

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(TRANSVAALSE PROVINSIALE AFDELING)

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DELMAS

1986-09-10

DIE STAAT teen:

PATRICK MABUYA BALEKA EN 21

ANDER

VOOR:

SY EDELE REGTER VAN DIJKHORST EN

ASSESSORE: MNR. W.F. KRUGEL

PROF. W.A. JOUBERT

NAMENS DIE STAAT:

ADV. P.B. JACOBS

ADV. P. FICK

ADV. W. HANEKOM

NAMENS DIE VERDEDIGING:

ADV. A. CHASKALSON

ADV. G. BIZOS

ADV. K. TIP

ADV. Z.M. YACOOB

ADV. G.J. MARCUS

146

TOLK:

MNR. B.S.N. SKOSANA

KLAGTE:

(SIEN AKTE VAN BESKULDIGING)

PLEIT:

AL DIE BESKULDIGDES: ONSKULDIG

KONTRAKTEURS:

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JUDGMENT ON ADMISSIBILITY OF TAPE RECORDINGS

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IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

T1.20
(Vol 146)

DELMAS

1986-09-10

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

JUDGMENT ON ADMISSIBILITY OF TAPE RECORDINGS

VAN DIJKHORST, J.: The defence objects to the admission of certain tape recordings which the state tenders as (10) proof. These audio magnetic tape recordings fall into two categories. EXHIBITS 1(1) to 1(7) purport to reflect the proceedings at the conference and national launch of the UDF on 20 August 1983. These seven tapes were found by Major H.S. Miles in the flat of Yunus Mohammed, an attorney of Durban, who is attached to the UDF, according to the major's testimony.

The defence admitted in EXHIBIT AAS 4, amplified by EXHIBIT AAS 6, that Yunus Mohammed was a regional secretary of the UDF from 20 August 1983 to 5 April 1985 and a member (20) of the national executive committee since the last mentioned date. From March 1985 he has also held office on the regional executive committee of the national region of the UDF. He is alleged by the state to be a co-conspirator.

The/...

The voices of some nine persons speaking on these tapes were identified by witness IC No. 12 from these tapes. A number of other speakers he could not identify.

The police had nothing to do with the recording of these tapes and their origin is unknown. Probably they result from a recording of the proceedings either officially by the organisers of the conference and public meeting or by somebody attending for his own purposes.

According to Dr Jansen, the expert who gave evidence for the state : (10)

- (1) Four instances were found where a female voice made a short announcement which was recorded on top of the existing recording of the meeting , with the result that that portion of the meeting is wiped off the tape and the announcement is substituted. An example is to be found in the transcript V 1 at page 1, where the words "opening national launching of the UDF August, 20th 1983" are so inserted. Such insertion is called a "slate" by the experts.
- (2) There are a number of instances where the tape recorder (20) was switched off during the proceedings and later switched on again. The duration of non-recording cannot be determined. These interruptions occur, however, during singing of songs, shouting of slogans, asking for nominations or making of announcements and not during the speeches. An example is transcript V 1 page 13 where during the announcement of the names of officials of the UDF there is an interruption. In transcript V 26 page 68 there is an interruption when the chairman puts resolutions to the meeting. In my prima facie (30) opinion/...

opinion these interruptions do not seem to be material.

- (3) During the recording process there were also certain technical problems . At times the sound disappears, either because the microphone was switched off or for reasons like connection problems. There are not many of these interruptions which last more than two seconds. They result in the loss of small portions of the speech.
- (4) EXHIBIT 1(5) side 1 duplicates a portion of what appears on EXHIBIT 1(4) side 2. It is not a copy, but a simultaneous recording of the same proceedings by two (10) microphones and two tape recorders situated at different locations in the hall.
- (5) EXHIBIT 1(3) side 2 is a copy of EXHIBIT 1(7) side 1 and the first portion of side 1 of EXHIBIT 1(4) is a copy of the first portion of side 2 of EXHIBIT 1(1).

In cross-examination of Dr Jansen it was put by the defence that EXHIBITS 1(1) to 1(7) are obviously not originals.

It was put that EXHIBIT 1 was in toto a copy. Dr Jansen disputed this but stated that certain portions are copies.

It was put to Dr Jansen that the fact of the discontinuity(20) of the tapes comprising EXHIBIT 1 indicates that they are copies. Dr Jansen's view was, however, that the discontinuity could indicate that there are originals because somebody making a copy would see to it that he does it properly. In an original recording there will not be continuity where the tape is turned over. Dr Jansen did not purport to give a certificate of originality in respect of EXHIBIT 1.

The faults and peculiarities in the tapes EXHIBITS 1(1) to 1(7) which have been mentioned by Dr Jansen are reflected in the transcripts of the proceedings V 1 and V 26 . (30)

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It is clear from these transcripts that the faults and peculiarities abovementioned in no one way can be said to render the speeches and rest of the proceedings unintelligible. On the contrary, when viewed in the context of the whole recording, the said interruptions might well be regarded as insignificant.

The second category of tapes are recordings clandestinely made by the police. A source with microphone and radio transmitter was sent into the meeting or a secret microphone was installed beforehand. In either case the proceedings (10) were taped by a police officer outside the hall. These tapes are EXHIBIT 6, the UDF meeting at Claremont, Cape Town, 26 November 1984; EXHIBITS 7(1) and 7(2), the Krisch Rabillal Commemoration Service at Durban on 25 February 1984; EXHIBITS 12(1) and 12(2), the Huhudi Youth Organisation Meeting at Huhudi on 1 July 1984; EXHIBITS 14(1) and 14(2), the Transvaal Indian Congress Meeting at Selbourne Hall, Johannesburg on 18 July 1984 and EXHIBITS 31(1) and 31(2), the Luthuli Memorial Service at Durban on 24 July 1983.

On EXHIBIT 6, the voices of two speakers were identi-(20) fied by witness IC No. 12. He also identified the voices of two speakers on EXHIBITS 7(1) and (2). Major Benjamin who operated the tape recorder when EXHIBIT 7 was recorded testified that he recognised the voices of three speakers at this meeting, the sound from the hall reaching him directly.

On EXHIBITS 12(1) and (2) the witness I C No. 12 identified the voices of three speakers. One of them is accused no. 20. The defence admitted that accused no. 20 spoke at this meeting. Captain Sons who operated the tape (30) recorder/...

recorder when EXHIBITS 14(1) and (2) were recorded testified that while recording he recognised the voices of four of the speakers of whom two were accused no. 19 and no. 20. It is admitted by the defence that accused no. 19 and no. 20 spoke at this meeting. Warrant Officer Beneke who operated the tape recorder recognised the voice of one speaker when recording EXHIBITS 31(1) and (2). The witness I C No. 12 identified the voices of three speakers from the tape. One of them is accused no. 20. There is an admission by the defence that he spoke at this meeting. (10)

The policemen operating the recording machines testified that they did not intentionally alter the recordings.

Dr Jansen gave expert evidence on behalf of the state in respect of all the exhibits in the second category. On each tape he encountered a number of so-called technical problems. He testified that the presence of these were normal for recordings in the field with normal equipment and often old tapes. The same type of problems are encountered in EXHIBIT 1, UDF Launch and Conference, which tapes were not recorded by the police. (20)

Dr Jansen's evidence on EXHIBIT 6 was as follows. The quality of this recording is reasonable to good. The tape recorder was stopped during the proceedings, once during singing before the meeting and once at the beginning of the speech by the Reverend Chikane. This stoppage was explained by Warrant Officer Nel who has switched the recorder off while waiting for the Reverend Chikane to start speaking and was a bit late in switching it on. The tape recorder was not stopped during the speeches, according to Dr Jansen. There were certain technical problems, (30)

consisting/...

consisting of short interruptions in sound as a result of a break in radio transmission, their duration being less than two seconds. This was caused by a faulty connection and does not materially affect the intelligibility of the speech as such. Dr Jansen found no indication that this tape was a reproduction or that the original tape had been altered at any stage or that it had been tampered with in any way. His view is that it is an original unaltered tape.

Dr Jansen was subjected to a very lengthy cross-examination on EXHIBIT 6, lasting more than four days. (10)

It sharply focused on the last part of the tape just before the end after the conclusion of the speech by Dr Boesak. The purpose of the cross-examination was to establish that EXHIBIT 6 is not an original. Dr Jansen was requested to listen again to the last portion of EXHIBIT 6 on stereo phones and also to the beginning of this tape. Having done this, he stated that he stood by his evidence.

In this process it was found that one channel had soft sound on it and one channel noise. He conceded that it was possible that he had not noticed this pre- (20)
viously as he did not use additional amplifiers and as he had not listened to the end of the tape on stereo. He stated that for his purpose it had been adequate to record that due to technical problems the rest of the meeting was not properly recorded. It furthermore appeared that the place where he works is noisy. As he had not listened on stereo he did not previously pick up the difference between the two tracks at the end of the tape EXHIBIT 6. As far as the first portion of EXHIBIT 6 was concerned, he stated that he did not hear that the sound got softer there, as (30)

was/...

was put by the defence. He did hear a click, which he did not regard as a switch off of the machine. To determine the cause of this click, one needs access to the actual recorder and know the circumstances under which the recording was made. He presumes that the first part of EXHIBIT 6 was recorded with the microphone of the recording machine itself, that is where the machine stood, and the rest by radio microphone, that is where the speeches were held. In his view the first portion of EXHIBIT 6 is the remnant of a previous recording which could have been made at the testing of (10) this machine. He is of the view that the machine was tested, played back and then started recording. He holds this view as there is no movement of the microphone itself to be perceived in the first part of EXHIBIT 6 and therefore the recording was probably by means of the built-in microphone of the machine itself.

The switching off of the machine at the beginning of the speech of Reverend Chikane which occurs at counter number 017 was dealt with in cross-examination.

His view is that EXHIBIT 6 could be a recording (20) on top of an existing recording, but that it is more probable that it is a stop/start situation at counter 017. He ascertained that all recorders used were official recorders. It is probable that there was a recording on top of the existing recording on EXHIBIT 6 at this stage, either because of a testing procedure or because there had been a previous recording.

It was put to Dr Jansen that the interruption at counter number 017 on EXHIBIT 6 is where the speech as recorded represents a recording over a pre-existing recording. (30)

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He answered that it is possible, but that he stood by his evidence that it is an off/on switch situation as set out in his report, EXHIBIT ABD 6.6 at 017 as the theory of the defence did not correspond with his photograph, EXHIBIT ABD 7.1 of the oscilloscope readings.

It was further put to Dr Jansen that his reliance on pulses on the oscilloscope is dangerous as all machines differ. His answer was that he had the necessary knowledge to distinguish. It was put to him that his demonstration tape EXHIBIT 32 which he had compiled he had made free of (10) other pulses, despite the fact that this tape was compiled with the purpose of demonstrating the various ways in which a tape recording can be altered. His answer was that he had done this with expensive equipment, ten times more expensive than that used by the police. It further appeared that he could not get the actual tape recorders used for the tapes before court for his test purposes.

The evidence of the source sergeant Uren that he had turned to the lady next to him after the meeting and spoken to her, was put to Dr Jansen and Dr Jansen stated that he (20) would expect the voice of the lady speaking to the source to be recorded at the end of this tape, but it was not known how loudly she had spoken. It could also have disappeared in the applause. There are voices in the applause but it sounds like a male voice.

The end of EXHIBIT 6 was played to Dr Jansen on Stereo, first the left then the right channel. There was no sound on the left channel and on the right channel a voice and other noises and a variation in sound level. Dr Jansen then changed his previous opinion. He previously (30) thought /...

thought that the soft portion at the end of EXHIBIT 6 side 2 was caused by technical problems at the radio microphone. Having listened by stereo he came to the conclusion that the problem originated after the radio microphone. This means that the problem would then have arisen in the motor-car where the recording took place.

Dr Jansen was thereafter asked about the click, called a burst of sound, which the defence stated was audible on the right channel only. Dr Jansen stated that this click was on both channels. It was put to Dr Jansen that the (10) end part of EXHIBIT 6 is a clear example of double erasure after the fact, that is after the recording was made. In answer to the dispute raised by the defence as to whether the click was on both channels or the right channel only, Dr Jansen on the next day produced three photographs, which refute the defence version of the pulse only in the right channel. These are EXHIBITS ABD 7.2, ABD 7.3 and ABD 7.4. He stated that nowhere could he find a pulse only on one channel. The defence persisted in putting that there was a clear pulse where the voice becomes softer. This (20) Dr Jansen denied, stating that it is not indicated on the photograph ABD 7.2. The last portion of EXHIBIT 6 does, however, have a soft pulse which is caused probably by a bump against the microphone, possibly by the speaker himself.

It was put to Dr Jansen that at counter number 591 an attempt is to be found to erase the sound and that this was not a good effort. Dr Jansen denied that an attempt had been made to erase the sound, saying that the sound gets softer immediately after the bump as the automatic gain control is activated by the bump which causes the (30) sound/...

sound to diminish for a short while, but it soon returns to approximately the previous level.

Asked about the phenomenon that sound was non-existent on the left channel and very soft on the other channel at the end of EXHIBIT 6, Dr Jansen's explanation was that this was caused by dirt on the recording head. He had performed tests and had found that his theory of dirt on the recording head was confirmed thereby. He has used a piece of tape to simulate dirt over approximately one-third of the recording head and had attained an effect exactly like the last (10) portion of EXHIBIT 6. That is a soft recording only on one channel and no recording at all on the other channel, but a very high noise level. He stated that this last portion of EXHIBIT 6 could not be the result of an ineffective erasure, because there are no pulses, which would have been the case had the erasure mechanism been activated. There is also a further reason. The sound becomes louder just before the leader tape starts. This could not have happened had it been a defective erasure. Then all sound would have been soft right up to the end of the tape. His view is that (20) the thicker leader tape could have caused the dirt to become dislodged. He stated that on the basis as put by the defence two faults would have to have been present in the erasure process. Firstly an electronically effective erasure head which does not erase properly and secondly an erasure head which erases only part of the tape. Dr Jansen was not prepared to accept this. He stated that on the left channel which has no speech the noise is louder than normal soft speech, referring to photograph ABD 7.5. That noise level is not normal. (30)

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It was put to Dr Jansen that there had been two efforts to erase the last part of the tape. The first effort started at counter number 591 and went on till the end. At counter number 591 Dr Jansen heard the bump against the microphone. The second effort started somewhat earlier where the clapping dies down. This second process caused a residual pulse at counter 591 and the sound after counter 591 is softer because it was subject to a double erasure, both not successful. Dr Jansen disputed this theory. The sound at counter 591, the bump against the microphone, is a sound acoustically fed (10) into the system, that is via the microphone. Immediately after this bump the action of the automatic gain control is seen or heard and very important, there is a strong pulse on ABD 7.2 at point, also on ABD 7.3 and ABD 7.4 and the softer sound begins some seconds before that pulse. Had there been an erasure process, that pulse would also wholly or partially have been erased. That pulse is an electronic pulse and it is not wiped out or diminished, neither is it part of the switch on process of, the erasure as it is too far from where that process starts. This pulse is probably caused (20) during the recording process by a battery contact problem. It is not of full amplitude as there was dirt on the recording head. Dirt on the recording heads is not an infrequent occurrence.

The photographs ABD 7.7 and 7.8 show that when the machine is switched on for recording two sets of pulses are made. One by the erasure head and one by the recording head. These pulses are 0,5 seconds apart.

Dr Jansen further stated in respect of counter number 017 side 1 of EXHIBIT 6 that the pressing of the record (30) button/...

button without pressing the play button would enable the operator of the machine to hear what goes on in the hall. He can start recording at the right moment by pressing the play button and the record button.

In answer to Dr Jansen's problems with the theory of the defence on the end of EXHIBIT 6 the defence put that the erasure head had probably been out of alignment and produced a sketch ABD 8.1 to illustrate this. Dr Jansen countered by stating that this does not fit the facts. This theory of Mr Atkinson, the defence expert, of misalignment of the (10) erase head is wrong, according to Dr Jansen. There is only less than 1% of the width of a one-quarter track utilised, but this thin line is unbroken. This is extraordinary as the tape moves a little sideways as it is recording. Had the erasure head been misaligned, it would at times have erased all sound. Furthermore a misaligned erasure head presupposes that one or more of the pins or a little plate in the erasure head which aligned the tape, has broken off. This is an abnormal situation. Alternatively, the erasure head would pull the tape sideways, which is abnormal. Both (20) these instances are conducive to lateral movement of the tape which would interrupt the unbroken line of faint recording on 1% of the one-quarter track of the tape.

It was then put by the defence that both the erasure head and the recording head could be out of alignment. Dr Jansen stated that when the original recording was made, the problem arose. He had never come across the faults on which the defence based their theory. It does happen that a recording head may be somewhat misaligned, but he had never found that an erasure head (30) only/...

only partially erases. He stated another objection to the defence theory. The left channel contains noise at least as strong as the speech on the right channel. The noise does not correspond to a portion of tape that has been erased correctly. Should it have been erased correctly, as suggested on ABD 8.1, then there would have been a very low noise level on the left channel. (See ABD 7.5) The residual sound on the left channel is not the remainder after an erasure process but is caused by a weak recording process. His experience is that dirt causing a problem, (10) causes it suddenly. The piece of dirt used by him in his test was only 0,5mm in diameter or smaller.

It was put to Dr Jansen that Mr Atkinson had done a test covering approximately three-quarters of a Blaupunkt record head with splicing tape and got exactly the effects as are found on the end OF EXHIBIT 6. This proves Dr Jansen's point. Dr Jansen says the portion to be covered on the recording head to produce the effects we have on the end of EXHIBIT 6 will differ with the type of machine used. This Blaupunkt had a much wider opening on the recording head (20) than his own test machine.

It was put to him that the noise level on EXHIBIT 6 is of erased tape. This Dr Jansen denied. It was put to him that the defence does not know what was picked up by the record head after the erasure to cause the loud noise on the left channel. Dr Jansen's answer was then the same noise should be on the right channel also and it is not.

The defence thereafter put certain ways in which the noise could have been recorded, but none of these explains the absence of that noise on the right channel. (30)

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It was put to Dr Jansen that erasures do not wipe out speech completely. It remains in the background and makes the background noise. This Dr Jansen denied. It was further put that at counter 591 the remains of an original pulse are to be found, but Dr Jansen stuck to his evidence that this is a sound caused by a bump against the microphone.

Dr Jansen conceded that generally speaking there are never positive indications that tapes are originals, but there may be indications that they are not. He further stated that it cannot be determined by tests whether the recording, (10) EXHIBIT 6 was made from another tape recording or was original. He stated that one can edit a tape in such a way that it cannot be detected. The easiest editing is to leave out a paragraph. Switching paragraphs around is more difficult. Leaving out words is much more difficult and this can only be done by a professional person. Only the latter will know to do the editing in such a way that as few marks as possible remain on the tape. He will need reasonably sophisticated equipment. Taking out words in one part of the tape and inserting them in another part, is ten times as difficult. (20) A professional person could do it with the necessary equipment but it would not be easy. Editing can best be done where there is no audible sound on the tape. Dr Jansen disagreed that editing would to him be undetectable if it is done where there are already lots of sounds on the tape. He would pick up signs of editing. Dr Jansen did not perceive any difficulty to detect edits on EXHIBIT 6 and is convinced that there are none.

It was put to him that EXHIBIT 6 has indications of an inconclusive nature that it is a copy, but that the (30) defence/...

defence was not sure. Those indications that it might be a copy are :

- (1) The noise level during the various radio microphone interruptions is higher than would be expected; and
- (2) The recording level on this tape, EXHIBIT 6, is lower than it should be.

In respect of the first alleged indication Dr Jansen stated that the noise level is not higher than it would be. One often finds that some sound breaks through even during radio microphone interruptions. The noise here is no indi- (10)
cation of a copying process. The noise emanating from a radio microphone is more than the noise caused by a copying and the latter noise gets lost in the former. The higher the noise level, the less discernable is the effect of copying, which is in any event soft.

In respect of the second indication, Dr Jansen's evidence was that different machines and tapes vary in recording level. Therefore relatively small differences in the recording level are no indication of copying. If copying is done correctly, it will not contribute to the noise level. (20)

In conclusion on EXHIBIT 6 it was put to Dr Jansen that the defence is not certain whether there have been edits of EXHIBIT 6 and is not sure if it is an original or a copy.

Dr Jansen's evidence on EXHIBITS 7(1) and (2) is as follows. The quality of the recording is reasonable to good. The tape recorder was stopped once only during the proceedings and this was during the singing before the meeting at counter 069. It was not stopped during the speeches. The stoppage referred to was explained by Major Benjamin, namely that he switched it off during the singing, presumably to save (30)
tape/...

tape. The same technical problems arise as in EXHIBIT 6. There are short interruptions in sound as a result of a break in radio connection. They are of a duration of less than 2 seconds and are caused by a faulty connection. They do not materially affect the intelligibility of the speeches.

On the first side of EXHIBIT 7(2) a short piece of recording was found on top of the existing recording of the meeting. This is also set out on the transcript V 7 at page 37 line 7. Major Benjamin explained that he had when replaying the tape mistakenly pressed the record button (10) when the telephone rang, instead of the stop button. Though he immediately rectified the position a small portion of the tape was erased. Dr Jansen could find no evidence that the tapes were copies or that the tapes had been altered, except as stated, or that the tapes had been tampered with in any manner. Dr. Jansen explained that a radio microphone system is subject to short interruptions, for example when a car passes in the street or the source, that is the carrier of the radio microphone, turns his body or somebody moves near or next to the source. (20)

Dr Jansen was also extensively cross-examined on EXHIBIT 7. At counter 069 on EXHIBIT 7, there was a switch off, which has already been referred to, and switch on. The break is 2,9 seconds on the tape. This occurs during the singing. How much of the proceedings was not recorded, does of course not appear from the tape. EXHIBIT 7(1) side 2 does not begin at the beginning of the tape - that is to say the recording. When the operator stopped at the end of side 1, he turned the tape over before it was at its end. It therefore begins at 016 on side 2. Where it starts (30) on/...

on side 2 there is a slight increase of noise before the sound recorded. That slight increase of noise commences where the erasure head was when the tape was switched off at the end of side 1. Dr Jansen states that although the double increase in noise is an indication of a copy, this is not the position here as the increase in noise is very slight. He thinks that the operator may have pressed the play button only and then realising his mistake corrected it by starting recording. This movement of the tape over the recording head could explain the very slight increase in (10) noise. Its duration is 3,1 seconds. The increase in noise is so low that it would not appear on an oscilloscope photo. It was put to Dr Jansen that the little increase in sound could mean that a very sophisticated machine was used. This Dr Jansen disputed. A new tape or tape properly cleared with a bulk eraser was used. Therefore, had this been a copy, a bigger increase in the noise level would have occurred. Dr Jansen rejected the defence version that EXHIBIT 7(1) is a copy.

With reference to the transcript V 7 page 33 eight (20) lines from the bottom it was put that during the applause there is a change in respect of rhythm and the echoes in the hall. Therefore there is a real possibility that it is a change of environment and that the defence does not know whether there has been an edit or not. Dr Jansen replied that the change in applause may be caused by a part of the audience stopping to clap hands and possibly sitting down. According to him it all sounds quite natural.

In his report ABD 6.3 Dr Jansen stated, with reference to EXHIBIT 7(2) side 1 that at counter 015 and 018 there (30) were/...

were short disappearances of sound caused by a radio microphone interruption and that 024 was a recording over the original recording. Having listened again, he changed his mind during cross-examination and stated that all three were instances of erasure after the recording. His failure to notice this in respect of 015 and 018 was due to his not noticing during his tests that a filter had not been removed. This caused incorrect information. It had not been the position when he examined 024. The erasures at 015 and 018 are very short, each a second or less. That at 024 is (10) 2,9 seconds.

He had in his possession a video of the same meeting and checked the tape against the sound track of that video. In that way he was able to ascertain the words deleted in EXHIBIT 7, the tape before court. This is accepted by Mr Atkinson, the defence expert.

Dr Jansen conceded in cross-examination that there is no positive indication of originality in EXHIBIT 7, stating that the same applied as he had previously testified in this respect. He further stated that had there been alterations through edits, he would have noticed at least some of them and he found none. (20)

It was put to him that the defence was not certain whether this tape EXHIBIT 7 is an original or a copy and whether edits were made in this tape or not. In conclusion it should be stated that Dr Jansen indicated that there was no difference between the video and this tape although the video covers a small portion of the meeting.

Dr Jansen gave the following evidence on EXHIBITS 12(1) and (2). The quality of the recording is not very good. (30)

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The microphone was not near the speaker, with the result that there are echoes and background noises. At times the transcriber could not hear what was being said. The tape recorder was not stopped during the proceedings, except when the tapes were turned over or changed. Of necessity a portion of the speech was then lost. This is not shown on the transcript V 12 at page 24. A portion of Galeng's introduction of Aubrey Mokoena to the audience is lost. There are a few instances where technical problems occurred.

These were momentary losses of sound less than one second(10) each caused by faulty connection. They do not influence the intelligibility of the speeches. Dr Jansen found no indications that the tapes were copies or that the tapes had been altered or that the tapes had been tampered with in any way.

It was put to Dr Jansen in cross-examination that the automatic gain control on EXHIBIT 12 is very fast. The word "savage" was used. According to the defence this is due to a copying process. Dr Jansen conceded that the automatic gain control on EXHIBIT 12 is fast, but stated so is that on EXHIBIT 7. In both cases the same tape recorder was used.(20) In this case a radio microphone was not used, but an extension cord with a microphone in the hall. The microphone is dependent on existing sound and has no amplifier as the radio microphone has. This has resulted in a low sound reaching the microphone where the automatic gain control only just works. Together with a machine with a fast reaction, the effect on this tape EXHIBIT 12 is totally acceptable. It is a natural situation which Dr Jansen would expect in the circumstances. He stated that he had done years of research on automatic gain controls and that he himself had in (30)

the/...

the past used machines with a faster automatic gain control than that found in EXHIBIT 12.

It was further put to Dr Jansen that the bad quality of the recording indicates that it is not an original. Dr Jansen replied that the quality of the recording is good. There are a number of troublesome echoes which make the speech difficult to understand. The microphone worked well, but was too far from the speaker.

He conceded that EXHIBIT 12 has clicks, clanks, bangs et cetera and that there is therefore scope for undetected(10) editing if done by an expert. Nevertheless, he stated that he would have expected an edit, had there been one.

The defence put that EXHIBIT 12 might be a copy, but that they did not know.

Dr Jansen's evidence on EXHIBITS 14(1) and (2) was as follows. The quality of the recording is reasonable to good. The tape recorder was not stopped during the proceedings except in the following instances. When the reel of the tape was changed of necessity an interval of approximately one minute would occur, which is not shown on the transcript (20) and at the beginning during the singing the tape recorder was stopped. This stopping of the tape recorder for the purposes of changing the reels accords with the evidence of Captain Sons.

There were technical problems caused by a faulty connection. Sounds disappeared momentarily in a few instances. Most interruptions were of shorter duration than two seconds, but one lasted as long as four and a half seconds. This led to the loss of a few words. That can be seen from the transcript. These faults did not materially affect the intelligibility (30)

of/...

of what was said. Dr Jansen found no indication that the tapes were copies or that they had been altered or tampered with in any way. His view is that they are unaltered originals.

In cross-examination of Dr Jansen it was merely put to him that EXHIBIT 14 has clicks, clanks and bangs et cetera and that therefore there is scope for undetected editing, which Dr Jansen conceded, provided it is done by an expert. Dr Jansen stated that he would nevertheless have expected to pick up an edit had there been one.

Dr Jansen gave the following evidence on EXHIBITS 31 (10) (1) and (2). The quality of the recording is reasonable to good. The tape recorder was not stopped during the proceedings, except during the singing preceding the meeting. This stoppage was explained by Warrant Officer Beneke who operated the tape recorder. He did it to save tape. There were technical problems of a twofold nature. Firstly caused by a weak connection between microphone and tape recorder and secondly caused by a weak connection between tape recorder and battery. In both instances the sound disappears. Most disappearances are momentary less than approximately (20) two seconds and do not affect the intelligibility of the speech. There are two cases of longer cessation of sound, namely 8 and 7,2 seconds respectively. These are indicated on pages 9 and 13 of the transcript V 24 . The first interruption is during the applause at the end of Reverend Xundu's speech. At the second interruption some words are lost during the speech of A.J. Gumede. On side 1 of EXHIBIT 31(2) a small piece of re-recording occurs on top of the existing recording resulting in that portion of the meeting being erased. This is indicated on page 48 of the transcript (30)

V 24 . This interruption on the tape is explained by Warrant Officer Beneke. He mistakenly pressed the recording button when during transcription he had stopped and wanted to resume playing back. Dr Jansen testified that he could find no indication that the tapes are copies or that they had been altered, except as mentioned or that they had been tampered with.

In cross-examination Dr Jansen was asked to listen again to this tape at approximately counter number 002. That is approximately counter number 005 on ABD 6.2. During the (10) singing there is an interruption. There is a slight pulse and a change in rhythm, which he had not made a note of. It sounded to him as of the pause button had been depressed. He did not know for how long. He stated that this was not an indication of a copy. If it is a copy it means that there had been a much longer tape of the meeting. This tape is a C90+6 tape. A reel-to-reel tape would then have been needed as well as a reel-to-reel machine with a much better quality than the cassette as the noise level is so low that it shows that it is not a copy. It was put to him that noise levels(20) are so variable that no firm conclusion can be drawn from them.

He further testified that after counter 024, the switch off during the singing prior to the meeting to which I have already referred, EXHIBIT 31 is uninterrupted, apart from battery contact problems. At counter 109 during the singing Dr Jansen found a 1,3 seconds disappearance of sound which he ascribed to a battery contact problem. It was put to him that the sound at 019 demonstrates that there is probably an insert erasure. Dr. Jansen disagreed, stating that a (30) re-recording/...

re-recording on top of this recording would create additional pulses. They are absent here. He produced EXHIBIT ABD 7.9 a photograph, in support of his view in this respect.

He stated that the basic pattern on the photo's of EXHIBIT 31 is the same where one has a switch off and where there is a battery contact interruption, but the effects of the switching on and the coming on after a battery contact problem differ.

It was put to him that this interruption at 109 which is to be found somewhere on page 3 of the transcript V 24 (10) during or between songs has exactly the same features as the accidental erasure at the telephone call and that it is therefore an insert erasure. Dr Jansen stated that the recording operator would be most likely to accidentally erase as he is used to pressing the record button and would tend to do so when replaying. At all places where Dr Jansen stated that there had been a battery contact problem, the same pulse pattern exists as at the end of the tape EXHIBIT 31 and where there is a certain insert erasure. Initially he was not sure, so he made a thorough study and (20) took a great number of oscilloscope photo's. The insert erasures had additional pulses not found at counter 109 and counter 414. Therefore he determined that those two instances were battery contact problems.

It was put to him that the following interruptions are instances where there could be erasures. On the transcript V 24 at page 1 during the song; at counter 024 transcript V 24 page 2 during the song; at counter 109 transcript V 24 page 3 during the singing; at counter 414 transcript V 24 page 8 during the speech of Xundu; at counter 442 (30)

to/...

to 445 transcript V 24 page 9 during the applause, at counter 670 transcript V 24 page 13 during Gumede's speech and on tape 2 side 1 counter 383 transcript V 24 page 48 where the investigating officer's voice breaks through. The latter instance is common cause and Dr Jansen conceded that the possibility cannot be excluded that at 109 and 414 there are in fact recordings over the previous recording. 024 is a clear off/on situation.

At 442 to 445 on EXHIBIT 31(1) side 1 ABD 6.2 Dr Jansen hears speech with a musical sound. It was put to him that (10) this was a musical instrument. This was a lengthy debating point. The sound is so short, the defence cannot even say what type of instrument they have in mind. Dr Jansen made a careful study of this sound and says he is the only expert on an oscilloscope in court. He handed in photo's ABD 7.11 and 7.12 of this part of the tape. The sound occurs during an interruption of some eight seconds which Dr Jansen ascribed to a combination of connection and battery contact problems. As stated, this is during applause.

There are very soft sounds in this period of eight (20) seconds, which Dr Jansen says are a small percentage of speech which leaked through the tape recorder during the interruption. It was put to him that the soft sound was picked up while erasing. This Dr Jansen denied, giving reasons. The pulse patterns do not correspond with an erasure.

It is clear from his evidence that the tape recorder was switched off, firstly at the end of the recording at counter 748; secondly at counter 383 side 2, where for 2,8 seconds there is a recording over the existing recording to be found at V 24 page 48; and thirdly at 024 side 1 of (30)

EXHIBIT 31(1) during the singing. This is to be found on the transcription V 24 page 2.

Dr Jansen says in respect of 024 that apart from the switch off there was also a battery contact problem. This the defence disputed. The relevance of this dispute escaped me.

It was put to Dr Jansen that at 442 to 445 there had been three efforts to erase. Firstly before the music began, secondly aimed at wiping out the music before the voice started and thirdly immediately after the voice (10) started giving rise to the silent part. Dr Jansen denied this, saying that the transitions between the various portions of sound are smooth and without discontinuities and that this is not reconcilable with attempts to erase.

At counter 670 on EXHIBIT 31(1) there is a 7,2 seconds cessation of sound during the speech of Gumede to be found at V 24 page 13. Dr Jansen ascribed this to a combination of connection and battery contact problems. When it was pointed out to him in cross-examination that the silent part between the two pulses on photo ABD 7.18 is the (20) equivalent of one second instead of the 0,5 seconds one would expect between erasure and recording head, he changed his view, saying that it was a case where the connection problem arose before the battery contact problem instead of vice versa. It was put to him that it was more likely that the machine was switched off at 670 instead of a battery contact problem arising. He disputed that. Dr. Jansen conceded that it is possible that one cannot distinguish between pulses caused by a battery contact problem and an on/off switch as the original machine was not tested. (30)

He/...

He said, however, he used additional information to come to his conclusion; including his experience.

At this spot there are no sounds in the silent portion. Dr Jansen says it is a nearly 100% connection cut. The defence was unable to explain it in terms of their theory. The defence put that it has more of the characteristics of an off/on switch than a connection problem, but that they were not sure.

There are a number of short interruptions on EXHIBIT 31 which Dr Jansen attributes to microphone contact problems. (10) The defence ascribes these phenomena to overload problems as a result of excessive sound. This difference is, therefore, not material. It is clearly not a case of tampering here.

Dr Jansen stated that there are no positive indications that EXHIBIT 31 is an original on the same basis as he had testified previously. There are no indications that it is a copy.

There are points where there could possibly have been edits done, if there are edits. They are at counter 024 on EXHIBIT 31(1), at a pause just before that, and where there (20) is a recording on top of the existing recording at 383. According to him there are not edits elsewhere on the tape.

Theoretically there could be carefully done edits on the tape, which are not discoverable. He stated that his examination had been complete.

On the tape EXHIBIT 31(1) on the transcript V 24 at page 10 in the last paragraph there is singing in the background. When the singing in the hall commences, it is no longer audible. This singing occurs outside the hall in another place or building. According to Dr Jansen it is real (30)

background/...

background. Its loudness varies with the activity of the automatic gain control. It was put to Dr Jansen that this was either background singing or a consequence of a bad erasure. This is the evidence which Dr Jansen gave under cross-examination.

In re-examination Dr Jansen reiterated that the tapes in the second category have not been tampered with and that there are no indications that intentional alterations were made on the original tapes.

At this stage I must make two further observations (10) in connection with the evidence of Dr Jansen. The first is that he did his tests on mono machines as the tapes had been recorded on mono machines and the second is that his evidence-in-chief is to be found to a large extent in the exhibits which he handed in which are EXHIBITS ABD 1 to ABD 6.6.

As appears from my judgment his evidence was also supported by certain photographs.

As appears from what I have said the defence case as put in cross-examination is as follows. EXHIBIT 1 is a (20) copy. EXHIBITS 6 and 7 might be copies and might be edited, but the defence is uncertain about that. EXHIBIT 12 might be a copy, but the defence is uncertain about it. EXHIBIT 14 has places where edits could be hidden. EXHIBIT 31 has a number of insert erasures. At one spot there are three efforts at erasure and at one spot there is an off/on switch.

It should further be mentioned that the defence made a series of admissions in EXHIBIT AAS 10 relating to the whereabouts and handling of the tapes. These can be summarised
(30)

as/...

as follows. The tapes in the second category were not tampered with or altered in any way, since leaving the possession of the original operator of the recording machine until they were produced in court. EXHIBITS 1(1) to (7) were not tampered with or altered in any manner since their attachment.

The evidence of Mr Atkinson the expert for the defence on the tape recordings was presented in an unusual way. He handed in a report EXHIBIT ABD 8.3 which deals extensively with his experience, expertise, brief and equipment used (10) by him. It contains under the heading Preliminary Findings statements like the following.

"Paragraph 2.1 :

A number of technical explanations given in the ABD series are found to be not in accordance with what was on the tape recording and these were taken up with the State's technical expert."

Only one example is given.

"Paragraph 3 :

A number of obvious and audible interruptions were (20) present in the recordings. Many had not been correctly identified and typical cases only were raised with the State's technical expert. Great care should be exercised at these points, because the interruption may conceal an otherwise unacceptable edit."

No examples are given.

"Paragraph 8.1 :

The majority of the recordings investigated commence in the 'leader tape' and many end in the 'leader tape'."

The exhibit numbers of the tapes where this feature is to (30)

be/...

be found are not given.

In viva voce evidence-in-chief these bald statements were not substantiated and I was surprised to hear the witness merely stating that he confirmed what defence counsel had put to Dr Jansen in cross-examination, adding that there had been a loss in the transfer of the technical information. That cross-examination had stretched over some eight days.

No doubt this procedure was adopted by counsel to save time which in a case like this, which has lasted for many months is a laudable motive. This procedure is, however, (10) not to be countenanced.

The opinion of an expert is only of assistance to the court where it is properly motivated and given with sufficient detail to enable the Court to evaluate it. Where an expert for one party has placed before the court detailed evidence, as Dr Jansen has done in respect of each tape recording in reports ABD 4, ABD 5 and ABD 6, consisting of some 44 pages on which he was cross-examined for days, it is adequate for the other party's expert to fall back on mere generalisation and merely confirm what was put by counsel in cross-examination. (20) In that way the expert does not put his evidence across in his own words viva voce, but hides behind the words of counsel. The phraseology of counsel may be more elegant, but is not necessary exactly what the witness had in mind. It may be a shade different, but the witness may not have noticed that or may be diffident about correcting counsel. Furthermore, the manner in which this evidence is adduced compels the court to wade through lengthy cross-examination to ascertain precisely what the point is which the defence intended to make, instead of having it precisely put by the defence expert in his (30) evidence/...

evidence-in-chief.

The evidence of Mr Atkinson is, generally speaking, that erasures after the fact (that is recordings over existing recordings) interruptions, drop-outs (that is where sound fades) clanks, bangs, level changes and changes in the nature of applause, could all be signs of or places to hide signs of editing of tape recordings and that all these features occur in the tapes before court. Furthermore where recordings commence and end on leader tape it is not possible to ascertain whether they are originals or copies and it is (10) common cause that a copy can mask tampering of all sorts.

In his evidence Mr Atkinson made certain general observations.

- (1) Magnetic recordings may be copied and altered and materially altered in such a way that even experts cannot detect the alteration or detect the evidence of the copying.
- (2) It is not possible to determine from an examination of a tape recording alone whether it is an original or not.
- (3) It may be possible to prove that a tape recording (20) is definitely a copy if definite signs of the copy process can be found.
- (4) If no obvious signs of a copy are found, that does not mean that the recording is not a copy. It simply means that no signs were found.
- (5) Editing and tampering can be carried out in such a way that evidence may be found, but it can also be carried out in such a way that evidence may not be found.
- (6) There may exist on a recording examples of subtle tampering as well as obvious stops and starts and erasures. (30)

(7) It/...

- (7) It is not enough to consider only the obvious interruptions. If anything, more attention must be given to the less obvious signs.
- (8) A great deal of time is required to investigate a tape recording fully for possible signs of tampering and the task is practically impossible without a great deal of background information and access to equipment allegedly used to make the recording. Even in those cases where the original equipment can be obtained, it may still prove impossible to come to the conclusion due to (10) the difficulty of controlling any variables present at the time the recording was alleged to have been made.

Mr Atkinson concluded :

- "(1) It is entirely possible that the recordings are copies even though obvious signs may not have been detected.
- (2) The majority of the recordings have been altered since the recording was prepared. Note further that the fact that a recording

(20)

- (3) Tampering may well have been carried out, but simply not be apparent on limited investigation which is all that these recordings have received."

Mr Atkinson therefore concluded that it was not possible for him to form an opinion as to originality or lack of tampering.

It will be noted that I have not expressed any views on the relative expertise of Dr Jansen and Mr Atkinson or the criticism voiced during cross-examination by counsel (30)

on/...

on the evidence of Dr Jansen. Neither have I evaluated their evidence. I have merely set it out rather fully to illustrate the type of problems encountered with the tapes before court.

On my approach which I set out hereunder, the weight of the evidence of these experts is a matter for the court consisting of judge and assessors to decide upon at the end of the case. This observation also applies to the question whether interruptions and peculiarities in the tape recordings are material and whether the tapes are (10) originals or trustworthy copies or not.

What struck me as curious in these proceedings was that the defence would employ a costly expert to examine the tape laboriously for signs of possible tampering, without ascertaining from some if not all of the speakers on the tape-recorded meetings, which included some of the accused, whether their speeches have been altered and in which respects. Had this been done, the experts would have been able to concentrate their efforts on those spots and a lot of time and effort would have been saved. Are we to assume from (20) the absence of any allegation to that effect in cross-examination that it is not the defence case that there is in fact a false version of the meetings before Court? It would seem so. In that case, we have the incongruous situation that the law of evidence which should be designed to facilitate court proceedings in quest of the truth is in fact utilised to stultify those proceedings by preventing the use of relevant evidence.

On 3 June 1986 I gave a judgment on the admissibility of twelve video tape recordings. Two days later the (30) learned/...

learned judge-president of the Natal Provincial Division ruled on the admissibility of certain audio and video tape recordings in S v RAMGOBIN AND OTHERS, as yet unreported. Our conclusions differ.

The defence argued that the latter judgment should be followed, whereas the state rested its case on my judgment on the videos. MILNE, J.P. held in respect of the admissibility of tape recordings that he was bound by the decision in R v SINGH AND ANOTHER 1975(1) SA 330 N, where it was held at 333 G that where the issue of a possible fabrication (10) is raised, it has to be established that the tape recordings produced are the originals. If it is likely that they are not the originals and therefore not the primary and best evidence the court will reject them. Accordingly, if there exists a reasonable possibility of interference with the tape recordings, then they are not admissible in evidence.

The learned judge-president supported that conclusion and held that before the tapes would be admissible the State had to prove beyond reasonable doubt :

- (1) that the recordings before court related to meetings (20) and conversations alleged in the indictment;
- (2) by way of testimony of a witness who saw and heard the events allegedly recorded, that the recording accurately reflects those events; and
- (3) that the tapes are the original recordings and have not been interfered with in any way, whether by mistake or otherwise, since the original recordings were made.

This stringent test for admissibility is laid down by the learned judge-president because tape recordings "can be altered (and materially altered) in such a way that even (30) experts/...

experts cannot detect the alteration". For this reason tape recordings are said to be dangerous from an evidential point of view unless certain precautions are taken. These are reflected in the tests set out above.

I respectfully differ. The above approach is equally applicable to viva voce evidence. It would be absurd to refuse to hear a witness because he might turn out to be a liar. Of course, a witness can be cross-examined. On the other hand, the evidence of a tape recording can be gain-said by calling the speakers themselves or members of the (10) audience to cast doubt on its authenticity and veracity. An accused does not stand helplessly tied to the stake of a tape recording.

The approach advocated above leads to the unacceptable situation that a court refuses to consider relevant evidence because it might be fabricated, where the correctness of that evidence is not even placed in issue in cross-examination, but only its admissibility. At no stage in our case was it put to any witness that the tapes are not a true reflection of what happened at the meetings. Cross-exami-(20) nation established that the witnesses do not remember the contents of the speeches, which was clear from the start. It was not put in cross-examination that the tapes had been tampered with. It was not disputed in cross-examination that the tapes relate to the meetings mentioned. And yet, I am asked on the basis of the test laid down by the learned judge-president to exclude this evidence from consideration by my assessors and myself when all the evidence is weighed at the end of the case. In my view this would lead to a miscarriage of justice in this case. (30)

I have dealt in my judgment on the admissibility of the video tapes with S v SINGH (supra). I will not repeat what I have said there.

I have considerable difficulty with the requirement that the state has to prove admissibility of tape recordings beyond reasonable doubt. In R v MAQSUD ALI 1965(1) ALLER the Court of Criminal Appeal did not lay down such a test. The matter was left open in R v STEVENSON 1971 (1) ALLER by KILNER BROWN, J. at 680 D. The learned judge did, however, express strong views on the procedure which was (10) followed by MILNE, J.P. and myself. He said at page 679 G :

"One further general proposition which must not be overlooked, is that although it is for the judge to rule on admissibility, it is for the jury to decide on the truth or falsity of any piece of evidence ."

And at 608 :

"... as a general rule it seems to me to be highly undesirable and indeed wrong for such an investigation" (that is of a technical nature on admissibility) "to take place before the judge. If it is regarded as a general practice(20) it would lead to the ludicrous situation that in every case where an accused person said that the prosecution evidence is fabricated, the judge would be called on to usurp the function of the jury."

In R v ROBSON 1972(2) ALLER 699 in the Central Criminal Court SHAW, J. held at 701 E that in considering admissibility

".. the judge is required to do no more than to satisfy himself that a prima facie case of originality has been made out by evidence which defines and describes the provenance and history of the recordings up to the (30)

moment/...

moment of production in court. If that evidence appears to remain intact after cross-examination, it is not incumbent on him to hear and weigh other evidence which might controvert the prima facie case. To embark on such an enquiry seems to me to trespass on the ultimate function of the jury. It is true that in determining whether an alleged confession is admissible or not, the judge has the duty of deciding a contentious issue and he has to apply the same criteria as a jury would have to do, but this is an anomalous case deriving (10) from its own special history and from considerations peculiar to confessions."

As I stated in my judgment on the videos I hold the view that the documentary best evidence rule should not be extended to tape recordings. Should I be wrong and should that rule be applied, however, I would respectfully agree that no more than prima facie evidence of originality be required at the stage where admissibility is to be decided.

I agree that it must be shown that the recordings relate to matters which are in issue before the court. (20) This is another way of saying that they must be relevant. I respectfully disagree that relevancy must be proved beyond reasonable doubt. All that is needed in this respect at this stage of the proceedings is that it be shown that prima facie the material tendered as evidence has some probative force. A link has to be forged between the tape and the meeting to which it is said to relate. That link can, of course, be evident from the contents of the tape recording itself.

I further respectfully disagree with the view that before the tape recording is admissible, a witness has to testify (30) that/...

that he saw and heard the events allegedly recorded and that the recording accurately reflects those events. This approach relegates the evidence of tape and video recordings to a role which is merely corroborative and then only to a limited extent. Obviously the state will have to convince the court of the reliability and accuracy of the tape recordings. I fail to see, however, why that has to be done before the final argument at the end of the case. I further fail to appreciate why that proof of reliability and accuracy can only be furnished by viva voce evidence of a witness (10) who saw and heard the events recorded. Surely, circumstantial evidence might, in a given case, lead to the same conclusion. I do not support the view of the learned judge-president that at the stage where admissibility is to be decided upon it has to be proved beyond reasonable doubt that the tapes are originals. As I pointed out in my judgment on the video tapes that requirement flows from the equation of tapes with documents and the application of the best evidence rule to the former. I could find no ground or authority in our law for this approach. (20)

I can see no objection to the use of a copy provided the court is satisfied that it accurately reflects what was recorded.

The proposition of the learned judge-president that it has to be proved that the tapes have not been interfered with in any way, whether by mistake or otherwise, since the original recording was made, is in my respectful opinion too widely stated. An example will illustrate this.

In the case of EXHIBIT 7(2) Major Benjamin, when replaying the tape inadvertently pressed the recording button. (30)

This/...

This resulted in a deletion of a short portion of the existing recording. On the strength of the proposition set out above, this interference will cause the whole tape to be inadmissible, without any room for the court to determine whether this interference materially affects the recording as a whole. To me this looks like throwing out the child with the bath water.

In my view a much sounder approach would be to deal with each interference, stoppage, interruption and fading of sound on its merits, determine whether it is material and (10) whether it amounts to tampering and thereafter ask the question whether the state has proved that the whole tape or a particular portion of it on which the state relies is reliable and accurate. This question has to be answered by judge and assessors at the end of the case. I will not at this stage usurp that function.

Even if a tape through faulty recording or otherwise is partly unintelligible, it may be that in a given case the court may be satisfied that the balance of the recording is reliable. No hard and fast rule should be laid down. (20)

In R v W 1975 (3) SA 841 T at 843 A it was stated that a photograph or film does not have to measure up to some theoretical and possibly unattainable standard of perfection as a record, before it can be admitted as evidence. The same can, in my view, be said of tape recordings.

The above remarks are made after having "had the privilege, or burden, of listening to extensive expert evidence on tape recordings," and their fallibility.

The learned judge-president referred to American Law Reports, second series (1958) volume 58 page 1027, third series (1974) page 30)

606 and volume 60 paragraph 11 and 12, fourth series (1985) page 817, where reference is made to rules prescribed for testing the admissibility of recordings. They are :

- (1) a showing that the recording device was capable of taking testimony;
- (2) a showing that the operator of the device was competent;
- (3) establishment of the authenticity of the recording;
- (4) a showing that changes, additions or deletions have not been made;
- (5) a showing of the manner of the preservation of the (10) recording;
- (6) identification of the speakers; and
- (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

I would hesitate to transplant this American species of the law of evidence into South African soil. In my judgment on the admissibility of video recordings I referred to the particular requirements of their jury system. In my view, apart from identification which may be a way of proving relevance, the rest of the above rules should not be (20) pre-requisites to admissibility. I express no opinion on rule 7 which is not applicable to this case.

It follows from what I have said above that I deal with tape recordings as I would deal with any other type of real evidence tendered where its admissibility is disputed. The test is whether it is relevant. It will be relevant if it has probative value. It will only have probative value if it is linked to the issues to be decided. That link will often have to be supplied by evidence of identification of voices on the tape, where the identity of a speaker is (30)

in issue. This proof of relevancy need only be prima facie proof. Consequently no trial-within-a-trial should be held on the question of admissibility as the defence will, apart from contesting this evidence by cross-examination, not be entitled to lead any evidence on this issue at this stage. The defence can canvass the matter fully when it presents its case.

In the instant case I expressed some reservations on the calling of Mr Atkinson by the defence out of turn at this stage. I allowed this procedure as it was also followed (10) in S v RAMGOBIN (supra) and to enable the defence to present its case on admissibility fully.

In the light of my remarks set out above, the calling of Mr Atkinson at this stage of the procedure was incorrect. His evidence will, of course, be considered with all the other evidence at the end of the case.

The above approach does not mean that sight is lost of the dangers inherent in tape recordings. All these dangers have to be duly weighed when the question is considered at the end of the case whether the state has proved that the (20) tape recordings are reliable. That decision will be reached on all the evidence then available which includes that of the accused, should they give evidence. Only then will the court know which portions of the tape recordings are disputed, whereas at present the defence is merely indulging in shadow boxing.

During the proceedings before me several features were indicated which theoretically might indicate that a tape had been tampered with. The defence expert was not prepared to state this as a fact. It was merely put forward in an (30) attempt/...

attempt to cast doubt on the tapes during the hearing on admissibility, but it was never put that the tapes were not materially faithful recordings of what happened at the meetings. In fact on behalf of accused no. 19 and no. 20 who attended and spoke at some of the meetings it was not disputed in cross-examination that the tapes correctly record what they said. What the defence in effect attempts to do is to nullify material evidence without disputing its correctness. I do not think that the law of evidence is intended to create such a travesty of justice. (10)

On the approach which I adopt the real issue, namely whether the tapes are a true record of the meetings concerned, will be dealt with without a prolix theoretical debate on possibilities which have no basis in reality.

The tape recordings before court are clearly relevant. The matters raised in cross-examination of Dr Jansen and the evidence of the defence expert Mr Atkinson will be considered at the end of the case. The objection against the admission of the tape recordings EXHIBITS 1(1) to (7), 6, 7(1) and (2), 12(1) and (2), 14(1) and (2) and 31(1) and (2) is rejected.

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MR BIZOS : My Lord, there is one aspect which we would draw Your Lordship's attention to and that is that I have not obviously had an opportunity of looking at the record, because it came very late in Your Lordship's judgment. Your Lordship mentioned in Your Lordship's judgment that accused nos. 19 and 20 agreed that the recordings are what they said. With due respect, I think that Your Lordship was probably thinking of the statement that I made on their behalf, if I remember his number correctly, it was IC. 8, the young man from - that identified voices. I do recall (10) ... (Court intervenes)

COURT : 12.

MR BIZOS : Oh, yes, 12. Thank you. I do recall clearly telling Your Lordship that I had been specifically authorised to place on record that accused no. 19 and 20 will not put their voices in issue. That they are their voices and not an admission that what is recorded has been said by them.

COURT : I think we must look it up again. We can all look at the record and whether you said it or did not say it, (20) if it was not correctly put or if it was not correctly understood by me, we will just correct it.

MR BIZOS : There is provision for Your Lordship to correct it. Then there would be no problem about it.

COURT : Will you just get the record out and we will see exactly what you said.

MR BIZOS : That is my recollection. I hope that it bears me out.

COURT : I also hope so. I did not write it down that way. It is not my note, but I may have incorrectly noted it (30)

down/...

down.

MR BIZOS : We will try and look into it.

COURT ADJOURNS.

COURT RESUMES.

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MR BIZOS : My Lord, we have checked the record and the form that the admission took appears on page 6 424. In order to get it into its context, I will read onto the record from line 20. My Learned Friend for the State, Mr Jacobs, says "Die ander vergadering wat oorbly is die TIC vergadering. Dit is die Transvaal Indian Congress se vergadering. U Edele, in daardie geval, My Geleerde Vriend het gesê in (10) al die vergaderings maak hulle 'n erkenning, ek kon dit nog nie op skrif stel nie, maar Terror Lekota, beskuldigde nr. 20 en Popo Molefe, beskuldigde nr. 19 erken dat hulle daar was by die vergadering en daar deelgeneem het aan die vergadering." Then Your Lordship asked "Soos op die transkripsie aangetoon." Then I answered instead of My Learned Friend. "What we have told the State is that they do not have to prove the identity of their voices. I hope - I do not want to mislead anybody. It does not mean that they admit the correctness or completeness of the transcript at (20) this stage." Then Your Lordship said "No, no, but that where it is alleged on the transcript that they spoke, that they in fact spoke. Not necessarily that the transcript is correct." "Correct, they will admit that they spoke at the meeting or they admit that they spoke at the meeting." That is the basis of the admission.

COURT : Before you sit down, there is one other matter that I would like to raise. The tapes have now been declared to be admissible. This means that I would require from the defence to give me a list indicating the page and line on (30)

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the transcripts and if possible the counter reading on the tape where there is a difference of opinion between the State and the defence, because then we will have to listen to each and every spot. So, you will have to prepare something if there is going to be a difference.

MR BIZOS : We did, we have been working in anticipation of this request because of the spirit of co-operation that has been between the State and ourselves up to now. A document is being prepared. I do not believe that the reading is going to be incorporated, but it is something that we (10) can look into and we have put ourselves on terms in view of the evident close of the State case and we have indicated to the State that we will try our best that Your Lordship and the State has this document by Monday morning.

COURT : I had in mind that should that occur that for one reason or another we would have to adjourn because a witness is not here or somebody has to prepare something on cross-examination, then that time need not be wasted, but we can utilise that time to solve genuine disputes about the transcripts. (20)

MR BIZOS : I do understand from My Learned Friend, Mr Tip, that there are discussions along these lines and that we will try and let Your Lordship have that as soon as possible. It will again be - the admission will be that this is what appears on the tape.

COURT : Yes, that is in order. That is the sole dispute that I wanted to solve, listening to the tape and then seeing what is on the transcript.

DELMAS TREASON TRIAL 1985-1989

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