at the Civic Centre. He told the court that he saw protestors who were chained. According to him 20 protestors were chained while 20 other
15 protestors were in the immediate vicinity. He was told by captain Prins to arrest the protestors. According this witness 20 of the protestors ran away. The rest of the protestors who were arrested, according to him, were on the chain and consequently were at court or were the accused at court.
20 During cross-examination questions as to whether it was possible to access the Civic Centre despite the protest, was possible, he indicated that no one would be able to pass these protestors even if they lifted their chained arms to allow them to pass.

25 It is clear from the evidence of accused 1, who then later

14/985/2013

came to testify for the defence and court is going to deal with that aspect later and the exhibits that were tendered, for example the photographs that were handed in, that there were no ...(indistinct) of any people in the vicinity of the chained
5 accused bringing the total of those protesting in the region of 40 as the last-mentioned had testified. According to his evidence the passageway to enter the Civic Centre was blocked and that people were being prevented from entering or exiting that side of the Civic. From the exhibits one can
10 clearly see another stairwell not too far from where the chained protestors were and the photograph actually depicts people utilising that side to the Civic. The state closed its case after this witness was cross-examined.

Defence then brought in application for discharge in
15 terms of section 174 of Act 51 of 1977. The state opposed it and the application was denied by the court. The defence called accused 1, Phumeza Mlungwana. She tells the court that she belongs to an organisation called The Social Justice Coalition and that she is general secretary of the said
20 organisation. In addition to her evidence an affidavit was handed into court setting out the history of their grievances as well as the communication agreements and frustrations as an organisation together with the community they experienced with the council and mayor in particular in trying to alleviate
25 the plight of the communities.

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14/985/2013

Protest action was decided upon by accused 1, 3, 5, 12, 15, 16, 17, 18, 19 and 21 after various agreements failed to address the plight of the poor sanitation in the area. It was decided that they would not give notice of their proposed
5 action as they would be no more than 15 people protesting. 15 initially, that is accused 1, 2, 3, 4, 5, 6, 8, 10, 12, 13, 15, 17, 18, 19 and 21 then chained themselves across the steps at Cape Town Civic Centre entrance. A letter was drafted to the mayor setting out their grievances and informing her and her
10 office that 15 protestors would be protesting outside her office at the Civic Centre on 11 September that day. This letter was dated 11 September 2013 as the court already stated and was e-mailed to the mayors office on the said date and was also handed into court as an exhibit.

15 During the course of that morning they called up other members who eventually totalled six to either bring food, water, files, buy padlocks, chains and rendered tasks like show media to the person in the chain whom they can interview and to send off e-mails. These other members were never
20 intended to engage in the protest action, but was there, according to accused 1, only to render support where needed. She tells the court that emotions ran high and at times these six would come within the vicinity of where the 15 were chained were, sang songs and chanted with them. At times
25 some of them would move in and out of the chain and then go

14/985/2013

on with what they were tasked to do for the day. At no stage were these people asked by the accused, who decided upon this action, to remain neutral and not to join the protest.

When the police arrived a captain Prins spoke to the
5 group chain and enquired about their reasons for being there. Accused 1 told him they wanted to see the mayor or one of her representatives in order to hand over a letter with their grievances. According to accused 1 captain Prins left, came back and advised that no one from the office of the mayor
10 would be coming and that their demonstration was illegal. They were told to disperse. Accused 1 pointed out that they were within their rights as they were only 15 people protesting and need not have given notice to do so. A quick count, however, by the officer proved more people were now either
15 attached or holding on to the chain, making the amount of people protesting in excess of 15. Accused 1 spoke to the group and told them that they only wanted to be 15 people as this would still keep them within the law and that if there was any one who no longer wanted to be part of the protest, they
20 were free to leave. Accused 16, accused 4 and accused 5, the last of whom I just mentioned are two of the accused who were meant to be part of the chain, according to accused 1. The three of them then left the chain. The rest then decided not to leave until the mayor or someone from her office came to
25 receive the letter.

11.02.2015/11:45-12:22/KMS

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14/985/2013

The instruction was given to arrest all those present on the chain, including those in the nearby vicinity. According to accused 1 those who left the chain, including the members who were there merely to render support as previously mentioned, were then also arrested with those still attached to the chain. The total number of persons on the chain at the time of the arrest then were 13, but in total 21 people were arrested. The 21 people who were arrested are currently the accused in court today.

10 In addition to her evidence various photographs were handed in depicting those on the human chain at various stages of the protest and where at the Civic Centre they were positioned. There are no other protestors totalling an amount of 20 people in addition to the accused immediately in front or behind them. It is clear from the photographs that where the group had chained themselves that entry to the Civic Centre was not blocked off. From the photographs there are no more than 16, then 17 and then 18 people on or in the vicinity of the chain at any given time in question, this being very different from the officer's evidence that there were about 40 protestors of whom 20 had run away and the rest on the chain then being arrested.

On one of their photographs one can clearly see another stairwell and people, in fact, making use of it, thus gaining access to the Civic Centre from another point. It is clear that,

14/985/2013

as testified by the accused, and in contrast to what the police officer testified, that at no stage was entry then to the Civic Centre prohibited by this group of protestors. The officer also told the court that no one would be able to pass under their arms if they were to lift it, but he, himself, did not witness any such refusal by those on the chain to allow anyone to the building by not lifting their chained arms. Despite this he tells the court the protestors were peaceful. From the photographs there is nothing to suggest that they were not. In fact, throughout accused 1 evidence, this is what she says.

Accused 1 also tells the court that they wanted to be 15 people at all times and that they never intended exceeding that number as they wanted to remain within the realms of the law, but only asked the extra persons to leave once captain Prins had pointed out to her that they were in excess of their number. The court notes that when she asked for those chained to kept at 15, there was no resistance, but complete cooperation. Clearly this could have been done earlier too before the police arrived.

20 The question then arises, did the accused contravene sections 12 (1) (a), that being the first and main count by not giving the required notice of the proposed action and was this, in fact, a gathering as defined in the act? Can it also be said that all 21 accused, in fact, were conveners of a gathering if 25 the court finds that indeed the gathering was convened. The

14/985/2013

answers to these question lie in the definitions of the words convene and gathering as defined by the act. The act defines convener as:

5 (a) Any person who of his own accord convenes a gathering and;

(b) In relation to any organisation or branch of any organisation any person appointed by such organisation or branch in terms of sections (2) (1).

10 Gathering means any assembly concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act 29 of 1989 on any other public place or premises wholly or party open to the air.

Now those who took the resolution to protest were
15 accused 1, 3, 5, 12, 15, 16, 17, 18, 19 and 21. These are, according to the admissions made by the accused as well as the testimony of accused 1, the conveners. Section 12 (1) (a) only has application on those who convened a gathering. Initially there were only going to be 15 protestors, but when
20 others joined in song and dance they did not stop them. in fact, accused 16 was one of those who decided to embark on this action with the accused termed by the defence as the convening accused and was thus aware of the fact that only 15 people would be used to protest on this day and knew the
25 reason why they wanted to remain 15.

14/985/2013

What is not clear for this court is whether the other accused, that is accused 7, 9, 11, 14 and 20, who did not form part of the accused planned reaction and who were asked to assist on the day in question, whether they, in fact, were aware that not notice was given and the intention of the protesters to remain only 15. Besides this fact, they, together with accused 2, 4, 6, 8, 10 and 13, were not part of those who took the resolution to hold the action and thus sections 12 (1) (a) is not applicable to them. **THE COURT FINDS THAT THESE ACCUSED ARE NOT GUILTY IN RESPECT OF COUNT 1, THE MAIN COUNT, AS THEY WERE NOT THE CONVENERS.** The court finds that the following are then guilty and their questions that were previously asked are answered in the affirmative, **ACCUSED 1, 3, 5, 12, 15, 16, 17, 18, 19 AND 21 ARE GUILTY THEN IN RESPECT OF THE MAIN COUNT.**

The alternative charge, being that of sections 12 (1) (e) of Act 205 of 1993 simply set out that this section is not applicable to the remaining accused as they were never the conveners to begin with and the prohibition with regards to the place where a gathering may be held is also not applicable to them. **THE COURT ACQUITS THE REMAINING ACCUSED ON THE ALTERNATIVE CHARGES AS WELL, THAT BEING ACCUSED 2, 4, 6, 8, 10, 13, 7, 9, 11, 14 AND 20.**

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14/985/2013

MR BISHOP: As it pleases the court, Your Worship.

PROSECUTOR: As the court pleases, Your Worship.

COURT: Mr Rajab?

PROSECUTOR: As the court pleases, Your Worship. With
5 respect, can I just ask that the people that have been
acquitted, that they then step off, Your Worship.

COURT: All right. Accused 2, the accused that I am going to
mention now, you may then leave. You may go and sit at the
back in court. You have been acquitted. Accused 2, accused
10 4, accused 6, accused 8, accused 10, 13, 7, 9, 11, 14 and 20.
Accused 1, 3, 5, 12, where's 12, 1, 3, 5, 12, do you know who
you ...(indistinct) be, all right, let me just see.

MR BISHOP: Just stand up when she calls your name.

COURT: I am just taking a count here. I just want to make
15 sure, is it Marlana Thlompe(?). You can sit down, I just... 15?
That would be Mpoi Bizingiso(?), 16, Senoko Mokondolozzi(?),
17, Senoko Boyowethu(?), 18, Sebezo Azethu(?), 19, Jana and
number 21.

MR BISHOP: And accused 14, Your Worship, was not
20 convicted, is that correct?

COURT: No, She was acquitted.

MR BISHOP: Thank you, Your Worship.

PROSECUTOR: Your Worship, can I request that the machine
just be paused, Your Worship? The state is in possession of
25 the SAP69. I just want to sort out the running of the SAP69.

11.02.2015/11:45-12:22/KMS

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14/985/2013

COURT: All right. Let's just pause the computer. The prosecutor just needs to sort out the SAP69's.

MECHANICAL INTERRUPTION (at 11:38)

COURT: The court just noted to both the state and the
5 defence that what I am about to say now is just a paragraph
that I omitted to read out as part of the judgment. It does not
change the courts' finding, but the court is going to read it out
anyway for purposes of clarity sake and this is the part where
the court, in actual fact, finds that those who had planned the
10 action were, in fact, the ones guilty of the main count. And it
follows on from where the court mentioned the accused 7, 9,
11, 14 and 20 who were the persons called up on the morning
to assist. Accused 2, 4, 6, 8, 10 and 13 and then the court
follows on by saying:

15 Despite planning on only being 15 protestors, they
allowed the number to be increased and only opted to do
something about it when it became clear that they would be
arrested. By then the intended 15 protestors 1, 2, 3, 4, 5, 6,
8, 10, 12, 13, 15, 17, 18, 19, and 20, including accused 16,
20 had already contravened the law. Court finds that at that
stage they were indeed a gathering and since sections 12 (1)
(a) is applicable on convening accused only, court finds that
they then made themselves guilty in respect of count 1 and
that would be accused 1, 3, 5, 12, 15, 16, 17, 18, 19 and 21,
25 the accused court already previously mentioned as the ones

the court had found guilty. That was all I wanted to say. Now you may proceed Mr Rajab.

PROSECUTOR: As the court pleases, Your Worship.

ACCUSED 1, 3, 5, 12, 15, 16, 17, 18 AND 19 HAVE NO

5 **PREVIOUS CONVECTIONS**

PROSECUTOR PUTS PREVIOUS CONVICTIONS TO

ACCUSED 21

PROSECUTOR: As it pleases the court, that finalises the matter, Your Worship.

10 COURT: Accused 21, there are three previous convictions. The court has insight thereto. Advocate Bishop, have you had insight thereto?

MR BISHOP: Yes, Your Worship, the accused confirms.

COURT: He must just sign the document please.

15 MR BISHOP: Your Worship, you will see from the SAP69 form that they old very old convictions in 1979 and they were all committed as part of accused 21 opposition to apartheid at the time, so I submit that they should not be taken to count as ...(indistinct) at this stage, 35 years later.

20 COURT: Their weight is, yes, I know what you are saying. Concerning their weight. Can you just pass the court the envelope please? Thank you. Documentation handed to court now marked EXHIBITS W, W1 TO W9.

DOCUMENTS HANDED UP AS EXHIBITS W1 TO W9

25 COURT: Advocate Bishop?

MR BISHOP ADDRESSES THE COURT: Thank you, Your
Worship. In mitigation I would like to address the court on four
issues before recommending what the accused submit as an
appropriate sentence in this matter.

5 The first is the nature of the crime. This is a crime for
doing something of which the accused are constitutionally
entitled to do, that is exercise their right to assembly. It's a
crime not because it caused harm to anybody, but merely
because they exercise their constitutional right without giving
10 notice. That is criminal, but the nature of the crime lies merely
at the fact that no notice was given, not that any harm was
caused to anybody.

Secondly, Your Worship, the reasons why the accused
convened a gathering without affording notice. Firstly, as you
15 noted in the judgment, Your Worship, the gathering was
convened in order to protest for better sanitation in
Khayelitsha in order to protect the dignity, safety and security
and the right to help for the residents of Khayelitsha and the
majority of the accused that have been convicted are residents
20 themselves of Khayelitsha and they do not resort to organising
this protest without according notice immediately. They first
engaged to the City over a long period of time, over several
years. It was only when that process of engagement failed
that they resorted to this type of protest action in order to try
25 and force response from the City. They did not act

irresponsibly or negligently in a way with disregard for the normal processes of dealing with their complaints. They followed those processes. Only when those processes failed did they decide it necessary to chain themselves to railing at
5 the city centre.

Third, Your Worship, their conduct at the protest, again, as you noted in the judgment, Your Worship, the protestors were at all time peaceful, respectful and non-disruptive. As accused 1 testified, their purpose was not to disrupt access to
10 the building, but merely to make a statement to force the mayor to come and talk to them and listen to their grievances and as a matter of fact, they did not disrupt access to the building. People were not inconvenienced as a result of the protest. In addition, Your Worship, this would not have been a
15 crime had there only been 15 people as the convening accused had planned. It did not work out that way.

People who were not intended to be part of the gathering ended up joining the gathering, but that was unintentional. The first accused tried to avert that, it was too late, Your
20 Worship, as you found in your judgment, but the intention was always to try and remain within the ambit of the law and even when the ambit of the law was exceeded, it was only minimally exceeded when a few extra people entered into the chain. This was not a gathering without notice of hundreds our
25 thousands of people. It wasn't even dozens of people. It was

at most of 21 people and if you only count the members in the chain, at most 17 or 18 people, so it was only a few people more than the rather arbitrary limit set in regulation gatherings act.

5 Also, Your Worship, I would like to briefly and if I may present the circumstances, the personal circumstances of the accused. Accused 1 is employed and is the main breadwinner of her family. She cares for seven members of her immediate family and a number of other relatives. She has recently given
10 birth and is currently on maternity leave or had recently been on maternity leave and is caring for her baby.

 Accused 3 is also employed and is the main breadwinner of his family. He has four dependants and a fifth dependant in the Eastern Cape. Accused 5 is not employed as he is
15 currently studying. He has one child and a partner who is pregnant with twins. Accused 12 is unemployed, is not the breadwinner for her family. Accused 15 is unemployed and has two children. Accused 16 is unemployed and cares for both his parents. Accused 17 is employed and is the main
20 breadwinner for his family. He cares for seven members. Accused 18 is unemployed and has one child. Accused 19 has six dependants, father-in-law, husband and three minor children and a nephew. Accused 21 is employed and has a number of health issues.

25 Your Worship, I would like to note that the accused have

all attended court on several occasions during this matter. On my count, I am open to correction, there have been eight times in which the accused have attended court, both for preponderance and during the trial and then for judgment, 5 which they have all attended with one or two minor incidents. I am not sure if that is actually the convening people who were convicted who weren't present on one of the occasions, but they have attended several times. They spent at least eight days in court at a cost to them both in terms of time and for 10 some of them in terms of money.

Your Worship, accordingly accused submit that an appropriate sentence in this matter, considering the nature of the offence of which they have been convicted is a nominal fine of R100,00 that will be suspended for one year on the 15 condition that the accused perform one week of community service during that year. Your Worship, I have been specifically instructed by the accused to propose the idea of community service. These are all community activists who, in their daily life, serve the community and they feel an 20 appropriate sentence given the nature of the offence which they have been convicted of, would be, for them to perform further community service in lieu of the payment of a fine.

So, Your Worship, it would be a fine and suspended under section 297 (1) (b) on condition they perform community 25 service for one week in terms of 297 (1) (a) ICC. Your

Worship, unless you have any questions, those are the accused submission on mitigation.

COURT: Thank you. Mr Rajab?

PROSECUTOR ADDRESSES THE COURT: As the court
5 pleases, Your Worship.

Your Worship, it is trite, Your Worship, that when the court considers sentence that the court look at the three factors. The interest of the community, the seriousness of the offence as well as also the accused personal circumstances
10 and that the accused then reach a balance between those factors.

Your Worship, the state would submit that in circumstance if the court looks at the charge whereof the accused have now been found guilty, it's not a typical cases
15 that the court deals with on a day-to-day basis within the court jurisdiction. If we look also at the background surrounding the case, Your Worship, defence has indicated that the accused were demonstrating and it's also trite that if you look at the law, Your Worship, it is not that the accused are not allowed to
20 demonstrate and that then also the purpose of the act in order to regulate such gatherings and therefore the reason or the necessity then also to give notice to have a peaceful and a structured gathering, Your Worship, so the state is not saying that the accused are not allowed to gather and I think that is
25 why we have laws so that the country and as such, society,

can operate in a functional and civil manner.

The accused have now been found guilty of convening and if we look at the first appearance of the accused, Your Worship, the accused appeared on 18 September 2013, just
5 over more than a year, almost a year and half ago, Your Worship and state will concede that the accused, all the accused, be it for a few minor glitches have attended courts on the various dates that it was then arranged for them to attend court. So with regard to the seriousness of the offence, the
10 state would submit that this is not a typical case that the court deals with on a daily basis, Your Worship, furthermore also looking at the purpose as to why the accused was then demonstrating or going to demonstrate.

With regard to the accused personal circumstances, Your
15 Worship, the court, state has take cognisance and it seems that of the accused are not employed, Your Worship and if indeed, if the court imposes a fine or imprisonment on the accused, Your Worship, it will merely mean also that the family or relatives, Your Worship, will have to be burdened by them to
20 pay this fine. With regarding to a sentence, if you look at the interest of the community, the court then also looks at the members of the community that has, each time the matter has been set down, Your Worship, they have been following and also attending these proceedings. So I would submit that if
25 you look at the community interest also, it also would not be in

the interest of the community that the court then sentence the accused to direct imprisonment.

Furthermore, Your Worship, also looking at the ... (indistinct) provisions of the act, a court can then sentence
5 the accused up to a year imprisonment or to a fine or both of such as the court deems then is appropriate. The court also has to impose a sentence that will also act as deterrence to prevent the accused or any other members of the community to act in such way in the future. Thus, I would be of the opinion,
10 it is my submission, Your Worship, that a fine coupled with direct imprisonment suspended for a period of time, Your Worship, would be an appropriate sentence and also that the court imposes the maximum time of direct imprisonment coupled with the fine suspended and then suspended in order
15 to also act as an deterrent, Your Worship, that the accused don't act in any such manner in the future, as the court pleases.

COURT: Just switch off the computer for a short while please for the court to decide on sentence.

20 **MECHANICAL INTERRUPTION (at 12:05)**

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SENTENCE

When the court considers a sentence, court takes into account the personal circumstances of the accused. The court
25 also looks at the seriousness of the offence and also the

14/985/2013

interest of the community when the court derives at a decision
afore purposes of sentence.

The court has heard the personal circumstances of the
accused. The court is not going to repeat them, save to say
5 that the court has taken into account that all of the accused
are first offenders today, except for accused 1, but those
previous convictions are extremely old and so the weight that
the court will attach them are minimal. In fact, the address by
the defence, in any event, was that they were committed
10 during the apartheid era and were for those purposes as well,
fighting against that evil of the time.

Some of the accused before court are heavily burdened
financially in that they are the breadwinners of their family.
They are employed. Others are unemployed. That does, of
15 course, not mean that they are not heavily burdened, they
probably too are. All of them are active in their communities
and even though accused 1 does not reside in the community,
is also active, working in the community and they all have a
common purpose in that they want to uplift and alleviate the
20 plight of so many people. The offence that the court needs to
look at, they cause no harm to anyone. There were no threats.
There was no damage to any property.

It is clear that the offence was transgressed because, as
accused 1 put it, emotions were running high. Their
25 understanding was that they were only going to be 15 people

14/985/2013

to do the demonstration and though their actions are understandable, it certainly cannot be excused by the law as they, of course, have contravened it. Their right to protest was never taken away. It still is not taken away. It has been
5 limited though in that if they needed, if they wanted to protest without giving notice they could do so, but they needed to keep their numbers within the realms of being 15 and if they knew that their number were going to increase, that they needed to give the requisite notice. This should not have been too
10 difficult to do, but the court has taken cognisance of what was said in the evidence presented by accused 1.

They were, at all times, as the defence had put it, respectful and peaceful. The court had found this already when giving judgment. When the court looks at the interest of
15 the community, the court certainly takes into account that it is the very community that they wish to help, hence the reason for their protest action, the various letters and engagements with the city and the mayor. Defence is asking that the court imposes a suspended fine today and add to it a condition that
20 the accused then does one week of community service. The state, on the other hand, is asking that the court imposes a fine coupled to a period of imprisonment which is wholly suspended and is also asking that the court not consider a period of imprisonment.

25 When the court looks at what the defence is requesting,

14/985/2013

the court will say the following. All of these accused that the court has just convicted are all active within the community. Nothing stops them and prevents them from continuing with their activities and to now make or give a sentence and include
5 therewith that they need to do community service, will serve absolutely no purpose. They are already active and even if they were to have a meeting and decide today that they would even continue and be more active within the community, I am sure that that exactly what they would be doing. They would
10 engage themselves and they would render their services. That option, the court does not believe is a suitable sentence option.

A fine wholly suspended, court has thought of that option as a suitable sentence and has also decided that that would
15 not be a suitable sentence. The financial backgrounds of many of the accused are also diverse and a suspended sentence hanging over their heads could have serious repercussions also for them in the future. Court is not saying that they are going to embark on action in future whereby they
20 would be found guilty and would then be before court again, but court does not believe that their actions on this particular day in question would warrant that kind of sentence.

The court, however, is of the opinion that the following, bearing in mind, all that the court has said with regards to
25 their demonstration on this particular day in question, is

14/985/2013

appropriate. **ACCUSED 1, 3, 5, 12, 15, 16, 17, 18, 19 AND 21,**
YOU ARE ALL CAUTIONED AND DISCHARGED.

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MR BISHOP: As the court pleases, Your Worship.

5 PROSECUTOR: As the court pleases.

COURT: You would want me just to adjourn just to clear the
court?

PROSECUTOR: We will adjourn at this point, Your Worship.

COURT: Court is adjourned.

10 **COURT ADJOURNS** (at 12.22)

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