IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(TRANSVAALSE PROVINSIALE AFDELING)

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DIE STAAT teen: PATRICK MABUYA BALEKA EN 21 ANDER

VOOR: SY EDELE REGTER VAN DIJKHORST EN

ASSESSORE: MNR. W.F. KRÜGEL

PROF. W.A. JOUBERT

NAMENS DIE STAAT: ADV. P.B. JACOBS
ADV. P. FICK
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145

NAMENS DIE VERDEDIGING: ADV. A. CHASKALSON
ADV. G. BIZOS
ADV. K. TIP
ADV. Z.M. YACOOB
ADV. G.J. MARCUS

TOLK: MNR. B.S.N. SKOSANA

KLAGTE: (SIEN AKTE VAN BESKULDIGING)

PLEIT: AL DIE BESKULDIGDES: ONSKULDIG

KONTRAKTEURS: LUBBE OPNAMES

VOLUME 145

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COURT RESUMES ON 9 SEPTEMBER 1986.

TIMOTHY PATRICK SHERIDAN ATKINSON: d.s.s.

CROSS-EXAMINATION BY MR JACOBS: I have no questions to ask this witness.

COURT: Mr Atkinson what experience do you have on the oscilloscope? -- One would have worked with oscilloscopes from the time when one was a student at university where one would have used it for a number of purposes. The oscilloscope is a fairly versatile laboratory instrument.

And in this connection, in connection with tapes? -- (10) The normal application for an oscilloscope when one is working with tapes or tape recordings is in fact to use it for testing the, certain properties of the tape recorder where you would use a standard reference source of sound such as a signal generator and you would then check through the various recording stages and playback stages of the recorder, checking that what you got back from the machine was as close as possible to what you were putting into it. So that would be a major use. As far as using an oscilloscope for analysing the content of material one would use it to study wave forms with a (20) view for looking for distortion, for looking for unevenness about the centre axis to get some kind of indication of frequency of a particular signal, to look at particularly lower, the quieter parts of a tape recording to see what information might be contained in them, and finally one might use it for an analysis of what we call transient responses. Those are relatively quick acting and relatively quick moving pulses. Now it is in that last area that an ordinary oscilloscope is perhaps more difficult to work with than what we call a storage oscilloscope or a device such as Colonel Janson (30)

has where you can actually store a short section of the recorded information or the sound and then you can analyse it on a static display rather than a rather quickly moving display.

Do you have access to that type of oscilloscope which Dr Janson has? -- Well not here in Johannesburg, no. I do have access to similar devices which in Cape Town at the University of Cape Town.

But only at the University? -- That is correct.

So it is not your job to work with that type of os- (10) cilloscope? -- It is beyond my financial means at the moment, they are fairly expensive.

And I take it that you do not use that type of oscilloscope normally in your work? -- No, there would be little need for that in our work.

I ask these questions because Dr Janson, in answer to a question from Mr Yacoob said that he is the only person in court who has the experience on that oscilloscope. It would seem to me that that is correct? -- No I think that is an incorrect statement. We have access to, for the case which (20) we were involved in in Cape Town we had access to exactly the same kind of instrument, it was of a different manufacture and we used it quite extensively.

Who is "we"? -- That is myself ...

I am asking about you yourself Mr Atkinson. -- I apologise My Lord. I have spent so much time representing my company I tend to use the corporate "we" instead of "I". I will try and use the word "I". I spent a considerable amount of time working with wave form analysers, which are devices which store the wave form and allow you to analyse it at (30)

a later time at your leisure and to analyse parts of it, and for that particular case we not only used the wave form analyser we also used it to prepare what I might call giant size blow ups of the kinds of photographs that Colonel Janson was producing. We can actually arrange for the machine to draw out on a sheet of paper an A3 size paper we can draw out the traces and wave forms.

Was that for the purposes of a court case or in the normal course of your work? -- That was for the purposes of a court case. (10)

And how long was the duration of your experience with this machine? -- Well we were working on that case for going on, I suppose four months in total. The time that we would have been spending with the wave form analyser would probably have been compressed into about six or eight weeks of that time.

What is your experience on detecting edits, not on making edits. That is your job I understand, but on detecting edits, that is looking for edits? -- Very considerable My Lord because one of my functions in my company is to maintain or to control the quality of output of the work done by my staff and this (20) I have been doing since we started the first recording studio and one of the things that was particularly critical in the early days, not for the gramphone record or music business but for when we were doing work for the SABC was the SABC at that time for their radio broadcast services restricted the number of splices that you might have in any tape that you sent to them. So that if you sent an half hour programme I think you were allowed a maximum of five splices.

Why was that? -- Well I think that they had had practical problems, you know you would make the tape some time in (30)

advance/.....

advance and send them to the SABC and they would store them there and perhaps at the time of transmission the splice would either be sticky and give problems or worse still would actually break at the time of transmission, thereby destroying the illusion that all radio broadcasts were taking place live. So there were quite considerable restrictions on the amount of splices that you might have, and there were also some restrictions by the SABC in terms of the number of generations in which you could copy material down. That was a bit more difficult for them to enforce but between the two ends of (10) the pincer as it were it would be our responsibility to ensure that as few edits as possible had been made into a programme, or at least as few detectable edits as possible. So I would have quite a bit of experience in that point there. Coming, programme material which had been produced in my absence as it were, I would have been out of the office doing other things, listening through the material and saying look this is either acceptable or not acceptable.

Now thirdly in your experience how often have you come across a case of proven dishonest tampering with a tape? -- (20) That is difficult to answer, I have only been involved in three court cases. It is also difficult to answer because often the problem of proof is not one that seems to fall on the people who retain me. I would not be able to give you an answer to that question.

So the answer is offhand you cannot think of one? -- No I cannot.

There is one possible misunderstanding that I have to clear up. At some stage during the cross-examination on EXHIBIT 7, I think that is the Krish Rabilal one, it was put(30)

that it is a copy. It was put on behalf of the defence that it is a copy. And at a later stage it was put, right at the end, that we are not certain if it is an original or a copy. Which of the two versions put by counsel is correct? Is it definitely put that it is not, that it is a copy or is it put that we are not certain if it is an original or a copy? -- No I think it should be correctly put that we are not certain that it is an original or a copy.

Yes. As far as EXHIBIT 31 is concerned what was put in that connection is there are a number of insert erasures, (10) that was common cause, Dr Janson conceded three, and there is a clear off and on switch, that is also common cause, and then it was put that at counter 442 to 445 there were three efforts at erasure, one on top of each other. Do you remember the sequence? -- Yes My Lord.

Now having said all that what is the conclusion that you want me to draw from that? -- Well if the evidence that I find on the tape is that a number of attempts have been made to erase something then one has to say, I do not have to say but somebody should be looking at it, why was it necessary? What (20) was so important that it had to be done not once but two or three times. If it were to have been done once one might possibly construe that it was accidental but when it has been repeated on a number of occasions then it would seem to me that the possibility of it being accidental reduces with the number of occasions that it is redone.

If it is repeated three times would that be indicative of professionalism or a lack thereof? -- No, it is one of the sort of conundrums of professional life that when things go wrong attempts to patch them generally end up making it (30)

worse/....

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If it is repeated three times would that be indicative of professionalism or a lack thereof? -- No, it is one of the sort of conundrums of professional life that when things go wrong attempts to patch them generally end up making it

worse than it was before you started. No I do not think it is an indication either way.

Any questions flowing from those put by the Court Mr Yacoob?

MR YACOOB: No thank you My Lord.

COURT: Mr Jacobs?

MR JACOBS: No thank you sir.

NO FURTHER QUESTIONS.

COURT: Yes Mr Yacoob, you are at liberty to address me on the question of admissibility.

MR YACOOB: As My Lord pleases. My Lord I have been taken somewhat by surprise by the no questions. I will carry on arguing. I think I will manage but in the interest of saving time if there is a problem I might ask for a little bit of time from Your Lordship but I would prefer actually to get on with it.

COURT: Yes.

MR YACOOB: My Lord the starting point in this matter must be Your Lordship's judgment in relation to the admissibility of the videos where Your Lordship drew a very clear distinction between admissibility on the one hand and weight on the other. A lot of the cross-examination of the expert had to do with matters of weight in the event of the tape being found admissible and I accept that as far as matters of weight are concerned this is certainly not the correct time to raise them, and if one worked on the assumption that all the evidence insofar as the expert, the previous expert was concerned related to weight only and not to admissibility there would obviously have been no justification in calling him. Now

I tried as far as possible to separate the two areas to the extent that it is separable, though there is a matter of degree involved from time to time as will appear from my argument. Now if Your Lordship's judgment in relation to the videos which makes a clear distinction between weight on the one hand and admissibility on the other hand were to be accepted as a judgment applying to the case as a whole, and in relation to not only those videos which Your Lordship was giving judgment on at that stage but were taken to apply to all future tapes and so on which would be handed in then as I read Your Lordship's judgment the position is that tapes and videos would be real evidence, that as far as weight is concerned it is not a matter for Your Lordship to decide alone nor is it a matter for Your Lordship to decide at this stage and for that reason there would have been no question of admissibility which could conceivably have been argued if Your Lordship's judgment were to be so interpreted. I agree with that completely and the position would then be that regardless of the extent to which one would respectfully disagree with Your Lordship's judgment if it were couched in those terms there is nothing one could actually do about it but lead our evidence later. My submission, however, is that while the distinction between admissibility and weight is very clearly made in Your Lordship's judgment Your Lordship's judgment is not, with respect, to be read as being applicable to all questions of admissibility which had arisen and which would arise in relation to videos and tape recordings. My submission is that on a fair reading of Your Lordship's judgment the reference, because Your Lordship there was dealing specifically with videos the reference in that judgment to tape

recordings,/....

recordings, and Your Lordship will recall that again and again there was reference in the judgment to videos or sound recordings, my submission there would be that Your Lordship's reference to tape recordings would have been a reference in passing and not absolutely necessary for that particular judgment in relation to videos. Secondly because Your Lordship was there giving judgment in regard to the admissibility of particular videos on the basis of a particular kind of evidence which Your Lordship had before Your Lordship at that particular point in time my submission is that that was an (10) interlocutory judgment relating to videos only and Your Lordship is here concerned with another interlocutory judgment in relation to tape recordings and obviously I will have problems in persuading Your Lordship that, well not necessarily problems, that is being unfair to Your Lordship, I would have the task of persuading Your Lordship about the fact, with respect of course, that Your Lordship's judgment is incorrect in relation to those matters and I work on the basis that that was an interlocutory judgment and I concede that if Your Lordship's judgment were to be interpreted in such a way as to apply (20) to all the tapes and all the videos I would not begin to have a starting price. Then on that basis, and again I had intended to make available to Your Lordship the judgment of which Your Lordship is certainly aware and on which I intend to rely in order to develop the proposition.

COURT: Is that the judgment by Judge President MILNE?

MR YACOOB: That is so My Lord.

COURT: Yes I have the judgment. I will ask my Registrar to fetch it.

MR YACOOB: As My Lord pleases. But I will not, unless it (30)

is/....

is specifically necessary be reading from specific passages of the judgment or to specific pages and so on.

COURT: Could you just tell me what is the name of the judgment, is it still STATE v RAMGOBEN or is it now something else?

MR YACOOB: My Lord that is one matter on which I had not checked. I am sorry. My recollection is that it is still STATE v RAMGOBEN. My copy of the judgment has no heading because it has been lifted from the record as I understand it.

COURT: Yes, neither has mine and I understood it that some of the accused were discharged and I was wondering whether they had changed the name of that case eventually. (10)

MR YACOOB: My Lord it seems they did not, I would imagine they did not but I will make enquiries and let Your Lordship know.

COURT: Yes please.

MR YACOOB: Certainly before the trial is over.

COURT: Well I think that will be a bit long, you will have to let me know before I give a judgment in this case otherwise I will refer to the wrong case. (20)

MR YACOOB: As My Lord pleases. The other distinction while Your Lordship is waiting for the judgment is that Your Lordship has now heard evidence in regard to the tapes and videos, in regard to the tapes and the evidence is somewhat different. Now as far as admissibility is concerned if Your Lordship's judgment in relation to the videos were taken and applied specifically to the tape recordings then all the tapes would be admissible even before the evidence of any experts were led in this case. Now ....

COURT: Well you can go ahead, I remember some of it and (30)

I will pick it up Mr Yacoob.

MR YACOOB: As My Lord pleases. I do not actually intend to refer Your Lordship to specific pages and read from there and so on because we can all read the judgment.

COURT: Yes. I have it in any case.

MR YACOOB: Thank you My Lord. Before I refer to that judgment the area of the evidence which I consider important for purposes of the admissibility question alone, and that is when one is looking at the admissibility of all the tapes, the evidence which is relevant at a general level to all the tapes in fact covers a fairly small area of the evidence. Of course I will be making submissions to Your Lordship and one looks at each of the tapes in turn, because I will submit that it is not a question of whether all the tapes are admissible or not, there are different combinations and so on to which one could actually get. Now the evidence that is relevant is the evidence that tapes and, tapes could be edited, there are great dangers that one does not know whether a particular tape recording has been edited or not on the basis that one cannot tell in the end whether tapes have been edited or not, and Your Lordship will recall that somewhere in the judgment MILNE, J. deals with the question of the people who would say that well the question is not whether it can happen but rather whether it has in fact happened and MILNE, J. then comes to the conclusion that really on the basis of the evidence he had before him the position is that one can never tell whether, one cannot tell, I do not think MILNE, J. said never but one cannot tell in many of the cases whether this has happened or not. And once that is so then the position is that the dangers loom quite large, and I

want to submit to Your Lordship that the evidence in this case is of a nature which establishes, in my submission fairly clearly, that it is possible to make edits, that it is possible to make them in such a way that they would not be discovered. The two exhibits which would be fairly important as far as that aspect of the matter is concerned are the two tapes produced by each of the separate experts in this matter. The first tape if EXHIBIT 32 which was produced by Colonel Jansen and the other is EXHIBIT 34 which was produced by Mr Atkinson. What those two tapes show is that one cannot argue the (10) genuineness or originality of a tape simply by listening to the tape itself and seeing whether the whole of the tape is in order. Both those tapes have the following characteristics: The first characteristic they have is that both are obviously not first generation recordings in the sense of being an original. Both have the characteristic that what they have done is to a large extent transferred the bumps and warts, as Mr Atkinson calls them, but the deficiencies in the original recording into the copy in such a way that it would be difficult, if not impossible, to tell whether the deficiencies (20) exist in the copy or whether in fact the deficiencies originated in the original from which copies were made. Here I refer to the source material which each of them used. Colonel Jansen used specific source material where he created scientifically certain things for Your Lordship to see and of course Mr Atkinson used other source material which was one of the exhibits in this case in order to create an example for Your Lordship to see. So the second characteristic which is common to both is that the warts or the problems in the original in each case, in one case the warts or problems deliberately (30)

created,/.....

created, that is in respect of EXHIBIT 32 and in respect of EXHIBIT 34 not deliberately created. That difference in my submission does not really matter. What is true though is that those two tapes have the second characteristic to which I have pointed which is that they transfer very clearly the warts and all the problematics in the original recording onto a copy. The implication of this is that the presence in fact of warts and problems and difficulties and erasures and so on on a particular tape does not tend in any way to show any kind of genuineness. Then the third characteristic in relation (10) to both those exhibits is that the edits are actually undetectable in both. Of course Your Lordship might say that of course both these were prepared by experts what do you expect. I say first that in relation to EXHIBIT 32 Colonel Jansen's evidence was to the effect that all he used was a particular kind of tape recorder and it was quite clear that he himself in terms of his own expertise did nothing special to make the recording good for Your Lordship. And in that sense therfore on Colonel Jansen's own evidence as far as EXHIBIT 32 is concerned expertise had little or nothing to do with it. As far as (20) EXHIBIT 34 is concerned all we have is what was put, that it was reasonably easy to do, that a person with sufficient common sense could do it and all the evidence we have on record as far as that is concerned is Colonel Jansen's evidence to the effect that it would take a particularly professional sort of person to do it. But those examples, if that were regarded as, if EXHIBIT 34 properly completed I would imagine would have been regarded by Your Lordship as a piece of real evidence. One of the accused is alleged to have spoken at this particular meeting, and that is the meeting (30)

depicted/....

depicted in EXHIBIT 31 from which EXHIBIT 34 was made. Your Lordship may have got some idea but we are here dealing with the sort of case with lots of co-conspirators and lots of things happening in different parts of the world and I think MILNE, J. also refers to that in some part of his Judgment. here of course the position is somewhat worse because the accused were not even present at the time, at many of those meetings and because there are such a large number of co-conspirators it may not be possible for the accused to tell exactly what was happening. But just as in the case of witnesses Your Lordship found in his judgment in relation to the videos that witnesses, it was not surprising at all that witnesses who gave evidence in relation to certain meetings in regard to the videos could not remember what had happened at that point in time. My submission is that equally it will not be surprising at all, even where the accused had been present at a particular meeting, or even where the accused had spoken at a meeting some three, four, five years ago it is not surprising at all that they cannot remember exactly what they said and it is not possible, it will not be possible to come up with answers in relation to what Mr Frank Chikane said or what someone else said, etcetera, etcetera. So the accused, and in any event that would be a matter of weight in the final analysis and it would be inappropriate and improper to discuss it at this stage. The real point is that by these examples all I am trying to show to Your Lordship is that the dangers of relying on tape recordings are such, particularly when one looks at this sort of case, the dangers are such, and the chances of detection are so small, that the question ought really to be one of admissibility. Maybe at this stage I should/....

should deal with another aspect of Your Lordship's judgment in relation to the videos. The question is not whether, the only difference, if I can put it that way, between admissibility on the one hand and weight on the other hand is not that in the one case assessors will decide, with Your Lordship, and in another case and that is in the case of admissibility Your Lordship will decide by himself. If that were the only distinction then Your Lordship's judgment to the distinction between the English law and South AFrican law would be of full application, which is that here obviously there are legally trained people who serve as assessors. There is another fairly important point of distinction which in fact looms large in a case such as this one, and that is that in this sort of case one, it is proper to determine in advance whether it is admissible or not and it ought in fact to be a question of admissibility so that the question of admissibility and weight can be separated from each other and so that at the end of the State case, before the accused give evidence, and before questions of weight are determined at another stage, it is very clear what admissible evidence there is before the Court and what not. So with respect I would submit that the distinction between ...

COURT: Now just a moment there. If it is ruled to be admissible it is admissible. Whether it has eventually any weight at all is a different matter. So it is incorrect to say that one should know at the end of the State case what admissible evidence there is. The moment it is ruled to be admissible it remains admissible throughout. It is a question of whether one takes any cognisance of it and to what extent you take cognisance of it eventually.

MR YACOOB:/....

MR YACOOB: Well that is so, except that if it is ruled inadmissible then it is quite clear that there is no need to take any cognisance of it because it is not admissible and that is basically the end of that. So that the only point I make is that obviously if Your Lordship rules, Your Lordship's assumption is that, and I am not saying that Your Lordship is already assuming that the tapes are admissible, Your Lordship's assumption for purposes of that argument is what would happen if the tape is admissible. I say well it would also be that the tapes are ruled not admissible and if that is so then of course ...

COURT: No I was taking you up merely on the statement that one should know at the end of the State case what is admissible. Well you can accept it that whatever is before Court and has been ruled to be admissible will be regarded as admissible. But I cannot take it further than that.

MR YACOOB: As My Lord pleases. Well then I was at the stage, I was saying that the dangers actually involved in tape recordings, the extent of the prejudice to the accused, the fact that edits cannot be determined in advance and so on, are factors which clearly point to the fact that this ought to be a matter of admissibility rather than that of weight. I tried to do some work on the question of where the line is drawn, where for example the question of admissibility ends and the question of weight begins. There are difficulties as far as that is concerned and the only line which I have been able to find as a kind of bottom line is that there are two factors which are taken into account. On the one hand there are the dangers inherent in particular kinds of evidence and on the other hand of course the probative value of that

evidence weighed hand in hand with the danger. The only submission I can make is that this is the sort of situation where the dangers are very clearly described by MILNE, J., I agree with them, I submit that those are correct. Little purpose would be served in reading those to Your Lordship ad nauseum but that the dangers are clearly set out. Those dangers are clearly evident, as far as this particular case is concerned as well, particularly if due regard is had to EXHIBIT 32 and EXHIBIT 34 and my submission is that this ought to be a question rather of admissibility rather than that of weight. My submission goes somewhat further to the, and again in line with the judgment of MILNE, J. to say that the dangers are such that certain minimum pre-requisites must exist for admissibility, and with respect even if one takes into account all the requirements of policy His Lordship's statement of the requirements accords not only with the English cases but with the South African cases in that judgment and it seems quite clear that in every one of those cases, and this is the area on which I could have been much better prepared if I argued it later, but certainly it is clear from a reading of the judgment that in every one of those cases there were certain assumptions made and in hardly any of those cases was the position where there was no witness who gave evidence in regard to the event itself. Now the accused's position in relation to this matter is in fact a very difficult one. Your Lordship has asked again and again what is your version on this, what do you say about it, is it true that what was said was in fact said and again, and Your Lordship will recall that I said that Your Lordship and I have different points of departure. I think those different points of

departure/.....

departure arise actually out of the distinction between admissibility and weight. If the question was simply one of weight then quite obviously there would be, it would be, the proper enquiry would be what do you say about this, what exactly is your version in regard to this matter. It is precisely because, in my submission, it is a question of admissibility rather than a question of weight that the accused's position became a fairly difficult one. The accused's position became a difficult one at the level that we have no information in relation to what happened in connection with (10) the tapes, we cannot say whether they are originals or copies, we cannot say whether they have been edited or not. We are in a position where we were not present at many of those meetings even, we are in a position where speeches being relied upon which were made a long time ago, speeches which the accused would not have heard, speeches which one has some considerable doubt whether the people who made them would remember, particularly accurately. Unless of course there were, as distinct from physically clumsy edits, intellectually is the best word I can think of, clumsy edits at a totally (20) different level where for example if the edits were intellectually as clumsy, and I do not intend any harm to Mr Atkinson by that, as that in EXHIBIT 34...

COURT: By intellectually as clumsy you mean that it does not fit?

MR YACOOB: It does not make sense, yes.

COURT: Yes.

MR YACOOB: And it actually is totally wrong. For example many people would know, the switches of names where one was a journalist and one was a member of the executive of the (30)

NIC. Quite often in questions of admissibility in relation to confessions one does get that sort of totally out of contextual thing which one can actually rely on, but it is quite clear that if it was that sort of error where the thing was completely out the accused would pick that up but the accused would pick them up only at the level that it would be so obvious. And talking of obviousness therefore the other aspect of the evidence which is relevant to this particular enquiry in regard to admissibility is the fact that on the evi evidence of both experts, on the evidence of Colonel Jansen, (10) fairly read, if one looks at the number of times the word "opvallend" or "opvallende" appears in his evidence, in the reports and so on it is in fact quite clear that Colonel Jansen was looking simply at the fairly obvious implications. But there is another problem which would actually make it one of admissibility, make the question one of admissibility rather than one of weight, and that other difficulty is that when one is listening to a tape which is long then there is an element of the subjective involved, and for the purposes of this argument let us accept that the reason why, there (20) are very good reasons why Colonel Jansen missed the, what we have called the pause edit at 002, at our counter reading 002 on the 7700 in the Luthuli tape. But the fact that he missed it, even if one does not criticise him for the fact that that was missed, it is not enough to say he missed it, he found it and he has now told us that it was there. How far does that get you? I use this simply to illustrate another danger, that an expert who has had considerable experience with tape recordings has got himself into a situation where, and maybe he is not to blame for it at all, where he has missed (30)

something/....

something obvious on a particular tape. If a person, and it could happen to anybody. The difficulty, the only point I make about that is that there is an element of the subjective in an analysis. If an expert misses with considerable training such an obvious thing like a pause, and I do not talk about differences in interpretation and so on and so on, those things would probably go to weight in the end but if an expert misses something which is fairly obvious then what chances do Your Lordship and I have, if I may say so with respect, not being experts in relation to this particular (10) matter finding more than any expert found, or looking at what one regards as a piece of real evidence and making sure that that even obvious indications, that there are problems with this particular matter are in fact picked up. The real problem, as MILNE, J. put it, is that the tape is not a witness, it cannot actually be cross-examined and these would be some of the difficulties which would have been borne in mind, not as fanciful bits of speculation but as real possibilities as demonstrated in this court. It was quite obviously, a rule is determined, a rule of law or a rule or practice would be (20) determined not in the air but in the light of real experience. I wish to commend Your Lordship to the real experience which Your Lordship has had in this courtroom in relation to EXHIBIT 32, in relation to EXHIBIT 34, in relation to what an expert can and cannot miss, to highlight the dangers inherent upon, inherent in relation to this sort of evidence. My submission is that the requirement that in addition to the tape recording itself one ought to have had a witness, in fact the evidence in relation to the videos is another distinction. The evidence in relation to some of the videos was at a much higher (30)

level/....

level I would say than the evidence in relation to the tape recordings although ...

COURT: Could I ask you a couple of questions on the judgment of Judge President MILNE?

MR YACOOB: Yes My Lord.

COURT: Do I have it correct that initially there seems to have been a misunderstanding on the part of the State as to the scope of the enquiry. They had in mind that it would only be the experts that would be led and then on the basis of the expert evidence that there would be a ruling and then it seems that after the ruling was given there was an application to reopen the matter to lead certain evidence which the State had but had not led and that is the evidence of the policeman for example who took the recording and those who took it to the forensic laboratory etcetera, etcetera? In the course of the judgment on whether the State case should be reopened or not MILNE, J. made certain observations, and I think his conclusions were that it would not help at all to reopen the case.

MR YACOOB: In most of the cases.

COURT: In most of the cases because it would take the matter no further.

MR YACOOB: Right.

COURT: The evidence did not go far enough. That is the way I understand the judgment.

MR YACOOB: Yes as I understand, I cannot remember the first part but as far as the end of the judgment is concerned what was clear is that His Lordship gave a judgment on the requirements of admissibility. He then said let me now look at the evidence which the, the further evidence which the State

intends to lead and as I understood it the further evidence which the State intended to lead was not further evidence in order to enable the Court to come to a proper judgment in relation to the issue of admissibility but rather to say look we do have more evidence to lead in relation to why the tape is admissible, rather than in relation to a judgment about what test should be applied in determining whether a tape is admissible or not.

COURT: But would that evidence not have helped in a proper decision of the case in the sense that it could have had a (10) bearing on whether the tapes had been tampered with or not? Because if you exclude tampering along the way, that is from the forensic laboratory to the man who recorded and if you exclude tampering by the evidence of the man who said "I recorded" what else is there then in between, then there can be, either you can reject the man who recorded's evidence, but where is the tampering then? Or do I have it wrong? Can it be that MILNE, J. decided that you also have to bolster the evidence of the tape or video, whatever it is, by that of a witness who was present and who confirmed that it is in (20) fact correct?

MR YACOOB: Yes My Lord, that is what MILNE, J. said in fact but the ...

COURT: But now I have this difficulty with that proposition, and that is what is the use of the tape then? Can the tape then never stand on its own legs?

MR YACOOB: No, no, maybe I should answer Your Lordship's second question first. Let us take, yes perhaps this example will sort it out, let us take a situation where one had a shorthand writer who went into a meeting, let us assume that (30)

he or she was an expert shorthand writer capable of making a perfect record of everything that was said at the meeting, that shorthand note was in fact transcribed and put before Your Lordship. That is the one situation, that is putting the witness question which YOur Lordship raises and making the assumption that the witness was at, the evidence of the witness was at the highest possible level, at the transcript. The other is then the tape which is put in and my submission is that the tape is worth more, much more than the transcript, and for purpose of the comparison what I have done is put (10) the transcript, put the position of the witness at a very high level. The differences are that one gets intonation patterns at pretty much the same sort of differences which Your Lordship referred to in the video judgment as being the strength of video evidence. Of course one does not go as high as that because the visual element is absent as far as the tape recording is concerned. But very clearly one gets intonation patterns, one gets emotion, one gets the emotion of the audience, one gets the atmosphere in the place, one gets the style in which the person spoke etcetera, etcetera. (20) And my submission is that the tape in a sense certainly takes the matter much much further. But there is a second point of distinction. The second point of distinction in the example that I have mentioned is, in a sense it is pretty much a matter of degree. Where the tape one hundred percent agrees with the transcript of the particular witness then my submission is that the case of the State, assuming that that case was based only on speeches at that particular meeting, would be absolutely unanswerable. All questions of admissibility, all questions of weight and so on would be taken (30)

care of and trying to look at the matter from the point of view of the accused in such a trial as a legal representative I will not know what I would be able to do. But again this is simply to illustrate the fact that there are these differences.

COURT: Now I have this difficulty with that judgment and that is that I do not entirely understand what the Learned Judge President had in mind when he laid down the requirement that somebody who was at the meeting should give that evidence. How far should that person go? Should he say "I was at the meeting and I remember five words of a speech and those five words coincide with what is on this tape" or should that person say "I remember the speech as a whole and this tape is exactly as the speech was"? What does the Learned Judge President intend to say? In the second instance which I have put to you it makes it virtually impossible for anybody to support the tape because nobody can remember a whole speech.

MR YACOOB: Yes, unless of course he made notes at the meeting itself, which he then spoke to. So firstly one could have the, well let me deal with Your Lordship's first question. It is true that His Lordship the Judge President does not make it clear how far the evidence of such a witness should go. That, as I understand it, was because that sort of situation did not arise in a case such, in that particular case. And the reason the Judgment as a whole, firstly it seems that no witness to the event had actually been produced, secondly, and I must check this again but the one instance where permission was given to call a witness is where they intended to call a witness who was actually at the meeting, and presumably....

COURT: But he was not called was he? I doubt it.

MR YACOOB: No, no, because as I understand it the State,

despite the fact that the State was given leave to lead some further evidence in relation to one of the tapes what happened, and I speak now only from my own knowledge of what happened, what happened was that the case in a sense folded without the State making any effort to call any further evidence.

COURT: Now could we just pause there. If what you say is correct then the Learned Judge President must have been of the opinion that a witness who attended a meeting, and said well the tapes sound like what I heard would go far enough to make that tape admissible? (10)

MR YACOOB: My Lord not, may I put it another way? I would make the submission in this way, I would say firstly that the Judge President was, the Learned Judge President was silent on the particular question and for that reason why evidence is sufficient or not of that particular witness for purposes of admissibility would depend on the circumstances of each particular case to be determined by the judicial officer presiding at that particulare case because Your Lordship will remember that part of the judgment in which MILNE, J. said that these would in fact be the minimum requirements of (20) admissibility, now the submission I would make in that regard is that it does not help on the one hand to have a witness who says "I was at the meeting. I actually do not remember what happened there but I was actually there. I am not too sure but the tape might well be a proper representation." That will be making nonsense of the judgment of MILNE, J. and that would clearly be insufficient to take the one extreme. The other extreme would be to say the witness must go to the length of being a shorthand writer, the sort of example I gave Your Lordship and again I would say that that is nonsense at (30)

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the level that it places too heavy a stricture.

COURT: Well is this not what he says because the words are:

> "It must be proved beyond reasonable doubt, by way of the testimony of a witness who saw and heard the events allegedly recorded, that the recording accurately reflects those events."

Now one can only say it accurately reflects the events if you can say that in toto of every word spoken?

MR YACOOB: Then what has to be able to say, I can, well heaven forbid that I may ever have to but I can give to Your Lordship in an hour I would imagine, or anybody, let us leave myself out, but any person with reasonable skill would be able to give to Your Lordship an accurate account of the evidence of Colonel Jansen in this case.

COURT: Well let us put it this way Mr Yacoob. Without referring to my notes I would not be able to tell you what he said three days ago exactly on which points.

MR YACOOB: Yes My Lord, but ...

COURT: Maybe I am not a normal person.

MR YACOOB: I would not begin to suggest that. But my submission is that it would be possible if a witness went to the meeting and listened because the difficulty about going to a meeting is that he goes there and ends up not listening. But if ...

COURT: Well some people go for the singing.

MR YACOOB: It seems to me that that is so. But anybody who went to a meeting for the purpose of listening to it carefully and for the purpose of remembering, and these are not very serious technical matters which were discussed at this particular meeting, but my submission is that any person who

went there for the purpose of remembering it would not remember each and every word but would remember sufficient to enable him honestly to say that this tape recording is an accurate reflection of the meeting. Quite obviously the tape recording would be there, he would be subject to cross-examination in regard to whether it is accurate or not and why he says it is accurate and so on, and as I imagine it there could be various different levels of evidence and the accurate does not mean, in my submission in relation to that judgment, accurate word for word but one is talking about reasonable accuracy, (10) and I would submit that what that particular passage means is that there must be reasonable accuracy, that a witness must be able to establish reasonably the accuracy of the tape by the kind of evidence he actually gives. For the rest it depends on the sort of witness he is and it will be for Your Lordship to decide whether or not a particular witness in a particular circumstance reasonably accurately, or is able to say honestly and reliably that the tape reasonably accurately represents what happened at the meeting. The only way in which one can deal with that is, and I exclude quite cate- (20) gorically the suggestion that the only way in which this can be done would be to have this sort of shorthand writer that one spoke about who would be at the meeting and so. And my submission is that the requirements put up, as I said, are not particularly stringent particularly if regard is had to the use of the word, if the judgment is interpreted not on the basis that one needs that sort of shorthand writer, and my submission is that on a proper interpretation what that judgment in fact means is that there must actually be a reasonably accurate representation. Now to come back to Your Lordship's (30)

earlier/.....

earlier question, if I still remember it correctly, as I recall the judgment His Lordship said these are the things which I think must be proved before a tape is in fact admissible. As I understand the matter the application for leave to lead further evidence, and this is hearsay, was conceived as a result of the impressions gained during argument, and YOur Lordship knows that these impressions can lead to lots of imaginative things. Then His Lordship gave a judgment and said look I regard these as the criteria for admissibility for these reasons. Then he spent a long time looking at (10) the application in each case. Where the evidence sought to be led did not meet at all the requirements which, I am sorry let me put it another way. Where the evidence already led in connection with a particular case seen together with the evidence sought to be led in relation to that tape did not meet or would not, in his Lordship the Judge President's view have met the requirements already laid down by him earlier in the judgment he refused the application and as I recall the evidence, I will go through it very quickly again at some stage, in most of the cases the difficulty was that what- (20) ever additional evidence the State sought to lead, whatever additional evidence the State sought to lead did not cover the question of having that additional witness inside in the hall present at the meeting, and that was the reason why that was actually thought about. Then there is the other question, and I cannot answer that, Your Lordship's question in relation to tampering and the whole question of whether any of the evidence sought to be led sought in fact to exclude the question of tampering. But apart from going to the judgment may I deal with that at this stage. Your Lordship's suggestion, (30)

as I understand it, is that once one excludes from beginning to end all possibilities of tampering and once one is sure that this is a recording of the meeting then it seems unnecessary to have any witness because a tape which has not been tampered with at the beginning, which remains untampered in fact remains untampered at the end. That, with great respect, is not an approach which takes into account all the problems that are on the tape. Firstly it is not possible by reference to the tape itself to establish the proposition that there has been no tampering. At the level of an objective situation one cannot really establish that position. Secondly the accused are presented with evidence with which they actually have had no contact at all and therefore one is really in between two fences here when for example policeman after policeman come to give evidence in regard to whether they tampered with the tapes or not. The position might well, also the question depends on the order in which the evidence is led, if the evidence of the expert is led first and one is aware of the various problems and so on and so on on the tape then obviously a measure of cross-examination can actually take place. But my difficulty in this case has been, and as I said earlier that rules and rules of law and rules of procedure arise in fact out of realities, they do not arise out of the air. The difficulty here, and the real difficulty here is that the accused had no contact with those tapes. It would be irresponsible of them to allege that there has in fact been tampering because they do not know. And it is impossible, and therefore you have no material, no material, no information on which to cross-examine those people who have custody of the tapes. Then of course one has the difficulty that, and

what/....

what we did in this case was a realistic thing where, if Your Lordship looks at the admission, we admitted everything short of calling every policeman in but left some time during which we could submit that tampering may have taken place.

COURT: Only by the original recorder?

MR YACOOB: Only by the original recorder. That was a...

COURT: So the question remains then eventually on whether the Court should believe that man or not?

MR YACOOB: No, no, no. The question is really this that the requirements of admissibility set out by MILNE, J. (10) are somewhat overstated as I understand Your Lordship, and that the matter would be cured if you believe that the tape, if Your Lordship believes that the tape has not been tampered with. Once Your Lordship believes that or does not believe that...

COURT: NO, no, I have not expressed any opinion on what MILNE, J.'s judgment means. What I put to you is this that in pure logic if one excludes tampering by the wayside, if I may call it that, if one believes the witness who originally recorded that he did not tamper, if one is sure that what was recorded was the proceedings inside the hall then in pure (20) logic where is the flaw?

MR YACOOB: In pure logic there is no flaw and here I make a distinction between pure logic and reality. The reality of the matter is that that is not a sufficient safeguard, bearing in mind the dangers. The reason why I say it is not a particular safeguard is that unless, from the point of view of the cross-examiner, there is specific information of tampering on the basis of which one can actually cross-examine the evidence ends up being a neutral sort, of a neutral sort of character and Your Lordship ... (30)

COURT:/....

COURT: What is neutral?

MR YACOOB: Neutral is ...

COURT: The witness says "I don't tamper", that is not neutral. That is positive.

MR YACOOB: No My Lord it would be of a neutral character at the level that no probabilities would arise from his evidence really ...

COURT: Yes but then you cannot work it on that way, it is a question of the Court eventually either believing or disbelieving the witness. (10)

MR YACOOB: Yes, but my submission is, I am actually saying that the requirements of admissibility should be as stringent because if they are not the accused is particularly disadvantaged because he does not have information on which effectively to cross-examine the witnesses in order to establish possibility of tampering and my submission ...

COURT: But Mr Yacoob either we are dealing with a rule which differs from case to case or we deal with a general rule of admissibility. The mere fact that in a particular case a particular accused is hamstrung because he has not got (20) information whereas in another case the accused may have all the information in the world to cross-examine on does not mean in the one case you can have one rule and in the other case you can have a different rule.

MR YACOOB: No, that is precisely the point, and I am saying that when the rules are formulated the rule should be formulated to be a proper, to be a reasonable effective well working rule which would not in fact start changing from time to time and so on.

COURT: But the normal rule Mr Yacoob would be applicable (30)

to cases where the police have a secret microphone in a hall or, well not a hall, a room where the accused does, says something or does something. That is recorded and then the accused comes along and says well I did not say that, the tape has been tampered with. It is all very easy for that sort of situation the rule was made. Now we cannot make a different rule because in this instance other people were talking and they were talking at a public meeting in a hall where the accused were not present.

MR YACOOB: All I am saying is that the rule must be broad (10) enough to take account of the widest variety of circumstances and, so that it has, the rule must be so determiend that it has a fair application in the majority of cases. My submission is that the way in which MILNE, J. has defined the rule makes it, does it in such a way that it does have a fair application in a number of cases and what I am simply putting is that the way in which Your Lordship formulates the matter and the problem is, with great respect, incorrect in terms of the formulation of a general rule because it does not cater for many circumstances. A rule to last the test of(20) time ought to be able to cater for as many circumstances as possible or to be able to have wide general application and my submission is that it is this rule which has wide general application. Otherwise one would take each case on its merits, one would say in relation to each case now how long ago did the accused speak, was there any possibility of tampering in this case or not and one would have a variable rule depending on the circumstances of each particular case in relation to admissibility. The point about a general rule is that it must as little as is possible be dependent on (30)

the circumstances of every case and it must operate fairly over a wide range of cases. And my submission is that this rule operates fairly over a wide range of cases, the sort of rule which MILNE, J. has enunciated and the approach which Your Lordship suggests is one which does not operate fairly over a wide range of cases because as like experience would have it, more as a rule than the exception where the police have made tape recordings and where a long time has elapsed it would be impossible, it would be difficult if not impossible to prove tampering. Then I must deal briefly, before I get (10) onto each of the tapes separately, with the question of whether a tape recording is a document or whether it is real evidence and so on. Your Lordship has already ruled that, again I have been unable to work out whether Your Lordship has ruled that all videos and tape recordings are real evidence or whether the videos in that particular case were real evidence and admissible, the only question to be left is the weight to be attached thereto. But on the assumption, of course if Your Lordship has ruled that all tape recordings and videos are real evidence then that ruling is applicable to the whole (20) case, then I do not have a starting point in this ...

COURT: Well even if that is ruled it is an interlocutory ruling and you can attempt to sway me.

MR YACOOB: As My Lord pleases. May I start with a couple of examples of what real evidence is. The classic example given by Hoffmann of real evidence is for example the knife which is a murder weapon. It is real because nobody has manipulated it, altered it, caused something to have been done with it or anything like that in any way, and it was not ...

COURT: But what about the blood on the knife? That may (30)

have/....

have been put on the knife later on? But it is still real.

MR YACOOB: Yes, that is so. The blood on the knife is certainly real and certainly what happens is that comparisons are made between the blood on the knife and something else. But essentially real evidence of the sort that we have been used to up to now has been ...

COURT: Well actually we live in a changing world Mr Yacoob and we will have to adapt our rules.

MR YACOOB: Yes, I do not suggest that rules ought to remain standard but the rules could be adapted in two ways, by (10) either extending the definition of real evidence, which Your Lordship appears to have done on my reading of, not extending necessarily but by saying that tape recordings are also real evidence.

COURT: Yes I did not stand alone, MILNE, J. said the same, MULLINS, J.

MR YACOOB: MULLINS, yes.

COURT: In the Eastern(?) cases.

MR YACOOB: That is so My Lord. But real evidence is actually limited to physical objects. (20)

COURT: Well is real evidence not something which the Court can see and hear for itself? Now if that is the definition then a tape is something which the Court can listen to itself. It may create an incorrect impression but so can a knife with blood on it.

MR YACOOB: My Lord my submission is that blood even on the knife is physical, is something physical whereas what the tape has on it, and what video has on it is a whole range of information put there by the person operating the tape recording. It is, suppose the real analogy is this that if a policeman(30)

comes/....

comes into the witness box and he says "But look at the scene of the crime there I found a knife which had blood on it". Then clearly the blood in that context is real evidence. The example might look ridiculous but it is the only way in which I can make the point. But if a policeman says this, "I went to the scene of the crime, I saw a knife lying on the side, I saw blood lying next to it and what I actually did was took the blood and put it onto the knife" just to illustrate that comparing a tape recording with information recorded on it with a knife with blood on it is not, with great respect, (10) a proper comparison. What the policeman does in this particular case is that he goes there with a tape recording which has nothing on it or which has something else on it. What he then does at the physical level is that he makes use of certain equipment to transfer information onto the tape recording. The real difference between the knife and blood exmaple which Your Lordship has given and the tape recording is that in the knife and blood case there could be a dispute about whether the blood was on the knife at the stage when it was found on the scene or who put the blood there, and in (20) that sense it is real. Here it is common cause, if one takes the knife and blood example, that the blood was actually put on by the policeman if I may put it that way. My submission is that that is the real difference, that one does not, unless, that one does not know exactly what the position was in relation to these tapes, and I am not talking about these tapes in particular now, generally speaking there are certain dangers and those dangers are not adequately catered for and with great respect a classification of a tape recording simply as real evidence on the basis that there is no difference (30)

between that and a knife with blood on it, that sort of classification rather than taking account of modern developments, with great respect, I would say this really ignores the complications, the difficulties which arise out of modern day sophistication and I do not begin to suggest that that is a difficult problem. My submission is that once you have the situation where there is then a phenomenal difference, in my submission, between the sort of real evidence a person's shoe or something like that is found at a particular place etcetera, etcetera. Here it is common cause that the evidence in fact, (10) the nature of the record changes, you do not have a shorthand writer making a note. Quite clearly so. But really what is important about the tape recording is not that the tape recording, the tape is an object like a knife is, really the tape is like a piece of paper or a blackboard or something. It is just a new method of the accumulation of a recording of a transfer of information. That is what it really is and with respect if one looks at documents on the one hand and real evidence on the other hand the real difference between documents on the one hand and real evidence on the other is (20) that documents have information recorded on it, and in a sense the piece of paper which constitutes the document is also an object, like a knife. But the point of distinction between real evidence on the one hand and documentary evidence on the other hand is that the one has information recorded on it, information which is intelligible, information which is put on by a particular method. In relation to a document you use a pencil or a fountain pen or whatever to write it down. In the case of a blackboard one uses chalk or whatever to write it down. In the case of a tape one uses simply a (30)

tape recorder. Can I put the proposition this way, that a tape as an object is no more real evidence than a piece of paper on which a document is written, and my submission is that if one then accepts the submission that tape recordings, like documents, are simply a new different modern method of recording information then they equate much more in conceptual terms to documents than they do, in conceptual terms, to the real evidence that we know of, such as the knife with blood and my submission is that the confusion, with great respect, arises actually because the information is recorded on an object, something which looks like an object, a piece of magnetic tape and so on and so on. And one tends, quite naturally, to pay more attention to the object which is there rather than to pay attention conceptually to the differences between the two. My submission is that I cannot agree, it is not for me to agree, my submission is that ...

COURT: Well your submission is that a document and a tape have so much in common that a tape has to be equated to a document and that the rules applicable to documents have to be applied to tapes.

MR YACOOB: Yes My Lord, if it has to be equated to anything.

COURT: And if that is the starting point then of course you are right on track on MILNE, J.'s judgment.

MR YACOOB: That is so My Lord. Then at the general level then this is as far as I take it and the real problem then is whether it is real evidence, and there is another reason why, I actually will not take that any further. So, I want to move onto certain specific areas. I have been trying to keep going without an adjournment. Is it possible to have an adjournment at this stage until 11h10, it may save a lot of time later.

COURT ADJOURNS.

COURT RESUMES.

FURTHER ARGUMENT BY MR YACOOB: As far as MULLINS, J.'s judgment is concerned, and unfortunately I have not been able to get hold of it, either I am right or I am not but he seems to have excluded, for purposes of his judgment, audio tapes and from a reading of the judgment as a whole it seems that MULLINS, J. drew considerable comfort from the fact that he could see as well as hear in relation to video tapes. That would be a point of distinction which I would ask Your Lordship to take into account as far as MULLINS, J.'s judgment is (10) concerned. Secondly, again this argument is on the basis that a tape recording is more a document than an object, that more care would need to be exercised where one is dealing with magnetic storage material, magnetically stored material, than where one is dealing with a document. And again I make reference to the fact of the ease with which things can be changed without the, the real problem is without any record being left behind and if there is one statement of Colonel Jansen with which I agree, it may be on the record that we got this morning but I have not been able to trace it yet, when I put to him (20) the whole concept of elastoplast edits and said to him that the real problem is that it is different from elastoplast on the basis that one does not know how deep the wound was underneath his answer was "Dit kan beweer word maar dit kan nooit bewys word nie." My submission is that that statement more clearly expresses everything that I want to say to Your Lordship more clearly than I could do it myself because that is the real danger, that you can do things with tape recordings in such a way that "dit kan nooit bewys word nie". Then on the basis that Your Lordship does not agree with submissions (30)

thusfar/....

thusfar advanced at the general level may I simply deal with the argument if it were to be advanced that comfort can be drawn, assurance, some security can be drawn from the fact that an expert, no two experts, have looked at these tapes, that very limited difficulties at the level of the tapes themselves have been pointed out to me and on that basis, particularly because both experts who have some skills have looked at the tape and what has been pointed out has been limited, that on that basis it would be safe to rely on the tapes. My submission is that that would be an incorrect basis for the following reasons: The first reason is the obvious things which Colonel Jansen could have missed, in particular I talk about that pause interruption which does not make it so safe and one cannot really say he picked up everything. Secondly I point out that, and again Your Lordship will have to make up his own mind about the differences between what he hears on the tape and what we hear on the tape, and I advance this submission on the basis that our assessment of what we hear on the tape is correct. If Your Lordship comes to any other conclusion, if Your Lordship comes to the conclusion that Colonel Jansen is correct then this argument would have no applicability but it will have applicability on any of the two other bases, (a) that we are correct and (b) that Your Lordship does not know who is correct. If we are correct, and it is quite clear that Colonel Jans n did not hear things which were on the tape, did not analyse a number of the interruptions with sufficient care, more particularly in relation to the different kinds of sounds which occur, and the reason for that I got the impression was the absence of time and pressure of work and so on. The overall impression I got. Also the

question/....

question is one does not know if filters were on on one occasion, when else filters were in fact on. Because of the absence of time and perhaps other reasons, considerable pressure and so on the tape recordings, I make the submission, were not analysed as well as they ought to have been. Indeed in terms of Colonel Jansen's own evidence he said that he looked at the obvious things only and even there he missed certain things. The fact that a second expert also examined the tapes cannot give much more comfort. I emphasise they are preliminary findings and the fact that Mr Atkinson was indeed at pains (10) to emphasise that he could not say whether there had been editing and that his investigation was not as complete as he would have liked. Against that background then I will turn to each tape in turn and deal with each tape on certain alternative bases, firstly on the basis, if Your Lordship agrees, with MILNE's judgment, secondly, firstly if Your Lordship agrees with MILNE's judgment certain results.

COURT: Judge Milne's judgment.

MR YACOOB: Sorry My Lord.

COURT: Or you may refer to him as the Learned Judge (20) President if you prefer that.

MR YACOOB: As My Lord pleases. It was just in the process of talking, I intended no disrespect.

COURT: Yes.

MR YACOOB: If Your Lordship agrees with the Learned Judge President's judgment then certain consequences follows, then certain other consequences follow on the basis of the tampering argument and then of course EXHIBIT 1 I would submit is in a category all of its own. May I then first deal with EXHIBIT 1. EXHIBIT 1 is not admissible for the purpose of (30)

the proof of its contents for the following reasons: Firstly if Your Lordship agrees with the Learned Judge President's judgment then it is quite clear that EXHIBIT 1 is not admissible. The only basis on which EXHIBIT 1 is sought to be admitted is on the basis that it was found in the possession of a co-conspirator. The fact...

COURT: Is it conceded that Mr Jonas Mohammed, I think it is, was a co-conspirator?

MR YACOOB: No, not he was, he is alleged ...

COURT: An alleged, he is an alleged co-conspirator? (10)

MR YACOOB: Yes sir. That is conceded. Now my submission there is that if it is a document then the fact that it was found in the possession of a co-conspirator does not prove the truth of its contents, if Your Lordship regards it as an object then the truth of contents does not actually begin to come into it and for example it would perhaps have as much value as, simply to quote an example, an AK 47 had been found in the possession of that co-conspirator in the particular point in time, or any object for that matter. And my submission is that it necessarily follows that as far as EXHIBIT 1 is (20) concerned there is nothing on record which makes the tape recording admissible as a true and proper reflection of the particular occasion which it is supposed to represent. That is EXHIBIT 1. Then of course Your Lordship will remember that there was no certificate of originality in regard to that. I deal then with EXHIBIT 6. EXHIBIT 6 is a bit more complex because even in relation to MILNE's judgment there was some sort of evidence, His Lordship Mr Justice MILNE's judgment, there was of course some evidence of the Constable Uren, the Sergeant Uren I think he was, who gave evidence that (30)

he was in fact present in the hall. I again say that the requirements which have been set out by MILNE, J., the minimum requirements for admissibility, and Your Lordship needs to look at the overall evidence with some degree of care, and here the care in regard to tampering and in particular how the recording was made becomes relevant. According to the evidence of Colonel Jansen it is quite clear that that portion at the beginning of the recorindg EXHIBIT 6 was certainly not made by the same microphone which made the recording of the speeches as such. The reason he gives for it is that there are certain wave forms and patterns which do not actually occur earlier on. If the witness Nel's evidence is accepted, of course one does not know what sort of tape he used, whether he used it before or not and so on, but if his evidence is accepted what he did was tested his tape recorder to see whether it was picking up a recording within the hall. That will presume that if he was testing he was testing that radio microphone which was eventually used in making the recording. My submission is that once it is clear that that radio microphone was not used in the recording considerable doubt is cast on the evidence even to the extent where with the limited information available one begins to wonder what happened and one begins to wonder whether or not the recording was made as it was. If he had said that he tested his own tape recorder or he pulled out the plug of the tape recorder so that his own microphone, the microphone in the tape recorder became active or whatever, my submission is that that would have held some sort of weight. All I rely on is the inconsistency in the evidence which causes considerable disquiet in regard to the crucial question of whether or not this tape recording was a tape

recording/....

recording of the meeting and whether or not the tape recording was made in the circumstances alleged by the witness. But there is another problem, leaving aside now the question of whether the end of this tape recording is an erasure or is in fact the question of dirt of the erase head in relation to the tape recorder my feeling is that that will go more towards the question of how much weight to attach in the end, leaving aside that question I find it, and I must draw it to Your Lordship's attention, particularly disquieting that Uren bumped into the lady inside the hall at the same time, if all the evidence (10) is to be believed, when problems arose in the tape recorder inside the car. My submission is that that coincidence, together with the fact that no lady's voice can be heard on the tape and my submission is that on a proper evaluation of Uren's evidence he says that some lady spoke to him, one would have expected to see some signs of it on the tape itself and Your Lordship will recall that the only evidence Colonel Jansen could give in relation to this matter was that well maybe it was drowned by the clapping and so on. My submission is that that sort of speculation does not help to dispell the sort (20 of difficulty which one begins to experience with this tape. The third problem to which I wish to draw Your Lordship's attention is that, again depending on Your Lordship listening to the tape and whether Your Lordship agrees that we are right when we say that that first initial recording reflects considerable change in background noise from time to time. Also..

COURT: Just a moment, what portion are you referring to?

MR YACOOB: The first portion.

COURT: Right at the outset?

MR YACOOB: Right at the outset, that is before the speech (30)

which is alleged to be of Frank Chikane starts. I would suggest that there are changes in background noise there which is inexplicable on the basis of the evidence given. The only point I make here that where in a case such as this where one is looking at evidence in relation to whether the recording was made at a meeting or not in circumstances where the accused had no particular knowledge of what happened the evidence has to be examined with great care, the probabilities have to be examined with great care and my submission is that if all these things are properly put into the melting pot the presence of the witness who gave evidence in relation to this particular tape, and the making of that tape recording, does not quite satisfy the requirement of, does not quite go far enough in the light of the other disquieting features. Of course a difficulty for me might well be that the difficulties originate at the beginning of the tape and at the end of the tape and that we appear to have picked up nothing which causes problems as far as the rest of it is concerned. My answer to that is that firstly one does not know how much of Frank Chikane's speech was actually left out, one does not know whether this is the original recording or not because this causes disquiet at the very fundamental level of whether the recording was made in the circumstances in which it was alleged to have been made, and once one does not know those things then on the basis, as I suggested to Your Lordship earlier during the cross-examination that a tape must actually, a tape recording like any document or any object even must be taken as a whole and if one looks at a thing as a whole there are a number of speculative possibilities about what could have happened and what could not have happened and what could have been left out

etcetera,/....

etcetera, etcetera. Quite apart from the fact that we may not have picked up any problems on the tape as we listened to it. But really that is the basis for the objection as far as EHXIBIT 6 is concerned, which is that the evidence does not begin to make sense as a whole. Then I go on to EXHIBIT 7, which is the Krish Rabilal tape. As far as that is concerned firstly we do not have the witness inside the hall. That is on the basis of MILNE, J.'s judgment. But if one goes a bit beyond that the difficulty is that there is nothing in the evidence. If the evidence had been properly given there is (10) nothing in the evidence which seeks to explain how it came about that the pause was on the tape, the pause control had been exercised on the tape at 002, counter reading 002, in Major Benjamin's evidence. The other difficulty, and the problem about that is if a pause had taken place then one would have expected there to be some kind of explanation for it. The fact that there is no explanation causes a measure of disquiet. Secondly Your Lordship will recall Dewar's evidence which was to the effect that in the final analysis that if Major Benjamin heard and monitored the proceedings through headphones what (20) it would mean is that he must have been using a reel-to-reel tape recorder. Once that is so then this is not a reel-to-reel tape and we have problems arising out of that. Then of course there are, and this must been seen in conjunction, I think it will be quite incorrect to look at each of these factors that I have pointed to separately and discount them or give them points. I actually rely on a cumulative effect of all the factors put together in respect of each of the tapes. And the other fact is the interferences in terms of what we have called erasures after the fact. Firstly they are unexplained (30)

and/....

and this must cause a measure of disquiet. And Your Lordship must also consider the fact that only those, in relation particularly to this tape, those problems identified, I am very sorry it just occurred to me that the pause at 002, if I could just check my note quickly, is not this tape, it is actually the Luthuli tape which is EXHIBIT 31 but if I can just satisfy myself about that. No I am sorry it is actually EXHIBIT 31 which has the pause so that does not fall to be considered here. The first point that falls to be considered here is the difference between reel-to-reel recordings and other re- (10) cordings. Secondly the so-called erasures after the fact for which there is no explanation. It seems quite improbable, even if one were to speculate about this, that three such erasures after the fact, as a result of butterfingered conduct, would actually have been made so shortly after another. And again because the expert was led after Major Benjamin was led there was no way in which we could ask him any particular questions about that. So that my submission is that these are the matters which do cause a measure of concern. The effort to cure this difficulty on the basis of what had been seen in (20) a video, with submission, does not cure it on the basis that again one does not know whether or not the video recording which Colonel Jansen had access to is a proper recording of that particular meeting and whether or not edits done at that point in time in the video were perhaps properly done with the edit being more clumsily done in this one. So my submission is that the fact that this tape recording accords with some video which had been seen does not help at all. I pass on then, may I say that all the other tapes, just to ensure that one does not repeat oneself, fall to be decided in, decided (30)

against/.....

against admissibility on the basis of MILNE, J.'s judgment simply on the basis that there were no witnesses. But if I may then go on to EXHIBIT 12.1 and 12.2 which relate to the Huhudi tapes, the specific points I raise here which go towards admissibility is firstly that there is no witness, and the only other point I really raise is that people were speaking off mike so often and on the assumption that a person could hear what was happening at the meeting through headphones so little of this tape is intelligible, and there is evidence that there is lots of speaking off mike here and so on and so on that one cannot get any comfort from the fact that the person was listening through headphones at the time when he in fact made the recording. As far as EXHIBIT 14 in concerned in terms, the way in which we have handled this tape I am limited to a reliance on the judgment of MILNE, J. And that leaves finally EXHIBIT 31. It is here that there is this obvious pause edit. If Your Lordship agrees that there is music and a voice at some point on the tape that we pointed out in, that is at counter no. 442, 445 our counter number, then that creates very great problems at the level of unexplained music. There is the possibility that there are erasures, as Mr Atkinson pointed out the question is why and how do they actually arise. They are actually fairly long pauses of between seven and eight seconds each and of course the question of the applause was raised there. I make the submission that there is a change in that applause and it ought to have been one of the things noticed by a sensitive expert. But basically my submission is that there are unexplained things. The pause is not explained on the basis of anything said by any of the witnesses and given the care which I ask Your

Lordship/....

Lordship to give to this sort of matter I would say that in addition to the requirements laid down in the judgment of MILNE, J. EXHIBIT 31 would be inadmissible on that ground.

COURT: Thank you. Ja Mnr Jacobs?

MNR. JACOBS : U Edele, ek het geskrewe notas gemaak. Ongelukkig kon ek dit nog nie in die kort tyd wat tot my beskikking was doen in die vorm van hoofde nie. Die regsposisie het ek opgesom en dit is getik, waar ek dit met 'n opskrif het Klankopnames. Ek gaan vir die Hof verlof vra om dit in te handig. Ongelukkig die feitlike aspekte kon ek nog in (10) handskrif gedoen het. Dit kon ongelukkig nie getik word nie. As die Hof dit so wil aanvaar sal ek dit ook so inhandig.

HOF : As dit leesbaar is en daar nie mee gepeuter is nie.

MNR. JACOBS : Ek dink as daar peutering hier plaasgevind het, het ek dit self gedoen. Ek moet net daar by verduidelik dat op bladsy 6 verwys ek daar na vier hofsake. Vir die gerief van die Hof het ek fotokopieë gemaak. Ek het die aanhalings duidelik gemerk met 'n geel merkpen. Ek gee dan my oorspronklike notas vir die Hof aan in blou ink en dan twee afskrifte. Ek het met groot belangstelling geluister(20) na die betoog van My Geleerde Vriend en - ek hoop ek is verkeerd, maar die indruk wat ek kry waarop sy hele betoog gebaseer word gaan uit van 'n voorveronderstelling dat, soos dit vir my lyk, al die polisiebeamptes oneerlik is en dat hulle getuienis sou fabriseer teen mense. My respekvolle submissie is dat 'n mens nie van hierdie veronderstelling kan uitgaan nie, maar die hele aangeleentheid moet ondersoek in die lig van al die getuienis wat voor die hof is en dan tot 'n gevolgtrekking te kom.

Die klankopnames, die getikte deel wat ek hier behandel,(30)

behandel ek u uitspraak in die vorige saak. Dit is my respekvolle submissie dat die bevindings in daardie uitspraak wel hierso geld en van toepassing is en is dit my submissie,ek gaan nie hierdie deel oor die regsaspek uitlees aan die Hof nie, ek stel dit dan net beskikbaar vir die Hof, maar dat die uitspraak van hierdie Hof wel van toepassing is en dat dit toegepas behoort te word, want anders moet ons net weer presies dieselfde veld dek en dan is dit my submissie dat argumente wat aangevoer is voor hierdie uitspraak ook hierso van toepassing is in hierdie saak, by hierdie ondersoek wat op die oomblik aan die gang is.

My submissie is, voordat ek die feitlike vrae beantwoord, dat hierdie bandopnames is wel "real evidence" om dit so aan te haal. Ek wil net op een punt van My Geleerde Vriend se argument hier antwoord op hierdie stadium reeds en dit is dat sy definisie wat hy dan probeer gee van wat "real evidence" sal wees, as 'n "object" waarop iets aangebring is. Daardie definisie van hom is so wyd dat dit alle - wat 'n dokument sou wees, is dit so wyd dat dit alle werklike ware fisiese bewysstukke sal insluit. Ek wil dit dan net noem dat die voorbeeld wat hy genoem het van die mes en waarop die bloed gekom het, die mes is 'n "object", die bloed wat daarop gekom het is iets wat agterna daarop gekom het. Met ander woorde, 'n mes moet 'n dokument wees. So 'n wye definisie kan nie aanvaar word nie.

HOF : Ek wil dit net anders om stel om die bewoording van die deskundiges te gebruik daar is geen positiewe aanduidings dat dit nie 'n dokument is nie.

MNR. JACOBS : Dit is reg. So, my respekvolle submissie is dat die bevindinge wat die Hof hier gemaak het in hierdie

saak by hierdie vorige uitspraak is dan heeltemal toepaslik hier.

Ek dink dit is belangrik dat ons in hierdie saak dan kyk na die werklike fisiese getuienis wat in hierdie saak aangebied is. Dit is 'n belangrike aspek, noem ek dit, want ek onderskei hierdie saak geheel en al van die saak in Natal en dan om hier terug te kom voordat ek begin met my argument op die getuienis, wil ek net op 'n sekere aspek wys. My Geleerde Vriend het hierso probeer om realisme, soos hy dit noem, in die saak in te werk, wanneer dit gaan oor getuie- (10) nis wat aangebied is in 'n hofsaak. Ek glo nie dit is die toets wat toegepas hoef te word nie, maar 'n getuie wat getuienis in 'n hof aanbied se getuienis moet getoets word aan sy geloofwaardigheid. Dit is die basiese beginsel wat oral en altyd geld wanneer 'n getuie getuienis aanbied in 'n hof. So, my submissie is dan om te sê dat dit realisties is of nie, dit is nie - dat die Hof realisties moet wees en 'n groter las op 'n getuie plaas, dit kan nie opgaan nie. Die basiese beginsel begin nog, het daardie getuie vir die Hof leuens vertel of het hy die waarheid vertel. (20)

My submissie is dan eerstens, die versigtige benadering van die howe ten aansien van die toelating van klankopnames in strafsake as getuienis is hoofsaaklik toe te skryf aan die wesenlike gevaar dat gefabriseerde en valse getuienis maklik voor 'n hof gelê kan word. So, daar is 'n versigtigheid wat aan die dag gelê word. Ek gee dit toe, maar 'n baie belangrike beginsel wat bestaan en hoegenaamd nie betwis kan word nie, is dat sodanige tegniese opnames wel aanvaar en toegelaat word as bewysmateriaal en nie totaal verbied word nie. Dit is dan my respekvolle betoog dat (30)

daar/...

daar nie spesiale bewyslas op die Staat rus om die getuienis toegelaat te kry nie, maar dat die normale bewyslas van bewys bo redelike twyfel die standaard is. Dit sluit aan by wat ek ter aanvang gesê het, dat die realisme waarmee My Geleerde Vriend wil werk is eintlik nie korrek nie en die toets is bewys bo redelike twyfel.

Dit is verder my respekvolle betoog dat die Staat met direkte getuienis oorweldigend bewys het dat die klankopnames wat deur die polisiebeamptes geneem was nie vervalsings of gefabriseerde getuienis bevat nie. (10)

Ek behandel dan eerstens die UDF Claremont Kaapstad vergadering op 26 November 1984. Ons het daarso die direkte getuienis van A/O Nel en hy het getuienis onder eed gelewer dat hy die opname gemaak het en dan haal ek 'n paar aspekte van sy getuienis aan.

Die eerste is dat BEWYSSTUK 6 voor die Hof word deur hom geïdentifiseer as die oorspronklike opname deur hom gemaak. Hierdie getuienis was glad nie deur die verdediging betwis nie. Daar was nie eers 'n suggestie vanaf die verdediging dat dit nie die oorspronklike opname is nie. Ek mag (20) net hierby aansluit by wat My Geleerde Vriend hierso gesê het dat die beskuldigdes - wat hy probeer as die gevare voorgee - nie 'n geleentheid het of die beskuldigdes nie teenwoordig was toe dit gemaak is en al daardie tipe ding nie. Dit is dinge wat gebeur in alle sake dat daar getuienis aangebied word waar beskuldigdes miskien nie teenwoordig was nie.

Die goue reël en goue toets wat nog altyd toegepas was was dat sulke getuienis deur kruisondervraging getoets kon word en in hierdie geval kan dit nie gesê word dat daar (30)

nie/...

nie getuienis bekom kon word wat op daardie vergaderings was nie. Daar kon inligting of getuienis deur die verdediging bekom gewees het om, indien daar enige bewys van peutering is, dat dit ingehandig word by die Hof, dat dit aangebied word by die Hof en dat daardie getuienis dan gestel word aan die getuie.

Die tweede punt wat ek behandel is dat die getuie het getuig dat daar gedurende die opname proses en solank hierdie bewysstuk in sy besit was en hy beheer daaroor uitgevoer het, het niemand op enige wyse met die bandopname gepeuter nie (10) of enigiets daartoe bygevoeg of uitgewis het nie. Die opname bied 'n ware beeld van wat daarop opgeneem is. Hierdie getuienis was ook hoegenaamd nie betwis nie en selfs nie eers 'n suggestie was deur die verdediging teenoor die getuie gestel dat hy op enige wyse hoegenaamd met die klankbaan en opname gepeuter het nie. Dit is dan my submissie dat hierdie getuienis staan dan as onbetwis voor hierdie hof met absoluut niks om dit te weerspreek nie.

Dan getuie A.M. Uren bevestig die getuienis van adjudant-offisier Nel dat hy behulpsaam was met die maak van BEWYSSTUK (20) 6, dat dit 'n opname is van die besondere vergadering en bevestig die oorspronklikheid van BEWYSSTUK 6 ensy getuienis is ook nie betwis nie en staan onbetwis voor hierdie hof. So, ons het die situasie eerstens van hierdie bewysstuk dat ons het eksterne getuienis, behalwe die bande self, per se self dat daar nie met hulle gepeuter is nie en daar is geen suggestie dat daar wel gepeuter was vanaf die kant van die verdediging nie.

Die Krisch Rabillal Memorial, Durban op 5 Februarie 1984. Majoor Benjamin het getuienis onder eed gelewer oor (30)

hierdie byeenkoms. In die eerste plek identifiseer hy die byeenkoms, tyd, plek en datum. Hy het 'n klankopname van hierdie byeenkoms gemaak en identifiseer BEWYSSTUKKE 7(1) en 7(2) as die oorspronklike opnames van hierdie byeenkoms en wat deur hom gemaak is. Hierdie getuienis was ook hoegenaamd nie deur die verdediging betwis nie. Geen suggestie was aan hom gestel dat die BEWYSSTUKKE 7(1) en 7(2) nie die oorspronklikes is nie. Verder getuig hy ook dat terwyl hy in beheer was oor BEWYSSTUKKE 7(1) en 7(2) was daar hoegenaamd nie met hierdie bewysstukke op 'n doelbewuste wyse gepeuter(10) of op enige wyse enigiets aan hierdie klankbane toegevoeg of uitgewis was ten einde getuienis te vervals nie. Hierdie getuienis was hoegenaamd nie betwis deur die verdediging nie. Daar was geen suggestie of enigiets aangevoer dat sy getuienis nie die waarheid is nie. Dit is dan weer my konklusie dat dus staan hierdie getuienis as onbetwis in hierdie hof en is daar niks deur die verdediging aangevoer om dit te weerlê nie.

Majoor Benjamin se getuienis dat BEWYSSTUKKE 7(1) en 7(2) opnames is van hierdie besondere byeenkoms, word op (20) geen stadium deur die verdediging betwis nie. So, ook in hierdie geval het ons die direkte getuienis wat hierdie effekte bewys sonder dat dit betwis word.

Dieselfde geld dan as ons gaan die volgende een, die Huhudi Youth Organisation vergadering te Vryburg op 1 Julie 1984. Adjudant-offisier J.M. Kock het getuienis gelewer dat hy 'n klankopname van hierdie byeenkoms gemaak het. In sy getuienis blyk die volgende. Dat hy op 1 Julie 1984 'n klank opname van die byeenkoms gemaak het en identifiseer hy BEWYSSTUKKE 12(1) en 12(2) as die oorspronklike opnames wat deur (30)

hom gemaak was van hierdie besondere byeenkoms. Hierdie getuienis was nie deur die verdediging betwis nie en was daar nooit enige suggestie teenoor die getuie gestel dat BEWYS-STUKKE 12(1) en 12(2) nie die oorspronklikes is nie. Dan verder getuie hy dat solank BEWYSSTUKKE 12(1) en 12(2) onder sy beheer was, daar hoegenaamd nie doelbewus met die klank-bane en opnames op genoemde bewysstukke gepeuter was nie en enigiets daartoe bygevoeg of daarvan uitgewis het nie. Dus is dit weer bewys dat daar geen vervalsing van die inhoud daarvan plaasgevind het nie. Dan herhaal ek weer ook hier-(10) die getuienis was hoegenaamd nie deur die verdediging betwis nie en was nie eers 'n suggestie aan hierdie getuie gestel dat hy of iemand andes met die bewysstuk gepeuter het nie. Hierdie getuienis staan in my konklusie weer onbetwis voor hierdie Hof en het die verdediging niks aangebied om dit te weerlê nie.

Die volgende aspek is dat Kock se getuienis word gestaaf deur adjudant-offisier Nieuwoudt en William Pascales dat BEWYSSTUKKE 12(1) en 12(2) opnames is van hierdie besondere byeenkoms. Dit word nie deur die verdediging betwis (20) nie. William Pascales bevestig ook dat, in sy getuienis, BEWYSSTUKKE 12(1) en 12(2) die oorspronklike bande is wat deur Kock gemaak is en soos deur hom getuig.Ook hierdie getuie se getuienis word nie betwis nie.

As ons dan gaan na die TIC vergadering te Johannesburg op 18 Julie 1984. Kaptein S.F. Soms lewer getuienis by hierdie klankopname - dat hy 'n klankopname van hierdie byeenkoms gemaak het. Die eerste punt wat uit sy getuienis duidelik blyk is dat hy op 18 Julie 1984 'n klankopname van die byeen-koms gemaak het en identifiseer hy BEWYSSTUKKE 14(1) en (30)

14(2) as die oorspronklike opnames wat deur hom gemaak is van hierdie besondere byeenkoms. Hierdie getuienis word hoegenaamd nie betwis nie en was daar nooit enige suggestie aan dié getuie gestel dat BEWYSSTUKKE 14(1) en 14(2) nie die oorspronklike opnames is nie. Hy getuig ook dat terwyl hy in beheer en in besit was van BEWYSSTUKKE 14(1) en 14(2) daar hoegenaamd nie doelbewus met die klankbane van die bewysstukke gepeuter was nie of enigiets daartoe bygevoeg of enigiets daarvan uitgewis is nie. Dus weereens dat daar geen vervalsing van die inhoud plaasgevind het nie. Ook (10) hierdie getuienis was hoegenaamd nie deur die verdediging betwis nie en was dit ook nie teenoor die getuie gesuggereer dat hy of iemand anders met die bewysstukke gepeuter het nie. In die sin wat ek "peuter" hier gebruik, as ek net miskien kan byvoeg dat met die vervalsing, doelbewuste vervalsing van getuienis wat voor hierdie Hof gelê word. In daardie sin gebruik ek peuter. Hierdie getuie se getuienis staan dus onbetwis voor hierdie hof en het die verdediging niks aangevoer om dit te weerlê nie. Kaptein Soms se getuienis dat BEWYSSTUKKE 14(1) en 14(2) opnames is van hierdie (20) besondere byeenkoms, word gestaaf deur die getuienis van A/O R. Baker wat die toerusting installeer het. Ook hierdie getuienis was nie deur die verdediging betwis nie.

Die volgende vergadering is die Luthuli Memorial Service in Durban op 24 Julie 1983. Getuie Jan D. Beneke lewer getuienis dat hy 'n klankopname van hierdie byeenkoms gemaak het en daaruit blyk dit dat (a) hy op 24 Julie 1983 die klankopname van die byeenkoms gemaak het en hy identifiseer BEWYSSTUKKE 31(1) en 31(2) as die oorspronklike opnames wat deur hom gemaak is van hierdie besondere byeenkoms. Hierdie(30)

getuienis was hoegenaamd nie deur die verdediging betwis nie en was daar nooit aan hom selfs of slegs gesuggereer dat BEWYSSTUKKE 31(1) en 31(2) nie die oorspronklike opnames is nie. (b) Hy het ook getuig dat terwyl hy in besit en beheer was van BEWYSSTUKKE 31(1) en 31(2) daar hoegenaamd nie doelbewus met die klankbane van hierdie bewysstukke gepeuter was nie en enigiets ongeoorloofs daarop bygevoeg of enigiets daarop uitgewis was nie. Dus ook weer eens dat daar geen vervalsing van die inhoud was nie. Hierdie getuienis was hoegenaamd nie deur die verdediging aangeval en betwis nie en was daar ook nie teenoor die getuie gesuggereer dat hy of iemand anders met die bewysstukke gepeuter het nie. Hierdie getuie se getuienis staan onbetwis voor hierdie hof en het die verdediging niks aangevoer om dit te weerlê nie.

Getuie Beneke se getuienis dat BEWYSSTUKKE 31(1) en 31(2) opnames is van bogenoemde byeenkoms word gestaaf deur die getuie M.B. Dewar wat die toerusting installeer het. Ook hierdie getuienis was nie deur die verdediging betwis nie. Ek het dan net BEWYSSTUKKE 1(1) tot 1(7) hierby ingevoeg, nie in die sin dat dit opnames is wat die polisie gemaak het nie, maar net om te bewys dat solank dit in die besit van die polisie was, na beslaglegging, was daar nie gepeuter daarmee nie, solank dit in hierdie getuie se besit was. Ek noem dit dan ook hierso in 4.6.

Dit is dan my respekvolle betoog dat die verdediging hoegenaamd nie geoorloof en geregverdig is om hierdie - om aan hierdie Hof te vra dat hierdie getuies se getuienis verwerp nie. Die regsbeginsel in die Suid-Afrikaanse Reg is dat voordat 'n party 'n getuie se geloofwaardigheid oor 'n sekere aspek van sy getuienis kan aanval en vra dat hy

ongeloofwaardig/...

ongeloofwaardig bevind word, moes daardie aspekte wat na sy oordeel ongeloofwaardig was, vooraf in kruisondervraging aan die getuies - onder dié getuies se aandag gebring word en aan hom die geleentheid gebied word om daaroor kommentaar te lewer en sy eie karakter te verdedig. Dit is in hierdie hof nie gedoen nie.

HOF : Wat sê u van die toepaslikheid van daardie beginsel op die kruisverhoor van mnr. Atkinson?

MNR. JACOBS : Ek sal nie vir die Hof vra om te vind - om te gaan sê dat mnr. Atkinson ongeloofwaardig is of iets van die aard nie, want sy beslissing aan die einde en sy finale bevinding aan die einde is baie, baie duidelik dat hy kon nêrens, my submissie sal aan u wees dat daar moet deur die verdediging 'n redelike moontlikheid uitgemaak word, 'n redelike moontlikheid en as 'n mens kyk na sy finale bevinding, dan sê hy dat daar is nie eers 'n moontlikheid dat hy kan sê of dit 'n oorspronklike band of bande hierdie is nie en of daarmee gepeuter is nie. Ek kan dit net lees hierso op bladsy 19 "Therefore it is not possible to form an opinion as to originality or lack of tampering." So, sy getuienis, is my respekvolle submissie dit neem nie hierdie saak enigsins verder of helder dit op nie, want hy kan géén - ek beklemtoon dit, sy konklusie is hy kan géén opinie uitspreek nie, òf dit 'n oorspronklike is en òf daarmee gepeuter is nie. Gepeuter in die sin van vervalsing. Hy het eintlik gesê op 'n vraag van die Hof as ek reg onthou, het hy 'n definisie van peuter eintlik verder gevat as net vervalsing. Hy het ook gesê gepeuter op die ander manier, maar die toets wat hierso gaan is daar vervalste getuienis voor hierdie hof gelê of wil die Staat valse getuienis voor hierdie hof lê en daarop is sy

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opinie so duidelik dat daar nie eintlik noodsaaklikheid is dat hy gekruisvra word nie. Dit verskil wesenlik van wat hier gedoen word waar dit die Staat se getuienis aanbetref. Daar is dit kernpunte wat betwis word. Kerngetuienis wat gelewer is in hierdie hof wat daarso ter sprake kom.

Ek verwys dan waar ek hierdie stelling maak van die aanval op die geloofwaardigheid van die getuies en waar hulle karakter aangeval word en gevra word dat hulle getuienis verwerp moet word, dan moes dit ten minste aan hulle gestel gewees het waarop die verdediging steun en die argument van (10) My Geleerde Vriend waar hy hier geargumenteer het dat die beskuldigdes is nie in die situasie om dit te doen nie, kan nie opgaan nie. As daar 'n bewering gemaak word dat daardie goed vervals is, dan moet hulle gronde hê waarop daardie bewering gemaak word en dan moet hulle hulle gronde stel aan die getuies. Dit help nie net om te sê dit is moeilik om dit te doen nie. Dit is om dit te oor te vereenvoudig. Daar is moontlikhede wat hulle kan gebruik om dit te doen. Daar is omstandighede. Hulle kon van die mense op die vergaderings gekry het. Dit was UDF vergaderings waar UDF (20) sprekers opgetree het, mede-samesweerders. Hulle kon van hulle gekry het. As hulle beweer dat daardie bande is vervalsings, dan kon hulle getuienis gekry het om daardie getuienis aan te bied. Op heelwat van hierdie vergaderings verskyn van hierdie beskuldigdes wat in hierdie hof sit. As hulle beweer dit is vervalsings, kon daardie beskuldigdes hier gekom het en daardie getuienis gegee het en die getuies van die Staat die geleentheid gebied het om te antwoord en te sê kyk, dit beweer ons is 'n vervalsing vir hierdie en hierdie redes en wat sê jy daarvan. Dit is nie gedoen (30)

nie en My Geleerde Vriend se argument oor realisme kan nie hier opgaan nie. Dit kan nie toegepas word nie, want die beginsel is baie duidelik en ek verwys dan in hierdie verband na vier hofsake. Die eerste een is 'n Appèlhofsaak.

HOF : Ek ken die sake. U hoef hulle nie vir my aan te haal nie.

MNR. JACOBS : Ek wou sê ek glo nie dit is nodig dat ek hulle uitlees nie, want daarom het ek hulle beskikbaar gebring vir die Hof. Dan gaan ek by paragraaf 6 aan. Ek meld dit daar dat dit is gemeensaak dat nadat elkeen van (10) bogemelde bewysstukke vanaf die tyd toe elkeen van bogenoemde - ekskuus nadat elkeen van die getuies wat hierbo genoem word wat in beheer was van hierdie bewysstukke, dat hy dit geseël en totdat dit by hierdie hof ingehandig is - ek het dit hier kort saamgevat, maar dit kom daarop neer dat vandat hy dit geseël het totdat dit by hierdie hof ingehandig is, was daar nooit met hierdie bewysstukke gepeuter nie, daar is nooit enigiets op die klankbane bygevoeg nie en daar is ook nooit enige uitwissings daarop gedoen nie. Ek verwys hier na die erkennings soos per AAS(10). (20)

Die somtotaal van die getuienis en die erkennings is die erkennings is dat die Staat bo enige twyfel - nie eers 'n redelike twyfel nie, soos die getuienis hier staan - bewys het dat 6.1 BEWYSSTUKKE 6, 7(1), 7(2), 12(1), 12(2), 14(1), 14(2), 31(1) en 31(2) almal oorspronklike klankopnames is wat, van elke betrokke byeenkoms. 6.2 Dat daar glad nie met BEWYSSTUKKE - ek noem hulle weer almal en dan daarby voeg ek 1(1) tot 1(7) op 'n ongeoorloofde wyse en doelbewus gepeuter was en byvoegings en/òf uitwissings daarop aangebring was nie. Dit is op hierdie oorspronklike opnames. (30)

HOF : Wat sê u van mnr. Yacoob se betoog op BEWYSSTUK 1 dat al wat dit bewys is 'n bandopname wat gevind is in die huis van 'n persoon, mnr. Mohammed? En dat dit dus eintlik by implikasie niks bewys nie en dus by implikasie nie relevant is nie?

MNR. JACOBS : Die getuienis as ek reg onthou van die getuie wat daaroor getuig het, Miles, het gesê hy het dit by Eunice Mohammed gekry en dat hy 'n lid van die UDF is.

HOF : Ja, daaris trouens voldoende erkennings op rekord wat aantoon dat hy 'n ampsdraer is van die UDF, maar dit is nie die punt nie. Ek dink dat in terme van die Strafproseswet 'n mens seker dokumente kan inhandig wat by iemand anders gevind is wat 'n mede-samesweerder is of wat, maar wat is daar in die wet ten aansien van bande? (10)

MNR. JACOBS : Ek sien die Hof se stelling, maar die feit is dat hierdie band is in sy besit gevind. Dit is 'n riële bewysstuk wat in sy besit gevind was. Die riële bewysstuk kan deur hierdie hof ondersoek word. Dit is die beginsels wat geld by riële bewysstukke en daarvolgens, as hierdie Hof hierdie riële bewysstuk ondersoek, kan die Hof daaruit sekere bevindings maak. Die Hof kan 'n bevinding maak dat hierdie riële bewysstuk is 'n bandopname van die loodsing van die UDF as 'n organisasie of liggaam. Die Hof kan daarvan 'n afleiding maak dat dit ook aanbied wat gebeur het by die konferensie daarvoor. So, uit die inspektering van hierdie riële getuienis wat by 'n lid van die UDF gevind is en wat handel oor UDF, kan die Hof dit ondersoek en as ons dan teruggaan na die vorige argument toe, kortliks daardie saak van TROPEDO 1920 AD 58 en R v KATZ 1946 AD wat reeds in u uitspraak genoem word en wat ook aangehaal word in (20) (30)

hierdie ding oor die klankopnames wat ek ingehandig het, kan die Hof dit ondersoek en die Hof kan afleidings daarvan maak en dit is getuienis voor die Hof. Dit is riële getuienis. Daar is niks, is my submissie, wat hierdie getuienis uitsluit deur enige spesiale reëls nie. So, my submissie is dat hierdie besondere band wat gekry is by 'n lid van UDF en wat ons weet 'n ampsdraer is van UDF en handel oor UDF, dat die Hof kan net soos met die videobande wat ook riële getuienis is , net so ondersoek word.

Dan vat ek saam hierso, dan sê ek dit is gevolglik (10) sonder enige twyfel bewys dat daar nie op enige van die bewysstukke die stigma kleef dat dit valse getuienis aanbied nie. My submissie is, die enigste wyse waarop die verdediging hierdie getuienis kon uitsluit was om die toelating daarvan te verhoed deur aan te toon dat dit onbetroubaar en vals is en daarin kon die verdediging nie slaag nie. In hierdie opsig is hierdie direkte getuienis onbetwiste getuienis en is te sterk en die feit dat dit onbetwis is, tel baie daarby.

As gevolg van die feit dat die verdediging nooit hulle (20) verweer tot aan die - ten aansien van die klankopnames openbaar het nie, was die Staat in 'n penarie of 'n deskundige, desondanks bogemelde sterk getuienis, geroep moes word. Daar is toe besluit om dr. Jansen as 'n getuie te roep en ter verdere stawing van bogenoemde getuienis. Dit is my respekvolle betoog dat dr. Jansen hom bewys het as 'n eerlike en uitstaande getuie en wetenskaplike op sy gebied en ek huiwer geen oomblik om aan hierdie hof te vra om sy getuienis te aanvaar nie. Sy getuienis bevestig dat daar nie doelbewus met die onderskeie opnames gepeuter was nie. Elkeen van (30)

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die betrokke bande was volledig deur hom geanaliseer en eienaardighede wat daarop voorkom het hy behoorlik uitgelig en ondersoek en wetenskaplik verklaar en verduidelik. Heel dikwels gestaaf met foto's en in hierdie opsig wil ek daarop wys dat die verdediging in deskundige in sy getuienis erken het dat dr. Jansen dikwels reg was in sy antwoorde terwyl verkeerde stellings aan hom gemaak was. Dit het ook dikwels gedurende die kruisondervraging gebeur dat die advokaat vir die verdediging erken en opmerk dat hy ten volle saamstem met bevindinge van dr. Jansen - sekere bevindinge van hom. So, my submissie is dat dr. Jansen se getuienis ondersteun die getuienis van die Staat tot 'n groot mate,want hy het voor hierdie Hof die getuienis - die bevindinge wat hy gemaak het ondersteun en vir die Hof die voordeel van sy deskundige kennis verleen om sy antwoorde te staaf.

My submissie is dat die verdediging het slegs een enkele getuie aangebied om die Hof te oortuig dat die Staat se weergawes foutief is en dat dit nie oorspronklike opnames is wat as bewysstukke ingehandig is nie en/of dat die opnames wat ingehandig is, opnames is waarmee gepeuter is en dus valse getuienis te verteenwoordig. Dit is my respekvolle betoog dat daar ook 'n - ek noem dit 'n weerleggingslas op die verdediging rus, naamlik dat dit nie slegs 'n vae moontlikheid van die oorspronklikheid en peuter is wat bewys moet word nie, dit is te vaag en kan gesê word, en ek gebruik dan hier net as 'n voorbeeld of as 'n moontlikheid as die hemel val, sal ons almal blou kêpsies dra. Dit is 'n voorbeeld ter illustrasie. Daar moet tog beslis iets nader as dit wees en die toets moet wees 'n redelike moontlikheid. Tweedens, dat daar ook 'n redelike moontlikheid bestaan dat daar

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met die opnames gepeuter is en nie 'n vae moontlikheid wat neerkom op 'n blote spekulasie nie. Dit is my respekvolle betoog dat die verdediging nie kan slaag om 'n redelike moontlikheid van die twee aspekte wat hulle aangepak het, om dit te vestig nie. Dit is selfs nie eers 'n vae moontlikheid nie. Die doodslag word aan die verdediging se poging toegeken deur hulle eie deskundige se finale gevolgtrekking en slotsom en dan haal ek daardie stukkie wat ek netnou gelees het aan "Therefore it is not possible to form an opinion as to originality or lack of tampering." (10)

Dit blyk verder dat die verdediging nie kan slaag in hul beswaar teen die toelating van die bande nie, as wat hulle aangebied het opgeweeg word teen die direkte onbetwiste getuienis van die Staat nie, soos hierbo aangehaal is en die uiterste vaaghede kan niks doen om die geloofwaardigheid van die getuienis aan te tas nie en ek versoek die Hof dan om die beswaar te verwerp.

My respekvolle submissie dan is dat hierdie getuienis op die reg gesteun op die uitspraak wat u voorheen gegee het in hierdie saak, wat die videobande betref wat hier (20) van toepassing is, duidelik toon dat die beswaar van die verdediging nie gesteun kan word nie. Die tweede aspek is dat ook op die direkte getuienis in hierdie saak kan die verdediging nie die Hof versoek om te bevind dat daardie nie oorspronklike opnames is waarmee nie gepeuter is nie en die derde aspek is dat dr. Jansen se getuienis op die opnames per se ondersteun ook dat dit nie sonder meer gesê kan word dat hier is 'n redelike moontlikheid dat daar met die bande gepeuter is of 'n redelike moontlikheid dat dit nie die egte bande is nie. So my - die vierde aspek is dat selfs (30)

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die deskundige deur die verdediging geroep noem dit self dat hy is nie in staat om te sê nie eers op 'n redelike moontlikheid nie, op geen moontlikheid nie, of daarmee gepeuter is en of daarmee - of dit nie die oorspronklikes is nie.

Dit is my submissie dat waar die verdediging hierso gegaan het en die beswaar geopper het hulle daardie beswaar moet substansieer en hulle het dit nie gedoen nie. Dit is nie vir die Staat om dit te kom bewys nie. Ek het hierso genoem dat die Staat het 'n bewyslas bo redelike twyfel, maar eintlik is dit die verdediging wat eerste een of ander (10) iets moet aanbied wat die Staat nodig het om te antwoord en dit het hulle nie gedoen nie. Dit kon hulle nie doen nie en hulle kon nie eers daarin slaag nie. So, ek vra u dan om hierdie aansoek van die verdediging of die beswaar van die verdediging van die hand te wys en die bewysstukke almal toe te laat.

MR YACOOB : I simply want to say firstly that I do not work on the basis that the policemen are dishonest men. There is nothing in my argument that suggests that and secondly, the record will speak for itself, that there was only one (20) occasion, I do not know what turns on it, but in any event that there was an occasion when I conceded that Mr Atkinson had agreed that Colonel Jansen was right, having gone on a logical frolic which I thereafter tried not to do. Finally just to emphasise again that the onus is actually upon the State and I can take the matter no further. Thank you.

HOF VERDAAG TOT 10 SEPTEMBER 1986.

DELMAS TREASON TRIAL 1985-1989

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