



JUDGES MATTER

Judicial Service Commission Interviews

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Western Cape Division of the High Court

Interview of Advocate M J Donen SC

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Chief Justice Mogoeng: Good morning Mr. Donen.

Advocate Donen: Morning Chief Justice.

Mogoeng: Are you well?

Donen: I'm a little stressed out by the prospect of this interview but I -

Mogoeng: Stressed out? Is it fair to assume that your confidence levels are high? You don't need to be helped to settle down for the interview?

Donen: I'm sorry, is that a question?

Mogoeng: Yes, I'm asking, you know when some people come for an interview they are a bit nervous. But I'm assuming that in your case you are just comfortable, confident and you don't need to be assisted to settle down for the purpose of the interview. Is that a fair assessment?

Donen: No that wouldn't, I'm pretty nervous, it's not an easy prospect coming here, Chief Justice.

Mogoeng: Okay. You did your BA LLB at the University, is that of, Nat...Cape Town?

Donen: Yes I did Chief Justice.

Mogoeng: And where in England did you do your Masters degree?

Donen: At the London University, London School of Economics. But, as you will see I majored, if you can call it that, in the Law of Armed Conflict and the International Protection of Human Rights, and the tutor that I wanted was the legal advisor to ZIPRA in Zimbabwe and he was at University College, so I spent most of my time at University College, London.

Mogoeng: Okay, did you spend some time in Zimbabwe?

Donen: No, no I didn't. But at that stage the struggle had just ended in Zimbabwe and we still very much had a struggle in South Africa, and I wanted to be taught by someone who could teach me those subjects in such a way that I could benefit when I returned to South Africa.

Mogoeng: Yes, I noticed that at some stage you were, in fact you joined the Black Lawyers Association in 1987, am I correct?

Donen: No, I was a founder member of the National Association of Democratic Lawyers Chief Justice.

Mogoeng: Yes?

Donen: We had previously, when the state of emergency was declared in the 1980s, formed an organisation called the Democratic Lawyers Organisation to deal with the proper organised response to the state and then in 1987 when Nadel was launched we became part of Nadel. I became a member of the Black Lawyers Association about -

Mogoeng: In 2014?

Donen: - four years, a few years ago.

Mogoeng: Well, I noticed that you are still a member of the Black Lawyers Association.

Donen: Yes, and I am very grateful for them for them having nominated me.

Mogoeng: Yes, were you recruited or did you volunteer your membership?

Donen: I was ... it was a little bit of both. There was someone who was high up in the organisation who said to someone in the organisation that we could both mutually benefit from meeting each other.

Mogoeng: Yes, and you're still a member, I see that up to 2016 you still are.

Donen: Yes, yes I am still a member.

Mogoeng: Yes. Now, you've been an advocate for quite some time now?

Donen: Yes many, many years.

Mogoeng: How many years in all?

Donen: I came to the bar in 1983 and I was admitted in 1975. I spent some time as a prosecutor and then I was in England for four years, I worked there and studied there.

Mogoeng: Yes, but in South Africa where you've been practicing as an advocate, is it from '83?

Donen: 1983 Chief Justice.

Mogoeng: And that makes it how many years?

Donen: 33.

Mogoeng: 33. And how many years were you a silk?

Donen: Since 2002.

Mogoeng: 2002.

Donen: 14 years.

Mogoeng: Yes, and why is it that women in general, but black women in particular and black men, are not as many as they ought to be at the Bar, the side Bar, especially in Cape Town?

Donen: I can speak at the Bar, and I'm not going to win friends here who representing the Bar, but there is a difficulty with the Bar in that it is an institution that is - at my Bar and I can only speak for my Bar - it is an institution that is riveted to the past, and it produces the past instead of the future. It would surely help, in my respectful view, the Bar, access to the Bar by members, if, as Advocates for Transformation have been demanding since 1998, there was equal representation on the Bar Council for members of AFT. The effect of that would be that they would be able to regulate after a way the manner in which access to the Bar through pupillage and so on occurs. They would be able to nurture and ensure that briefing patterns allow more black and female advocates to pass through the process, and one could be more assured that they would nominate them and push them and assist them to become judges, and therefore change the complexion and the nature of the judiciary in the Western Cape.

Mogoeng: Well, you know, giving instructions and briefing advocates is really where it starts, where the process of creating a pool out of which people may be appointed to the bench. Is that not so?

Donen: That is absolutely so.

Mogoeng: Now what needs to be done, who needs to be spoken to? Because generally the perception is the Judicial Service Commission coupled with the judges, they don't care about gender representation, they are insensitive, they are conservative and, and therefore they are to blame for the limited representation of women and black people in the High Courts all the way up. What is it that can be done to ensure that there is a fair distribution of work through which people can sharpen their forensic skills? What can be done?

Donen: Firstly Chief Justice, and now I won't win too many friends among Advocates for Transformation, I believe the solution to this is really, will be the Practice Bill. So that the legal practitioners could enter practice and they could have direct connection with the public so they wouldn't have to go through this Bar process and in that way they would build up experience and it would become obvious that people who have the competence get the work and would be qualified to move upwards. The other alternative is the one that I have mentioned and that is that Advocates for Transformation should have a large say in the rule making in the Bar Council so that there are rules made which affect briefing patterns.

Mogoeng: Well, what do you do to change the attitudes of those who actually give instructions to attorneys and the attorneys who give briefs to advocates to desist from insisting on a particular race? It's a question of, "we grew together, I know so-and-so, give the brief to so-and-so". How do you persuade people from departing from that attitude? Because it doesn't start with attorneys, it doesn't start with advocates, it ends there. There are people who dish out instructions there are people who dish out instruct ... briefs that the attorneys there. But some people, understand, tell their attorneys it is advocate so-and-so-and-so-and-so that you must be. The result is that if you visit the Constitutional Court at any given time you will be lucky to come across a black person there.

Donen: It would -

Mogoeng: - at times even when the state is involved.

Donen: Yes, I have observed that Chief Justice, and the place I think to start is clearly with the state and with the state insisting that black and female advocates are the ones that are briefed and in fact, nobody else, or no one as else as far as possible. But the -

Mogoeng: But that would be wrong, we are all South Africans, we are all taxpayers.

Donen: It would not be entirely wrong because they would ... what would be said is not that you must brief people because they are black, you must brief people because, who are competent and prefer black advocates. But, my respectful submission is that one should also deal with the other side, the side of the advocates who are briefed. If there are regulations, if there were rules at the Bar that said "this is the way that briefing is going to happen" then it

would happen in that way and there would be more briefs. That would be in the system that operates now where there is in fact a Bar, where in the future in my hopes in the Legal Practice Act and that access to justice both for, in the sense that advocates would come into the profession and people in the public could meet to make contact with advocates both of those areas would be sorted out in such a way that there would be access to justice as we hope for.

Mogoeng: As I close this one, don't you think it would be better if we appeal to all South Africans in private business, state subsidised entities as well as the State to remember the previously disadvantaged as they issue out instructions and as advocates are briefed because it seems to be better when people are convinced that it is the right thing to do than when you impose it upon them?

Donen: I agree with you Chief Justice, but we have been making calls like that for a long time and it hasn't really worked.

Mogoeng: Yes, very well DJP? You are settled now I have no doubt?

Deputy Judge President Traverso: I am.

Mogoeng: I meant him. I meant Advocate Donen.

(Laughter)

Advocate Donen: I am.

(Laughter)

Traverso: I also arrived here in a bit of a rush this morning Chief Justice, thank you. Mr Donen just *apropos* the question the Chief Justice has just asked you. Don't you think that transformation can never be brought about by the imposition of rules rather than trying to change the attitude of members of the profession? Let me tell you why I say that. When I was still fairly young in practice I was sent over by the Law Race and Gender Institute to undergo a course in sensitivity training. I came back to this country and I was asked to partake in sensitivity training for members of the profession across the board and as far as I'm concerned it worked, unfortunately it just ended up in a dead end. But, don't you think that's the better route to go than imposing rules and having a certain quota of AFT members on the bar council?

Donen: It is the better way without the benefit of hindsight and it is the way that obviously one would encourage and one would keep encouraging. But, we have been attempting to resolve the problem since I can remember at AFT, since 1998 to try and make it possible to improve briefing patterns so that black advocates could survive at the Bar, and they haven't because they haven't been briefed, and no amount of encouragement seems to succeed, so eventually there would come a point where something would have to be done and I'm not calling for anything - I would not suggesting anything that hasn't already been done, there is already a Legal Practice Act, there is a National Forum, there will be a Legal Practice Council, and maybe that would be the right way. I'm not saying, don't continue to encourage people to brief black advocates, but certainly I'm pinning a lot of faith on the Legal Practice Act.

Traverso: You've been, you are a silk, is that correct?

Donen: That's right.

Traverso: And how long have you been a silk?

Donen: Fourteen years.

Traverso: In that period of time, how often do you bring either a female or a black junior on board, perhaps even at your own expense?

Donen: If you look at my CV, often I do not have a junior but I would say that almost exclusively every single time I appeared with a junior, the junior was black and female. So there were people that you would know, like [indistinct], Liziwe Dzai, Karrisha Pillay, Nazreen Bawa and a few more, and I was embarrassed once in the Constitutional Court where I was briefed privately with a white male junior and I insisted on bringing a black female in as my second junior, and I was asked by one of the judges, "Mr Donen why must you have three advocates?" and the answer was that because I was encouraging the junior one to, trying to make the profession accessible and to help her advance, because she had in fact started her off career selling door-to-door in Khayalitsha. But because of the situation one couldn't embarrass her and humiliate her, you know, the answer I had to give was "well really there was so much work". But I was only being half honest because I have exclusively, except I think for one occasion besides the one I mentioned, always had black female juniors.

Traverso: One last question, is that because you were briefed with black females -

Donen: No.

Traverso: - or because did you ask for them?

Donen: I insisted on black females, I have, there were two things I understood in the new dispensation since 1994. One was that when you acted for the State you should charge reasonably and less than you would in the private sector, and two who must always be with a black female junior.

Mogoeng: Thank you Deputy Judge President, Ms Stewart?

Ms Stewart: Thank you Chief Justice, Advocate Donen I've got more than one question, are we still limited to three Chief Justice, is that the rule?

Mogoeng: Yes.

Stewart: I'll keep it to three. Advocate Donen from the State's perspective, the rules that have been bandied, and your suggestion was that they should first apply to the State, are all very well, but at the Cape Bar at the moment there is not one black senior female silk. So when rules are imposed on the State we are being given a task which is almost impossible to climb without the buy-in of other members, and from my perception one of the stumbling blocks is the silks themselves, because silks generally choose their juniors and they are very adamant about who they will work with and who they won't. So, whilst we say that the obligation must be on the state and we must try and change the attitudes of people who brief, which I fully agree with, the attitudes of silks is a massive stumbling block in how we get that achieved, in my view. What do you think about rules being imposed on silks as to how they choose their juniors?

Donen: Well that would be the easiest starting point, it's been proposed, and it should be demanded. I don't have any difficulty at all with that demand, they must always have, I've never had a difficulty demanding a black female junior and I don't see why there shouldn't be a rule to that effect. Even if as sometimes happens you have to pay the fee, the silk must give part of his fee to the junior, that's not, that's not, I would say that would be a good thing.

Stewart: Advocate Donen, I think it's only fair to raise this with you because it's topical and in the conversation we're having, have you seen the comments that were received by somebody from UCT, a lecturer?

Donen: Yes, yes I have. I was deeply hurt by that, because what that, I won't mention the name because she wants to remain anonymous and I don't really know, recall her ever shadowing me. The picture she paints of me is not something that I am, it's not something I stand for, it completely conflicts with my agenda and it completely conflicts with my track record. I have already mentioned the advocates who I've worked with and I'm sure if you ask them they would not agree with that person about me. If you look at the judgments I produce,

I was brought up by Roman Catholic nuns and brothers to respect God and women, and I took that to heart, and so you will see from my judgments, one of them is attached, that I regard the equality of women and the dignity of women above virtually everything else, I've said in judgments that the dignity of women, next to the right of life, are the most important values in our Constitution. So there is one judgment, which is attached to my questionnaire, in which I deal with the equality of women and I demand, well I don't demand, I provide that they must have equality of arms before the court. There is another judgment, which is in my CV, the *State versus M* where I increased the sentence of a convicted rapist on appeal because of the way he had cross examined the victim, the rape victim, during the trial, and my difficulty in dealing with this particular report is that I haven't, no one has shadowed me as far as I can remember since I've been a silk, because I just sit in my room most of the time and draft papers, so there is nothing to shadow but, those people that did shadow me in the days that I was shadowed were usually female and they usually wrote letters saying the very opposite of what this person has said. So I believe that if it had been taken up with me I could've, there must have been a misunderstanding, it was certainly not me that she is painting a picture of.

Mogoeng: Well, for the benefit of those who might not have seen them, what did she say literally?

Donen: She said that she was involved in shadowing me and that there was a male person who was also shadowing me and I showed preference for the male person and disregarded her because of her sex and I was chauvinistic, arrogant and of no help, not helpful and she was in fact top of her class when she wrote her exams and he was, did not do as well as her and therefore I should have treated her differently. That's the substance of the email as I understand it. But she did not want to be disclosed and I don't recall her ever as being one of the people who ever shadowed me and so I can only assume that it was years ago, I was asked every now and again to talk to people who were doing shadowing and tell them about life at the Bar but I can't, I don't think this was in a experience where I was physically followed around and watched.

Stewart: Thank you Chief Justice, one more question, there's two vacancies and there are four candidates, why do you think you should be recommended what will you bring to our bench?

Donen: As the Chief Justice has pointed out I have decades and decades of experience it brings, it covers, every court in the land, the Truth and Reconciliation Commission, the International Criminal Court, and all of that helps me to assess issues, find out what issues are and make sure that social justice, or to see what social justice demands, that's what you get you get out of experience, experience by itself means nothing but it's what you get out of it, and then finding legal techniques to get there. The second thing that I would bring is that I come from a generation where we were conscientised by the freedom charter and therefore it is easier for me, or for our generation, to internalise the values of the Constitution and then to give effect to human rights in giving judgments, I would think that I bring that and third of all I work very hard.

Mogoeng: Thank you Ms Stewart. Is it reasonable to be concerned that you are 66 already?

Donen: No, I'm 65.

Mogoeng: Almost 66?

Donen: Well at my next birthday I'll be 66.

Mogoeng: Should we, is it reasonable for people to be concerned that it's past pensionable age already?

Donen: I respectfully point out that people of age have made a great contribution to our democracy, not that I put myself in that category, but there are certain benefits that come with age. First of all, I don't have family, I don't have distractions.

Mogoeng: You don't have family?

Donen: Sorry I don't have family to distract me, young children, I don't do extreme sports anymore, so the whole focus of my life is in fact on being a judge and then second of all, I have the benefit of age, sorry, the benefit of masses of experience going back to the struggle and the most terrible times. So that helps me in ways that I have already described in answer to the Deputy Chief Justice [sic] and Premier's representative, and I would respectfully submit that if I had come here 20 years ago and you'd have seen fit to make me a judge, I would have had to gain all of that experience at the expense of the people in the court. I would, my dearest wish is to put my experience into the, to make it available for our people.

Mogoeng: What about 10/5 years ago?

Advocate Donen: This is another tricky one. 10/5 years ago I was very conscious of section 174(2) of the Constitution, and I thought that I should give black and female people that opportunity, that it was not my place. But what has happened in the recent past is that I was approached, before these positions became available, by members of the Black Lawyers Association who wanted me to make myself available and I was also approached by members of the National Association of Democratic Lawyers. My upbringing was such that I've always taken the advice of, certainly in matters of political of this kind of nature, of people whose opinions I respect above mine, in the old days we used to call them political commissars, people who knew what I should do politically, and as a result of their requests, I respect them, I trust their judgment, and if they felt that I should put myself up for the post, then I've done exactly what they suggested.

Mogoeng: Yes, and I've notice that you joined Nadel when it was not fashionable to do so.

Donen: Well it was, I joined the Democratic Lawyers Association and we had, people were being locked up and detained without trial, people were being prosecuted -

Mogoeng: Yes it was very difficult to join Nadel at the time you joined it.

Donen: Well it seemed to me to be the only thing to do. We had a deal with the regime and it was a way to organise the response through a legal organisation at a time the UDF and the ANC had to operate underground so, it had to be done.

Minister Masutha: Thank you Chief Justice and good morning Advocate Donen.

Donen: Good morning, Minister.

Masutha: If my stats are correct, there's less than 20 Africans at your bar, there's about 67 black generic, and the number of women on that bar is miniscule, and this is over 20 years after democracy. I get bombarded with smses on a regular basis by African advocates, who are saying they are threatened with closure, because they cannot pay Bar fees, they cannot sustain themselves at that bar because of marginalisation. Why is that bar so alienating of blacks and females, in your opinion?

Donen: I ... I'm going to get myself into trouble. It is a colonial institution, and it perpetuates itself and that kind of philosophy which makes it, and that's why I spoke about internalising the values of the Constitution. I have a feeling that certain people there may know the constitution very well, but they know it as a book, they haven't absorbed the principle of Ubuntu, they don't understand what their duties are and what is in their best interests and it's for that reason that I started off talking about Advocates for Transformation having a 50% representation because then the perception that they bring to the control of the Bar would, in my view, change things. But, they've attempted to do that 18 years ago and they were unsuccessful and they've attempted to do that recently, probably a month ago, and they were still unsuccessful and that is why, probably because I am frustrated, that I feel, and I may even be wrong, people have suggested I'm wrong, that the solutions are the ones that I have mentioned.

Masutha: Now in the rounds that I have done over the past year or so, I have found each court to have its own unique challenges. Your court's challenge centrally is the question of transformation, as I outlined earlier. Now, I've met the Bar, I've met the bench and the context at the time in particular was a stand-off over some 17 nominations for silk, of which one or two were black, questions about that number as well but be it as it may, and to a point where I reluctantly recommended that list, with a proviso that come the next round we do need to see some movement with regard to change in terms of the composition of the list from a demographic point of view. Are you aware of any efforts since on the part of the Bar to ensure that we get more women and more blacks on the list of candidates that are recommended for silk from that bar, as a member of that bar?

Donen: Minister I, I am not closely involved with the Bar, as a Bar, partly because of my membership of the Advocates for Transformation for the past 20 years, so I am not in a position to answer that question, but my proposal would be if I was asked and as someone who's -

Masutha: Perhaps if I may, Chief Justice, in the light of that, and obviously you are a member of the Bar as in, call it an ordinary member of the bar in those circumstances, and I would assume that as a member of AFT, AFT has a conferring relationship with the Bar at least. In that conferral relationship, what is the current way forward on the question of transformation to the best of your knowledge? Maybe let me rather rephrase it that way.

Donen: The difficulty at my Bar is that as we sit here, as I understand it, Advocates for Transformation has boycotted the Bar Council. So, conferral is not what takes place there. So I can't, on that basis, tell the Minister what has been done to improve that situation. I would, and this is again from my frustration, suggest that the solution is the Legal Practice Act, and the abolition of silk as we understand it.

Masutha: I'll put that one aside and we'll follow it through other processes. But, the issue of briefing patterns can be nuanced in many ways, one of course being the reality that, one of the limiting factors being the reality of clients electing particular council to represent them. But even in that context, as you correctly cited an example of yourself, it is possible for council to tag along juniors who are black and female. To what extent is that practice pursued in that Bar, and if there is resistance to using that as a tool for transformation, why then do you agree with the DJP when she suggests that intervention through prescripts is not the solution but rather that the change of attitude would be a better option if, 20 years down the line, that change has not been obvious?

Donen: My view in fact is that 20 years down the line persuasion hasn't helped and I think I tried to make that point right at the beginning, that we've passed the point of persuasion. But in answer to the Minister's question about proposals, there have been proposals and there is a suggestion which I have seen on email by the senior silks that in fact we pass a rule at our Bar that black and female advocates must always be, accompany silks regardless and that there should be compulsory measures taken to that effect. There is such a proposal as I understand it, and its coming from the silks.

Masutha: Chief Justice, I've exhausted my quota so I'll leave it at that.

Mogoeng: Thank you Minister. Commissioner Motimele?

Advocate Motimele: Thank you very much CJ. Good morning counsel.

Donen: Good morning.

Motimele: CJ I just wanted clarity seeking question, it shouldn't count for the three -

Mogoeng: Is it going to be a preamble like the Minister's?

Motimele: No, no. I see in your questionnaire you did not mention the membership for the Advocates for Transformation, but I thought I heard you say you are a member of AFT, is that correct?

Donen: I am virtually certain that it's on my CV, I am a founder member of AFT, I was a member of AFT when it was established in 1998 -

Motimele: It's okay, I just wanted to ascertain.

Donen: And I've been on the executive of AFT as well, in the Western Cape.

Motimele: Very well. Let's talk about transformation in the profession and especially in the Western Cape. The Constitution of the Western Cape Bar, despite a resolution by the General Council of the Bar for co-governance, 50-50, general membership and 50 Advocates for Transformation, still does not recognise Advocates for Transformation for co-governance, are you aware of that?

Donen: I am very aware of it, because that demand was made in 1998 and what transpired at the Cape Bar was that somehow or another there was provision made for "black advocates" to become members of the Bar as opposed to AFT. That was following negotiations and meetings and confrontation and a boycott of the bar in 1998, the same process is being repeated now.

Motimele: Counsel, you are preaching to the converted, between me and you the history of AFT and the Bar, it's well known, just stick to my questions. You said AFT in the Western Cape walked out of the Bar Council?

Donen: No, it didn't walk out of the Bar Council, as I understand it -

Motimele: Boycotted the Bar Council?

Donen: - in 1998 in order to achieve -

Motimele: Let me rephrase my question, and I apologise if I misspoke, did you say or didn't you that Advocates for Transformation in the Western Cape boycotted the Cape Bar Council?

Donen: That's what they did in '98 and I understand it that they made a call presently, within the last few days, for another boycott because there was an attempt made to reconcile our Constitution with the General Council of the Bar and the other Bars, there was a huge meeting -

Motimele: Will I be right to say the answer is yes, you did say that?

Donen: Yes, it's boycotting, yes, so I understand.

Motimele: So you understand?

Donen: That's how I understand it, I see an email that's called for that and I assume if there's a call for that then that's what'll take place.

Motimele: The Cape Bar Council divided the black constituency into three, or the progressive organisation, it meets with BLA, it meets with AFT and it meets with Nadel, which constituencies meeting do you attend when you meet the Cape Bar?

Donen: I never meet the Cape Bar, it is done through those organisations it's not, I've never been personally involved in, not since 1998, and it was very acrimonious and I personally suffered a lot of consequences because I took the side of AFT at that stage.

Motimele: The last question, the transformation committee of the General Council of the Bar resolved, which resolution was endorsed by the AGM of the GCB almost 10 years ago, that

silks, senior silks, should carry juniors, black juniors and female junior, and record those transformative actions they are doing so that we will be able to see the contribution of the Bar in relation to the briefing pattern. You said you normally appear alone without a silk - without a junior?

Donen: No, I have often appeared alone, but what I said is whenever I have appeared and I have been assisted it has almost invariably been with a black female.

Motimele: Very well, back to the resolution, what's your record in relation to that resolution of carrying black juniors and female, since the resolution of the General Council of the Bar?

Donen: I have black female assistants despite that. I've always, since I've had silk, had black female assistants -

Motimele: Counsel, give me the stats.

Donen: Sorry?

Motimele: Give me the stats. I'm struggling to get answers out of you. How many averagely per annum since then, how you doing in relation to that resolution?

Donen: To have black female assistants? I've done nothing but that ever since I've had silk. Whenever I have had an assistant I have insisted that they should be a black female, and I think on one occasion it was a black male.

Motimele: I see you joined the BLA two years ago?

Donen: I think it may have been 3 or 4, but yes.

Motimele: 2014 on your form to 2016 and at the same time you remained to be a member of Nadel.

Donen: Yes.

Motimele: What was it in the membership of the BLA that would have assisted you, why did you join BLA?

Mogoeng: I'm uncomfortable with that question, Commissioner.

Motimele: I will rephrase.

Mogoeng: It sounds unfortunate. Maybe you want to rephrase it?

Motimele: Let me explain the background.

Mogoeng: No, put your question to him.

Motimele: Yes.

Mogoeng: You can argue the background later.

Donen: I can answer the question if you wish me to.

Motimele: No, the CJ says he's uncomfortable, let me rephrase. Programmes, organisations have aims and objectives and they execute those aims and objectives through their programmes, what I'm asking is simply, what does that programme and aims and objectives in the BLA which you thought you could pursue better which you couldn't pursue in Nadel, is it still unfortunate CJ?

Donen: I was becoming, I'd been a member of AFT since its inception, I'd been a member of Nadel since its inception -

Motimele: The BLA, two years ago?

Donen: Yes, and I became, in the recent past, frustrated with the lack of transformation and the lack of what was being achieved and I thought that if I joined the BLA as well that perhaps in my small way and through that organisation I could do a little bit more for transformation particularly of a profession because it seemed, particularly at my Bar, nothing seemed to be changing very much. So it was through frustration and I thought that the BLA would help to give more momentum.

Motimele: I'm a member of the BLA and I don't remember seeing you participating in the programme of the BLA to get that momentum. Never seen you, in fact.

Donen: I belong to the BLA in the Western Cape, and I have attended every meeting of the BLA in the Western Cape that has ever been called, except maybe one, since I became a member.

Mogoeng: Thank you Commissioner Motimele. Commissioner Notyesi?

Commissioner Notyesi: Thank you CJ. I will just start where you left with Commissioner Motimele. BLA and Nadel do not provide for dual membership and my view point, if I'm unfair to you you can indicate and correct me, my view is that your membership of the two organisations at the same time was just an opportunistic thing.

Mogoeng: Well, the Deputy Chief Justice was a member of Nadel and BLA. So when was that cancelled? I'm saying at some stage while in practice the Deputy Chief Justice was a member of both, so when did that preclusion come into being? We've got to be fair to candidates. I know for a fact, while an advocate, the Deputy Chief Justice was a member of both. Unless it's forbidden for Mr Donen alone?

Notyesi: Well CJ, as far as I know, that's not what the constitution of this organisation says. But I'm not going to -

Professor Ntlama: I can confirm CJ that there is no such, in our constitution as the BLA. There is no bar for dual membership.

Mogoeng: There's no bar? Thank you.

Notyesi: Okay, I will withdraw that question. Now, I also note that you are member of the Jewish Board.

Donen: Yes.

Notyesi: What is your view with regard to the continued or the demand for the existence of an independent state of Palestine side by side to -

Mogoeng: No. That is a political question. Please, let it be about the law now. Independent state of Palestine? That's a highly sensitive political question.

Notyesi: I -

Mogoeng: Please. Please.

Notyesi: Thank you Chief Justice.

(Laughter)

Notyesi: Alright, you were involved in the treason trial of Mr Sexwale, what was your role?

Donen: What was my role?

Notyesi: What was your role in that particular matter?

Donen: I was a junior prosecutor, I had just finished University, my studies were paid for by Standard Bank, so I took a job with the Prosecution Service because I had to pay back the money. I then prosecuted murders and rapes and things like that, and one day I was allocated a position as a junior prosecutor in this matter. Once I got into the matter I realised that this was not like the murders and the rapes I was doing, this was politics. I realised also that I was on the wrong side, and after a few conversations with Tokyo Sexwale I was easily convinced that I should be representing the ANC so I resigned, I left the country, I studied the Law of Armed Conflict and the International Protection of Human Rights, I came back to South Africa and I acted exclusively for the United Democratic Front, the ANC, activists like that and I went, during that time, to see Sexwale on Robben Island and he was very pleased with my progress. That was basically the position, I was a junior prosecutor.

Mogoeng: Thank you Commissioner Notyesi. Commissioner Singh?

Commissioner Singh: Thank you very much Chief Justice. Good morning Advocate Donen. I think you may be aware that today for this position, or these two positions, we do not have any female applicants and that becomes a problem for us as a JSC because as the Chief Justice did mention earlier on, that the Commission for Gender Equality, the CGE, does put some kind of, exert some kind of pressure on us to have females, they feel we're not appointing females. Now, you mentioned some female names earlier on, have you ever thought of encouraging any of these females, advocates, to apply for acting judgeship positions and subsequently come through here and apply to be judges with you experience, and things like that, and what has been the outcome of that?

Donen: The outcome was that Karrisha Pillay, who I actively encouraged, acted as a judge, and so did Nazreen Bawa. Whether they want to take it further, I don't know. The other black females are, well, Liziwe Dzai is very junior, but there are among the BLA a number of females who we encourage and who have acted and will one day make great judges.

Singh: Thank you, after going through this process do you think that you would be able to go and encourage some of them to apply for acting judge positions?

Donen: It's not the process, I do that anyway, I have always females, some of them at the State Attorney some of them at even Head of the State Attorney and other because I expected it was an inevitable process and I have done that.

Singh: Thank you, my last question is, when I was looking through your questionnaire and I came to item 8, I began writing a question and then I struck it off because I thought maybe, you know, I was misinterpreting what you had written there but I heard the word "shadow" being used quite loosely earlier on and the question is, "Please furnish any particulars of your membership of any political organisation" and I thought you had written "NIA"?

Donen: No, no "Not Applicable".

Singh: Oh, not applicable so are you -

Donen: I've never belonged to a political party.

Singh: So now you have confirmed that it is not applicable but with your links with the ANC and the UDF and, did you not ever consider taking membership of any of these political organisations?

Donen: Yes, I did.

Singh: But you did not?

Donen: I did not because I am not a political animal. I was on the original DLO executive, which preceded Nadel. I believed that persons, that black people, should have been in charge and I stood down, and the person who took my position in fact used that position and became a politician, and in fact became a Deputy Minister of Justice. It is not in my make up to follow politics, my makeup is in fact to protect human rights.

Mogoeng: Thank you Commissioner Singh. Professor Ntlama?

Professor Ntlama: Thank you CJ. Morning colleagues, morning counsel. Just your opinion, there are reports in today's newspaper that the courts are very legalistic in their approach so we should be adopting the traditional way of resolving our issues.

Donen: Do you want my view on that? My view accords with that of Justice Ngcobo in the *Shibi* and *Bhe* matters, and that is in most of Africa there is statutory law, there is so-called common law and there is customary law, a large part of the population of South Africa have their lives every day regulated by custom. The Constitution says that customary law must be applied, the Constitution provides for institutions which would apply them, and I believe it's the fundamental right of people to follow the customary law in the customary courts, the customary institutes as far as possible and to keep, instead of coming to the ordinary courts unless there are statutory requirements or Constitutional requirements that say they can't be judged and adjudicated and proceed and resolve their problems according to their custom.

Commissioner Schmidt: Advocate Donen, you used some strong politically loaded adjectives to discuss the institution to which you belong, *inter alia* the word "colonial". Do you refer to the association as in general, or do you refer to the Bar Council?

Donen: It seems to be controlled, the large body of people are not like that, but somehow or another, the people who control it seem to perpetuate a philosophy which is not in the best interests of the Bar or the country, and I don't know why that is, so I'm certainly not referring to the Bar. I use the word "colonial" because, in fact, the Cape Bar is a colony and was part of a judicial institution in a colony, and somehow or another that attitude hasn't changed. In 1998, AFT wanted 50% representation on the Bar. People got up from the Bar saying, "you know you're not 50% of the population of the Bar so why should you be there?". About a month ago, the same debate was raised, the same people got up, they said the same things and the outcome was the same. I don't know why that is, it's certainly not the huge majority of people of the Bar most of them are decent -

Schmidt: Because I would like to juxtapose it with, for instance, the Johannesburg Bar Association. I'm not sure whether you would label that association as "colonial" within your view, or not, and the reasons why not or, if so?

Donen: I don't know about the other Bars, to tell you the truth, it just seems that our Bar seems to stand out in South Africa and I don't know what life is like at the other Bars, but I hear the criticism of our bar among all the other bars, I hear that it is the only one that hasn't complied with the GCB rule for AFT membership, I hear that the other Bars have and so I ask myself the question why. I don't know the answer.

Schmidt: And then just lastly, despite this you decided to remain a member of that Bar Association?

Donen: No, I have to be a member of the Bar. I keep my protest to myself and I haven't been comfortable answering these questions, but they were asked and I've given my honest answer, I would prefer first of all to be wrong about my answers, but I'm a member of the Bar and I would like it to change and be like other Bars. I don't like being criticised all the time and being told we're unusual and we don't produce judges and all the rest of it.

Advocate Hellens: In paragraph 9 point 5 of your questionnaire you indicated two outstanding judgments as at the date of filling out the form. Have those judgments been delivered?

Donen: Yes they have.

Hellens: Tell me, could you analyse for me as briefly as possible, what the essential evil or wrong is in reserving judgment for an unreasonable time? I know the norms and standards set various time limits, 3 months etcetera, but let's just take the broad concept of an unreasonably delayed judgment. What is the essential wrong from the point of the judge and justice, for reserving judgments for too long?

Donen: You're denying people justice, you're failing to carry out your duty.

Hellens: In what sense?

Donen: In the sense that you're denying people who've come to court, who've access to justice, an outcome. They're entitled to have an outcome and they're entitled to hear the reasons for that outcome, because the court is accountable to them, the court can't simply disregard people to whom it is accountable.

Hellens: Is that, that's it? You must deliver justice swiftly, and the wrong is in the delay for giving a judgment, there's nothing inherently wrong with the quality of the judgment that comes out if you take a long time?

Donen: No I, with respect, I understand you say longer than 3 months or a long period. I, certainly in this period that I have been acting, take longer to give judgments than I did when I acted in 1998. I try to get something down on paper when I come out of court that expresses my view, I then write the judgment, and I reflect on it, because there's not only the question of getting it right but may I just give one example? There is a judgment I gave its reported in the January Law Reports. When I originally wrote that judgment the result was the opposite. I didn't rush into it, I reflected on it, and I thought there's been a very clever advocate in this matter and he's written books on Constitutional Law, and he's convinced me, but he's wrong, and so I had to rewrite the judgment. So there is a danger, a great danger, in rushing judgments but it is also unacceptable to delay judgments unreasonably and the 3 month benchmark, with respect, is, seems to me to be a reasonable time to require judgments by.

Hellens: I'll change tack. You were asked about your age with regard to taking an appointment, and your answer was that your age brought with it much experience, which I'm sure is not incorrect, but you tagged to that experience your struggle credentials, your experience in the struggle I think are the words you used. What is your struggle credentials or your experience in the struggle got to do with your lawyering experience that leads to the wisdom of age for, to qualify you for a position as a judge? I don't see the connect between the struggle and the lawyering wisdom.

Donen: The connection is, as stated in the Constitution, we are trying to take South Africa from the horrors of the past to a future based on social justice and human rights. I have had an experience of the horrors of the past, because I spent every day of my life for 8 years in those horrible courts and horrible places experiencing those horrible things, and one learns from that experience what justice should not be, and one sees sometimes, even today, echoes, echoes of those experiences when people present cases in the courts. And those experiences help me to identify them, to identify what the problem is, what the issue is, and then to find a just solution. So that is the connection.

Hellens: Mr Donen, I'd like your comment, if someone were to say that whilst this Commission definitely takes into account the overall qualities of a person including commitment to Constitutional values and historical participation in transformation, although those are all relevant, it might be said of your interview that you've leaned heavily on your past, your struggle credentials in order to give a wrong balance to our perception, and that that was deliberate. In other words you've leaned on your struggle credentials in fostering yourself?

Donen: No, if that is the impression that I've given that's not something that I wanted to do, its always been my position, and Dullah Omar made it very clear to me when I was a young man that there are no rewards for being in the struggle, I've never expected any rewards for that,

and in fact I've never expected, never attempted to advance myself, I wouldn't be here if I hadn't been approached by people in the Nadel and BLA, whose views I respect. Otherwise I would have stayed away like I had been doing for a long time.

Mogoeng: Thank you Commissioner Hellens. Commissioner Fourie?

Commissioner Fourie: I heard you saying that you pin your hopes on the Legal Practice Act to advance the transformation agenda. Now as part of the organised attorneys' profession we've been actively involved and supported and encouraged the coming into being of the Legal Practice Act, and we certainly hope that that will be achieved but to be more specific, and I'm sure you've read and studied the Legal Practice Act, what gives you that hope, looking at the Legal Practice Act, on what provisions or on what sections or where in the Legal Practice Act, as it currently stands, do you get your hope from?

Donen: We have been talking about the Legal Practice Act in the context of transformation and I really see the Practice Act within the context of access to justice. The position is that the creation of legal practitioners, all of whom can be approached directly by members of the public in my view, would further access to justice. At present, there is a blockage if you are a person who has a human right, you're denied medical aid and in a township and you come and you can vindicate your right in the High Court, presently you would have to come into Huguenot Chambers, you would have to find an advocate who speaks your language, if you did that you would probably be told that an attorney is necessary -

Fourie: Sorry, Mr Donen, do I understand you correctly that you're saying that in future legal practitioners can be approached directly, that the advocates' profession will not be referral profession anymore?

Donen: As I understand it, it's two-fold, if you have a Fidelity Fund certificate then there can be direct access, which would allow you direct access into the High Court.

Fourie: There will still be advocates and attorneys in terms of the Legal Practice Act and then there will be a third category, and that will be advocates with Fidelity Fund certificates. Are you talking about that category?

Advocate Donen: Yes, I am talking about that category because that, at present, is a blockage. An advocate right now would be very frightened because they'd be struck off the roll if they appeared without an attorney, and the effect of that is that a member of the public has to go through that whole route in order to vindicate their rights in the High Court and that's an obstruction to access.

Fourie: Thank you, my last question. To what extent do you think that that third category of legal practitioners, being advocates with Fidelity Fund certificates, to what extent do you think that will be utilized by advocates, because to be able to get Fidelity Fund certificate you have to comply with all the requirements regarding keeping of books, trust account requirements, oversight requirements in respect of your trust accounts. Do you think that advocates will avail themselves and go to those lengths in order to obtain a Fidelity Fund certificate?

Donen: I don't know the answer to that because I can't predict that, but what I can say is that there may be people who, instead of going to the Bar, go through that process and as their number increases the blockage in access to justice will be improved, I certainly hope that there are people who do that.

Fourie: So your hopes are pinned, in terms of the Legal Practice Act, on the access to justice aspect to advance the transformation agenda?

Donen: Yes I think there is a kind of blockage, almost a monopoly that creates, that stops access, and I think that if that access is made possible then a lot of benefits could arise for South Africa.

Mogoeng: Thank you Commissioner Fourie. Professor again?

Professor Ntlama: Thank you Chief Justice for the indulgence. Just a follow up Counsel, on my question, my question was the courts are legalistic, so -

Donen: Sorry, the?

Ntlama: My question was, it is argued the courts are legalistic in their approach in the application of the law.

Donen: Yes.

Ntlama: Yes, so the issue is, is it possible to use African law as a primary source of law if the courts are legalistic in their approach or are rigid in the application of the law? And secondly, your response you also mentioned the *Bhe* case where the Constitutional Court decided the equality issue and issues of succession under customary law, as an academic I am arguing, in remedying customary law issues the courts was misguided in its approach where it adopted the common law conceptions of the law of succession in addressing the customary law issues. What is your opinion regarding the use of common law principles in addressing the disputes that are arising out of customary law, instead of using customary law as a primary source of law in addressing its own issues under the new dispensation?

Donen: My view is that, first of all I did say that I took the view of Justice Ngcobo, which was dissenting, second of all the position is that if courts are applying common law where they should be applying customary law then they are violating the Constitution because s211(3) is very, very clear, it says that customary law must be applied when it is the applicable law. So if that is happening in cases then they are acting contrary to the Constitution. That is my view. They can't apply the common law where customary law must be applied, it's invalid and unconstitutional.

Ntlama: So, does it mean that customary law continues to be the baby in the new dispensation?

Donen: You would be in a better position to say that than I would, I don't know enough, but my impression is that you're correct and the courts must get their act together if they are in fact applying common law where the Constitution requires them to apply customary law.

Advocate Ntsebeza: Advocate Donen, I was going to ask what Mr Notyesi asked from you because I wanted you to have the opportunity to put to bed this whole question of your being in the prosecution of Tokyo Sexwale. Now, it's your answer here today that, that causes me to ask the question again. I don't query that you were in the prosecution of Tokyo Sexwale, what I want clarity on is the fact that you say, and I don't want to put words in your mouth, when did you get to know that that case, which was in terms of the Terrorism Act and I think the death sentence was called for, when did you get to know that it was not just a criminal matter, it was in fact a political matter?

Donen: I realised, I was brought up in a home where we were not allowed to discuss politics or be involved in politics so I was very naïve. I thought when I saw the charge sheet that this was in essence an attempted murder, that he had shot someone, it was attempted murder, there could be no question of a death sentence. It was only when the trial started that I realised that this was not like the murder trials and the rapes and the robberies that I'd been doing, this is something else, this is entirely politics, and it was in that time that I spoke to Tokyo Sexwale and Joe Qabe and I was convinced that they were right and that the State was wrong, and that I should be on their side and I was convinced by Tokyo Sexwale that in fact I should be representing them, which is what I did. But that trial was seminal to my existence because I then, it determined how I behaved for the rest of my life, I went overseas, I studied what I did, I returned here, I did exclusively the work that I did for that reason because of that trial.

Ntsebeza: No, Advocate Donen, I'm very uncomfortable about that response, in this way. When they were charged, is it so that they were charged in terms of the Terrorism Act no. 83 of 1967?

Donen: Yes, I believe so it was, I think, it was charge of conspiring to overthrow the government of South Africa by violent means.

Ntsebeza: Yes, and it was clear right from the beginning that this was not a rape or a murder or anything of that sort, it was clear right from the beginning when you got the docket to prosecute, was it not?

Donen: It was clear to me that it was not like the cases that I had been prosecuting, it was something that I had never seen or done before, and at the time it seemed that they were charged with violence and I, at the time, the ANC were putting bombs inside Wimpy bars in Pretoria and I thought, well that's something that's illegal, probably morally incorrect to target civilians and I did not at the time think that there was anything wrong with me being involved in the prosecution. But, once it started it was very clear to me that I was in the wrong place at the wrong -

Ntsebeza: Now, I won't take this further other than just to put it to you and you know I, we have been in the same group in Cape Town, we are on the same floor, and we were together in the AFT. I just want to say I will argue, when the time comes, your answer is not as candid and as honest as it should be because, a person of your intelligence, even at the age that you were at when the prosecution against Sexwale and others was mounted, could never have had any doubt whatsoever that this was not just a criminal matter because there were allegations of murder, this was a political case and as you have just indicated it was a charge against those individuals because they were alleged to have been involved in an attempt to overthrow the government of the Republic of South Africa, and there's no way you could have mistaken that as an ordinary murder trial.

Donen: I didn't mistake that at all, I didn't mistake that as a murder trial, I believed that people would come and testify, as they normally do, that these people did these things that they were trying to do these violent things. But the nature of the trial, as politics, was that it was political space which the State was using, the State was trying to label people, that's what I learnt. The State was attempting to label people as "terrorists", "criminals" because they resisted Apartheid, that's what I learnt. I believed when I'd started that the law was the law but it was clearly, I learnt that that was not so and it was for that very reason that when I changed sides, so to speak, I used that political space to do the very opposite of what I'd learnt, during the trial, the State was doing, I used the space to further the aims and objects of the liberation movement as opposed to what the State had been doing previously, and that's to label people as "terrorists" when they were doing nothing but resisting Apartheid.

Ntsebeza: Is this the first time that you are appearing before the Judicial Services Commission for recommendation for the judicial appointment?

Donen: No, no I was here about 18 years ago, about '98 or '99.

Ntsebeza: And this issue was an issue in that JSC, was it not?

Donen: The question was raised.

Ntsebeza: Yes, and are you confident that you gave then the same answer that you are giving today?

Donen: No, not at all because I was caught completely by surprise, and I've had 18 years to think about it, and at the time I hadn't thought about the answer, the question was a surprise.

Ntsebeza: And what answer did you give then?

Donen: I can't really recall, it may have been that I was conscripted that may have played a role, but largely the substance is what I have said. I learnt from that experience that I should be on the other side, that's the substance.

Mogoeng: Mr Donen, I was a prosecutor. You ask me any question about my role then, I don't have to prepare, my answers will be clear in respect of any case. I don't get clarity from what you're saying. Please help us understand so that we don't disadvantage you as a result of lack of understanding. Who drew up the charge sheet? Or the indictment, as the case may be?

Donen: I think a Mr [Gey van Pittius?], the leaders of the team, I was brought in when it was all ready for trial, as far as I can recall.

Mogoeng: And you read the charge sheet?

Donen: Yes.

Mogoeng: You understood it?

Donen: Yes. Well I understood what it said, that people were trying, well it said that Mr Sexwale has shot a policeman and his group were trying to overthrow the government.

Mogoeng: So the terrorism aspect, or the aspect relating to the overthrow ... was patently clear as at the time that you took over?

Donen: Yes.

Mogoeng: And you did it from the beginning to the end?

Donen: The trial?

Mogoeng: The trial.

Donen: Yes, it was patently, clear but it was supposed to be by violent means -

Mogoeng: Sorry?

Donen: It was supposed to be by violent means -

Mogoeng: Yes.

Donen: - and I assured Mr Chaskalson at the time, that as long as I was in the trial there would be no question of a death sentence -

Mogoeng: No, no, no, no. No let's just focus on my questions. What conviction did you ask for? Because it's the responsibility of a prosecutor, take it from me. What conviction did you ask for? Is it in terms of the Terrorism Act, or something else?

Donen: I was not the lead prosecutor, I assume it must have been, he was convicted of terrorism, yes.

Mogoeng: Yes. That's the clarity that I'm missing. We've had people who were members of the Broederbond come here, who were involved in all sorts of things come and say, "you know what? I was a member of the Broederbond, this is what we were about. I shouldn't have been, I'm sorry that I was involved in this thing, I knew clearly what this was about, it's in the past now, and I took a decision years back that I'm not going to be party to this thing". That's clarity. I don't get that clarity from you, and I'm trying to help you. What exactly are you saying? Because initially I thought you said that this was not terrorism it was attempted murder, now there's terrorism, there's shooting of a policeman, I don't understand.

Donen: I did not see the -

Mogoeng: Finally in your own words, what is your explanation? Just very briefly and clearly.

Donen: My explanation is that I did not see this prosecution as any different to any other until it started. Once it started I realised that this is something completely different.

Mogoeng: I don't understand, a prosecutor not only familiarises himself, or herself, with a charge sheet, but he or she consults with the witnesses, which in this case would have included the police, and from the evidence you get to know exactly what the case you are going to present, either as an individual or as a member of the team, is all about. There's preparation that goes into it so how could you not have known, before it even started, what it was about?

Donen: I knew -

Mogoeng: Unless you did not prepare?

Donen: No, I prepared, I knew what the charge sheet said, I knew what had to be proved, but there is a difference between criminal trials and political trials, and that is something that I did not have the slightest grasp of until it started, until I met the parties and saw that what they were doing in that arena was politics, it was not one side proving their case and the other side saying I'm not guilty. It was about furthering, the one side were furthering the struggle, the other side were trying to label people as terrorists. It was not about law, it was about politics, and that's what I simply did not grasp, I did not understand that kind of thing -

Mogoeng: Yes.

Donen: - at that stage of my life.

Commissioner Malema: What did you plead for in that case?

Donen: Sorry, what did I plead for?

Malema: Yes.

Mogoeng: I think it's the convict - the question that I asked you, what conviction did you ask for?

Donen: I was a junior prosecutor so I did nothing I, I didn't do the real talking in the case -

Malema: No, no, no, no, no.

Donen: - there was a lead prosecutor.

Malema: No no, you're not going to do that counsel, you are going to be honest with us. You are part of a collective prosecuting team, stop isolating yourself, and that's what makes you appear different now. You take full responsibility. As a judge, you ought to be honourable and take responsibility, that's what you're applying for, and it starts now. What conviction did you plead for? As a team, what did you plead for?

Donen: The team would have asked for a conviction as charged, it would have been in terms of, would it have section 6, some section of the Terrorism Act.

Malema: What does it say? I'm not a lawyer.

Donen: It was a statutory offense of terrorism.

Malema: What were you pleading for? 20 years?

Donen: Oh, the years. Oh you mean in the sentence. It was a prison sentence, there was no question of a death sentence, and it was a prison sentence. I was, I had given an assurance to Mr Chaskalson at that time that I would see that there would be no question of a death sentence.

Malema: So you didn't plead for death sentence?

Donen: I don't believe that they did.

Mogoeng: I'm sorry Commissioner Malema, something just occurred to me. If you were not involved, there was a lead prosecutor, you were almost an inconsequential member of the team, why were you able to assure Chaskalson that there won't be a death penalty? How were you able to assure him, what authority did you have in relation to sentence which you did not have in relation to the conviction?

Donen: I had no authority whatsoever, but I told him that I would do whatever it took to stop that from happening, and I was not an inconsequential member of the team, I argued I think for *in camera*, I might have presented a few of the arguments, and I might have led one of the witnesses or two of the witnesses, and I cross examined one of the witnesses.

Mogoeng: I thought you said that you were not quite involved?

Donen: No, I was a junior prosecutor, I was not the leader or the brains behind the exercise, I was a participant in the sense that I, when I was told "you will argue this" or "you will cross examine this", that's what I did.

Mogoeng: And you were able to assure Advocate Chaskalson that a sentence won't be death?

Donen: I couldn't give him that assurance, but I could give him the assurance that I would do whatever it took to stop that happening.

Mogoeng: Yes. Commissioner Malema?

Malema: No, no. You just said now that you gave an assurance that there won't be death sentence. You said that now, you just said that now. Now you are twisting it and watering it down, because you can see that it is actually exposing you.

Donen: No, with respect, there was never going to be a death sentence, it was attempted murder, there was a shooting of a policeman, it was not a death sentence case.

Malema: But Terrorist Act is death sentence? You can't say that there was not going to be such a thing when people are charged with terrorism, you can't say that.

Donen: Well I took the view that the crime, however you dress it up, is attempted murder, you shoot a policeman, then the appropriate sentence is for attempted murder. That was my view, and that was what I attempted to convince my seniors and that was the basis upon which I spoke to Mr Chaskalson.

Malema: You know, the purpose of what we are doing here, having gone through your CV, all your qualifications, satisfied ourselves that this is the right candidate, we also bring you here to test you, just to see that what is written here really match the person, and from your presentation here do you think that you have managed to persuade us that indeed you are credible candidate which can be trusted by this committee to be assigned such a huge responsibility of being an honourable judge?

Donen: I have already said that I don't expect anything and I don't have a view of my credentials or anything else, so I obviously leave it to this commission to determine from what they've seen of me and what they've heard of me what should be done.

Malema: You don't expect anything?

Donen: I'm not here to push myself. I'm here for the reasons I've already given, because people who respect me, people who I respect have asked me to be here.

Malema: But if we appoint you do you think that we'll be doing a good thing to those who are listening to you answering our questions, particularly on this case, and people who might be looking for more answers since we have started asking questions about this case. Do you think you have satisfied this body and those who are listening?

Donen: You know, the best person I would say to ask is Tokyo Sexwale, because certainly my impression was when I went to see him and I met up with him on Robben Island and he asked me to try and find out who murdered his, how his brother died in Butterworth, was that he was very pleased with the way I had turned out.

Malema: Unfortunately we are not interviewing Tokyo Sexwale and we'll never interview him, we're interviewing you. Do you think that you've given a satisfactory answer to this question, because I think you are hiding something?

Donen: Well you can tell me what it is that I'm hiding, I've tried to work out, in my own mind, exactly what happened in those days and it may sound wrong but that's exactly what happened. I had a, I came from a background where politics was forbidden under any circumstances, I went into that case thinking in essence, "well here is another prosecution", and I had a, I learnt a lesson which changed the direction of the rest of my life. That's the crux of it.

Malema: Did you participate in any other case where Apartheid's murderous regime killed our people, where you were a prosecutor yourself and people who were prosecuted with terrorism and they were killed?

Donen: No, after that I resigned and I left the country and I came back and defended in those cases as you will have seen.

Commissioner Didiza: Just following up on the last question that has been raised by Honourable Malema, you said that after the Sexwale case after you were converted, you then left the country, studied and came back and then defended those who were part of the struggle at the time.

Donen: Yes.

Didiza: So from the time you were in that case as a prosecutor, when it occurred to you that the, Sexwale and others were actually fighting for a just society, did you recuse yourself, or did you continue?

Donen: No, I continued to the end, partly for the reason that I gave you, and then I resigned and I left the country.

Didiza: Would I be wrong to say, in the first instance, as prosecutors in that case and the nature of it at the time, the maximum sentence you would have called for was the death sentence?

Donen: There was a death sentence for terrorism at that time, I don't believe it was called for, it certainly was not given, it was never -

Didiza: No, what I'm saying is that as prosecutors, at the time, in your arguments in trying to convince the judge, you would have argued that the sentence that that case, in particular those who were involved, it merited a death sentence?

Donen: I don't believe that that was argued for, I don't think that -

Didiza: Was it because you had to convince one another after you, as you say, had been persuaded differently? You said that you were part of the team of prosecutors?

Donen: Yes well it was, my view was that it was, Tokyo Sexwale was alleged to have shot a policeman, that was attempted murder. In those days every case that I prosecuted in had a potential death sentence, this was no different in that sense. But this case was not murder, it was attempted murder. That was the worst that was demonstrated.

Didiza: At what stage did it then occur to you that you had to have a conversation with Chaskalson, assuring him that there was no possibility that there would have been murder?

Donen: It would have been around the conviction stage, I don't remember the precise details, but I remember that I told him that I would do whatever it took and he asked me the same questions that you've asked me, "how are you going to do that?". But it never came to that.

Didiza: Which therefore means in any way there could have been that possibility, that a sentence for murder would have been called for that's why you said - death sentence. That's why you would have said you will do everything within your power to ensure that such a sentence is not pronounced?

Donen: It was, that was one of the sentences, and that's why I said it.

Mogoeng: Thank you Commissioner Didiza.

Malema: CJ, CJ? No, no, no.

Mogoeng: Yes, Commissioner Malema?

Malema: No, no, no. He says it was an attempted murder, therefore the possibility of death sentence didn't exist, and then Honourable Didiza put it to him that the fact that we engaged in such an assurance that there would not be such a thing, it means a possibility of it, existed and you participated in it knowing very well that there's a possibility of a death sentence, you knew that.

Donen: There was a possibility of a death sentence in every case that I appeared in, in those days, this one did not seem to be at that level because usually people had died and no one had died so it did not seem to me a case where there would ever be a death sentence.

Malema: There was no possibility of a death sentence, is that what you are telling us?

Donen: I'm saying in practical terms there couldn't have been.

Malema: So why do you assure that you'll make sure that there won't be death sentence if there was no possibility of death sentence?

Donen: Because I had a leader who was very hostile towards the ANC and he wanted to do whatever he, cause them whatever harm he could, and I was trying, assuring Mr Chaskalson that I would do everything I could to neutralise that.

Mogoeng: Thank you Commissioner. Commissioner Hellens you are the last now.

Hellens: Mr Donen, I want you to understand where these questions have been headed. It may have been at the time your absolute duty as a prosecutor to prosecute under the law to the full level of your duty. That is not what is being questioned here, what is being questioned here is your shying away from the reality that you did what you may well have been required to have done in order to gild the lily of your character, so that you ingratiate yourself with us. There's a stark difference between the two propositions, that's what's being put to you.

Donen: No I was a prosecutor and I prosecuted, no question about that. But when I did it I realised, I didn't wake up 20 years later and say I walked away from it, I realised during the

course of this trial that this is the wrong place, that this is wrong and I shouldn't be here. That's, I didn't take as long as some of your other candidates to realize that what I was doing was wrong.

Mogoeng: Thank you very much Mr Donen, you are excused.

Donen: Thank you Chief Justice.

Mogoeng: Commissioners, we took almost two hours, let's speed it up now without compromising on the quality of our questioning, please.