IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(TRANSVAALSE PROVINSIALE AFDELING)

DELMAS

1986-01-22

HAAL DEUR WAT NIE VAN TOEPASSING IS NIE
(1) Rapporteerbaar: JA/NEE
(2) Van belang vir ander Regters: JA/NEE
(3) Hersien

Datum Handtekening

DIE STAAT

teen

PATRICK MABUYA BALEKA EN 21 ANDER

UITSPRAAK OP BESWAAR DEUR VERDEDIGING

K20.60 VAN DIJKHORST, R.: Op hierdie stadium is sersant Adolf Branders in die getuiebank en hy het getuienis gelewer oor gebeure by Kroonstad in die Swartwoonbuurt Seeisoville op (10) Maandag, 11 Februarie 1985, ook op 18 Februarie 1985 en op 21 Februarie 1985. Wat die eerste datum betref is die getuienis ten aansien van oproer wat plaasgevind het en wat die tweede en derde datums betref is die getuienis oor oproerigheid wat in verband staan met begrafnisse wat voortgevloei het uit die eerste oproer. Ten aansien van die derde datum is die getuienis dat by die begrafnis teenwoordig was in 'n voertuig beskuldigde nr. 20 en poog die Staat om getuienis voor te lê dat beskuldigde nr. 20 uit die voertuig geklim het en 'n klip opgetel het, blykbaar met die doel om dit na die polisie te gooi,(20) soos ander persone op daardie stadium besig was om die polisie onder die klippe te steek.

Teen hierdie getuienis is daar beswaar. Die beswaar is dat die getuienis nie gedek word deur die akte van beskuldiging en besonderhede wat daarop verskaf is nie en dat dit gevolglik

... / nie

nie toegelaat moet word nie.

Op hierdie beswaar het mnr. Jacobs twee antwoorde. Eerstens dat die Staat moet bewys dat die UDF nie 'n vreedsame organisasie is nie en dus, indien die Staat aantoon dat beskuldigde nr. 20, wat 'n ampsdraer van die UDF is, self geweld gepleeg het, het dit die strekking dat dit kan aantoon dat die UDF self nie 'n vreedsame organisasie is nie. Mnr. Jacobs sê dat die Staat opset moet bewys aan die kant van die UDF om uiteindelik die land onregeerbaar te maak en dat hierdie getuienis daardie strekking het. Op sigself (10) gesien, mag dit so wees, maar die vraag moet beantwoord word of die Staat by die verskaf van besonderhede sy saak nie beperk het tot so 'n mate dat hy hierdie afsonderlike dade, waarvan nie melding gemaak is in die besonderhede nie, uitgesluit het.

In hierdie verband is daar 'n aantal vrae gevra deur die verdediging. Wat betref paragrawe 66 en 67 van die akte van beskuldiging, wat die strekking het dat beweer word dat daar vanaf Augustus 1983 tot einde April 1985 deur die United Democratic Front en andere, 'n kampanje gevoer is om die Regering se beleid en wetgewing ten aansien van verskillende vorme (20) van sy gesagstrukture, en in die besonder ten opsigte van Swart plaaslike besture, sowel as wetgewing rakende die beheer oor Swart burgers in die Republiek van Suid-Afrika, te gebruik om die massas in Suid-Afrika te organiseer, mobiliseer, polities te indoktrineer en te aktiveer en op te sweep tot geweldpleging.

In dié verband is in die algemeen gevra of dit beweer word dat enigeen van die beskuldigdes direk of indirek geweldadige optrede aangemoedig het met die resultaat wat genoem word in die paragraaf. Dit is 66.7, dit wil sê dat groot- (30) skaalse geweldpleging gevolg het in die Swart woonbuurte.

... / In

In antwoord daarop het die Staat gesê dat elke beskuldigde direk sowel as indirek deur deel te word van die sameswering en die nastreef van 'n gemeenskaplike doel en om Swart plaaslike besture te vernietig as deel van opset om die Regering van die Republiek van Suid-Afrika buite parlementêr te vervang en deur die kampanjes teen die Regering se beleid en wetgewing te voer en die massas op te sweep teen en raadslede en die stelsel van Swart plaaslike besture te tipeer as verwerplik en as verraaiers van die Swart massas, geweldpleging aangemoedig en die raadslede geïntimideer het. (10)

Dit is duidelik uit hierdie antwoord dat die Staat nie beweer dat daar direk opgetree is by die geweldpleging deur beskuldigde nr. 20 nie.

Daar is verder 'n verwysing na paragraaf 8 waarin spesifieke beskuldigdes behandel word en waarin ten aansien van beskuldigde nr. 20 beweer word dat hy as deel van die bestuurstruktuur van UDF bewus was van en gemoeid was met die doel van die UDF en dat hy aktief meegewerk het in besluitneming, koördinering en uitvoering van aktiwiteite om die doel te verwesenlik.

Op 'n vraag, 27.6.5., hoe die geweld in elke gebied veroorsaak is deur enige besluit of aksie aan die kant van die beskuldigdes, is geantwoord dat dit veroorsaak is deur propaganda en dat dit die gevolg is van sameswering, soos in die akte van beskuldiging beweer word en verder dat die beskuldigdes bewus was van die organisasie en mobilisering van die Swart-massas rondom die kampanjes en dat hulle hulle vereenselwig het en aktief meegewerk het in ten minste die Vaal Driehoek met die algemene doel om deur die organisering en mobilisering van die massas in verskillende organisasies onder leiding van die UDF die massas tot geweldpleging op te sweep. Dan word daar gemeld dat oproer uitgebreek het in, onder andere, (20) (30)

... / Seeisoville

Seeisoville en dat sedert Februarie 1985, onder andere, UDF daar georganiseer het. Die antwoord is dus nie dat beskuldigde nr. 20 direk deelgeneem het aan die geweldpleging in Seeisoville nie, maar dat hy en/of die UDF georganiseer het wat tot geweldpleging in Seeisoville aanleiding gegee het en dat dit juis hul oogmerk was.

In hierdie opsig dus is daar, myns insiens, 'n geldige beswaar teen die getuienis wat die Staat tans poog om voor te lê.

Mnr. Jacobs poog om hierdie beswaar te beantwoord deur te betoog dat die vrae gemik was om vas te stel wat die geweld veroorsaak het en nie hoe die geweld verder verloop het nie en hy betoog dat die getuienis is dat die geweld eintlik voor die betrokke dag plaasgevind het of begin het. Myns insiens gaan hierdie argument nie op nie. Die opneem van 'n klip tydens sporadiese geweld, met die doel om dit na die polisie te slinger, sal klaarblyklik verdere geweld veroorsaak en tot gevolg hê. Al sou ek in hierdie verband verkeerd wees in my vertolking, en ek is van mening dat ek dit nie is nie, sou geregtigheid, myns insiens, vereis dat die beskuldigdes in kennis gestel word van spesifieke dade van geweld wat hul ten laste gelê word.

Op die akte van beskuldiging, aangevul deur nadere besonderhede, is die vraag dus nie toelaatbaar nie. Die beswaar word gehandhaaf en die getuienis verwysende na die optel en gooi van die klip word van die notule geskrap.

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V.C

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

HAAL DEUR WAT NIE VAN TOEPASSING IS NIE
(1) Rapporteerbaar: JA/NEE
(2) Van belang vir ander Regters: JA/NEE
(3) Hersien

Datum Handtekening

DELMAS

1986-01-24

THE STATE

versus

PATRICK MABUYA BALEKA & 21 OTHERS

(10)

J U D G M E N T

VAN DIJKHORST, J.: After we adjourned yesterday I was seen by counsel in Chambers in connection with my ruling that the evidence of the present witness, and certain other witnesses, be given in camera. The evidence of this witness relates to a number of persons and events on which the defence needs to do research for cross-examination. To a certain extent the defence team is hampered by the ruling I gave on 22 January 1986 and representations have been made to me in this respect. I have carefully considered and weighed the necessity of (20) affording the defence an opportunity to prepare their case properly against the necessity to safeguard the interests of the witness. It may be that the ruling I am about to give will not be entirely satisfactory seen from either the one or the other side. Insofar as the defence may still be materially hampered in their preparation, if that is the case, that fact will have to be taken into account when the weight of the evidence of this witness is to be assessed. I have also given careful consideration to the number of persons in respect of whom the embargo is to be lifted. Paragraph 5 of the (30)

ruling/.....

ruling which I gave on 22 January 1986 in respect of the proceedings behind closed doors is qualified and amplified in the following respects:

(a) Where this witness referred to persons or events where he himself was not directly involved, as communicating with that person or participating in that event, preparation for cross-examination can proceed without falling foul of the existing ruling.

(b) Where this witness referred to persons with whom he had material conversations or events wherein he played a material part, Senior Counsel may, in consultation, mention the name of the witness

(1) without revealing the fact that he is testifying in this case, and

(2) without giving any indication of his present whereabouts, and

(3) unless absolutely necessary, without revealing the fact that he has deserted from the ANC, and

(4) only to the person with whom the witness allegedly had the conversations and persons materially involved in the aforementioned events, and

(5) always bearing in mind and striving to attain the purpose of my ruling.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. 482/85

DELMAS

1986-01-27

THE STATE

versus

PATRICK MABUYA BALEKA & 21 OTHERS (10)

J U D G M E N T

VAN DIJKHORST, J.: I have heard a debate about whether I should compel the witness to reply to a question by Mr Bizos as to the identity of the person with whom this witness has entered into an agreement, which agreement inter alia provides that he should not disclose the identity of that person. On the answers I have so far heard I am not convinced that the answer would be relevant at this stage and it may be that the application can be repeated eventually when we have further (20) information before us. At this stage I am not going to compel the witness to answer the question.

R

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC. 482/85

DELMAS

1986-01-27

THE STATE

versus

PATRICK MABUYA BALEKA & 21 OTHERS (10)

R U L I N G

VAN DIJKHORST, J.: I have heard argument on the question whether you have to answer the question put to you as to the identity of the people with whom you have been staying from time to time, and my ruling is that you have to answer the question. Bearing in mind that I have made an order that steps are to be taken not to disclose your identity directly or indirectly or the fact that you are giving evidence in this court. (20)

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DELMAS

1986-02-03

HAAL DEUR WAT NIE VAN TOEPASSING IS NIE
(1) RAPPORTEERBAAR: JA/NEE
(2) VAN BELANG VIR ANDER REGTERS: JA/NEE
(3) HERSIEN

Datum Handtekening

THE STATE

versus

P.M. BALEKA AND 21 OTHERS

JUDGMENT ON APPLICATION FOR EVIDENCE TO BE GIVEN IN CAMERA

C50.61 VAN DIJKHORST, J. : I have considered the arguments, both for and against and having considered them, I am of the view(10) that the evidence of this witness should be given in camera, and my previous ruling as to the evidence to be given in camera will stand. The same will apply as in the case of the previous witnesses.

The fact that this person is a detainee, is also not to be published at all by the press.

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COURT ADJOURNS UNTIL 4 FEBRUARY 1986.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC 482/85

DELMAS

1986-02-12

THE STATE

versus

PATRICK MABUYA BALEKA & 21 OTHERS (10)

J U D G M E N T

VAN DIJKHORST, J.: During the cross-examination of the present witness, who is detained by the police and who was also warned by this Court in terms of Section 204 of the Criminal Procedure Act as an accomplice, it transpired that he had been assaulted by the police who wanted him to tell the "truth", namely that he had been involved in the killing of Mr Caesar Motjeane, which allegation he persisted in denying. He testified that at the time he was a detainee, that he (20) had no rest and that he was interrogated right through the week of his detention. He was kept at a place in the country-side beyond Vereeniging. He did not know the name of the place nor the names of the police who had assaulted him.

Mr Bizos, for the defence, thereupon pursued a line of cross-examination which was intended to establish where the place was and, so I was told during argument, also to establish who the policemen involved were. The question thereupon arose whether this line of cross-examination should be allowed. I was told that this line of cross-examination might reveal (30)

facts/.....

facts which might enable the defence eventually to piece together which police station was involved and possibly which policeman. This would then enable the defence to cross-examine any policeman from that station and any other witness held at some stage at that station on the basis of the evidence of the present witness. It was furthermore suggested that this line of cross-examination also tested this witness's credibility.

For the sake of clarity it should be added that the witness was released from detention after a week and that the (10) statement from which he was led in chief was taken some time later: initially when he was not detained at all, but later amplified when he was re-detained. The evidence was that he was not assaulted during his re-detention and it appears that other police officers and another police station were involved the second time. Whereas the first questioning was directed at the witness's involvement in the death of Mr Caesar Motjeane the second interrogation ranged much wider and covered the aspects on which his evidence was led in chief.

As stated by HENOCHSBERG, A.J. in CARROLL v CARROLL (20) 1947 (4) SA 37 at 40:

> "The objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief, to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party. Hence leading questions may be asked and point-blank questions may be put with the object of discrediting the evidence given for the other side or of supporting the cross-examiner's own case." (30)

One is naturally reluctant to interfere with the cross-examination of counsel. There is an important principle at stake, that is that the truth must be found. A vital tool in this search for the truth is the skilful probing of the adroit cross-examiner. Yet there are limitations to the questions to be allowed. The Court must guard against its proceedings wandering beyond the broad path of permissible cross-examination and getting unduly side-tracked to become bogged down in the mud of irrelevancy.

A guideline was laid down by the Appellate Division in (10) S v CELE 1965 (1) SA 82 (A) at 90H to 91G. WILLIAMSON, J.A. stated the position as follows:

"The difficulties which sometimes arise in a trial in regard to a limitation of the right of cross-examination, relate more usually to attempts by counsel to cross-examine a witness on matters merely collateral to the issues being tried, the purpose being to undermine his credit as a witness. Particularly when the attack is directed to a witness's credibility can the ambit of such an examination tend to become unduly extensive (20) unless properly controlled. That the judicial officer presiding at the trial has both a discretion and a duty to control undue or improper examination, has recently been restated both in this Court and in the Court of Appeal in England; see S v GREEN 1962 (3) SA 886 (AD) at p. 888B, quoting JONES v NATIONAL COAL BOARD (1957) 2 All ER 155 at p. 159G. That discretion, it must be emphasised, is one that should, however, be exercised with caution and with a full awareness of the vital role that cross-examination plays in our system of evidence. As (30) was said by Prof Wigmore in opening his chapter

on/.....

on the subject of cross-examination in his work on Evidence (see Volume V para 1367):

'the belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. Not even the abuses, the mishandlings and the puerilities which (10) are so often found associated with cross-examination have availed to nullify its value.'

That incompetent or prolix cross-examination can be aggravating to even the most patient of judicial officers, must be recognised. Yet nevertheless it is with patience and discernment that the problem of curbing any cross-examination must be approached. I would like to adopt the words used by BROOME, J.P. in his judgment in the case of DONGWA v THE ASSISTANT MAGISTRATE OF DURBAN, (NPD 10 December 1951 (the case is unfortunately un- (20) reported but the judgment is quoted in extenso in May South African Cases and Statutes on Evidence, 3rd Edition, paras 560 - 564)) where in setting aside on a review the proceedings of a magistrate's court criminal trial, he said inter alia:

'Judicial officers, particularly in criminal trials, frequently have to endure long and tedious cross-examination. In my opinion a cross-examiner ought not to be obliged to demonstrate beforehand the relevance of every question he wishes to put. (30) It is the duty of the judicial officer to allow

a certain measure of latitude in the cross-examination and to avoid even suspicion that the defence is muzzled. --- The discharge of the judicial function requires endless patience. Circumstances, it is true, may occur and undoubtedly do sometimes occur in which judicial patience is tried almost to the point of exhaustion. In such a case the danger must always be present that the accused is unconsciously made to suffer for the shortcomings of his representative.'"

See also S v MNGOGULA 1979 (1) SA 525 (T) at 526. (10)

On what is relevant and what is not one may refer to the dictum of SCHREINER, J.A. in R v MATHEWS & OTHERS 1960 (1) SA 752 (A) at 758A-B:

"Relevancy is based upon a blend of logic and experience lying outside the law. The law starts with this practical or commonsense relevancy and then adds material to it, or more commonly, excludes material from it, the resultant being what is legally relevant and therefore admissible."

See also LETSOKO & OTHERS 1964 (4) SA 768 (A) at 755. (20)

When there is a sufficient link or nexus between the fact in issue and the fact sought to be proved for an inference as to the occurrence of the fact in issue to be drawn then the evidence will be relevant. See GOSSCHALK v ROSSOUW 1966 (2) SA 476 (C) at 482.

Even similar but unconnected facts can be relevant if, in proximity of time, in method or in circumstance there is a nexus between the two sets of facts. If these are absent no inference can safely be deducted therefrom and they are irrelevant. S v GREEN 1962 (3) SA 886 (A) 894F; (30) S v HASSIM & OTHERS 1972 (2) SA 448 (N) 453.

A case where the Court refused cross-examination on the grounds of irrelevancy of unrelated issues was S v COOPER & OTHERS 1976 (1) SA 932 (T). In that case the defence sought to cross-examine a police officer on alleged assaults on an accused in order to establish that accomplices who testified that they, the accomplices, had not been assaulted were untruthful. BOSHOFF, J. stated as follows at page 939:

'The question whether the accused were assaulted or whether unlawful pressure was brought to bear on them by members of the police while being interrogated is not a fact in issue, either on the charge against them or on possible defences they may rely upon. There is consequently no nexus between the evidence proposed to be led by the accused and the issue or issues before the Court. The purpose of the evidence is to enable the defence to use it in order indirectly to attack the credibility of the three accomplices in respect of evidence which according to the defence is false because it is evidence forced down their throats by interrogators who believed in the truth of such evidence. In my view there is not that nexus between the evidence proposed to be led by the defence and the facts in issue before the Court as to render it legally relevant. In any event, apart from the facts in issue in the present case there is not sufficient evidence of a concerted modus operandi as far as the accused and the accomplices are concerned to provide a nexus in

proximity/.....

proximity of time, in method or in circumstance between the facts testified to by the accused and the facts testified to by the three accomplices from which any inference can safely be deduced.'"

The Learned Judge found that as there was no modus operandi the cases of S v LETSOKO supra and GOSSCHALK v ROSSOUW supra were not in pari materia.

It remains to apply the principles set out above to this case. The accused stand arraigned on a charge of treason with alternative charges of terrorism and subversion under the (10) Internal Security Act No. 74 of 1982 and six counts of murder. The answers sought to be elicited by this line of cross-examination cannot, by any process of inferential reasoning, help this Court to decide those issues. At best for the defence there is a possibility that the answers might furnish some information for future cross-examination if perchance a witness is called who has some connection with the police station in question, either as a policeman or as a detainee, and then only will this information be of use if the conceivable prospective witness has knowledge of this witness and of the (20) circumstances of his detention. For that contingency I am asked to listen to this type of cross-examination. I decline to do so.

Insofar as it was argued that these questions test the credibility of the witness I differ. The witness has stated that these names are to him unknown. There is no suggestion that he is lying. Clearly the purpose of this line of questioning was not to test credibility and if it was it was ill conceived. The question is disallowed.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC 482/85

DELMAS

1986-02-19

THE STATE

versus

PATRICK MABUYA BALEKA & 21 OTHERS (10)

J U D G M E N T

VAN DIJKHORST, J.: I have considered the question whether the proposed witness is to give his evidence in camera and my ruling is that the evidence is to be in camera, that my previous ruling applies and that it is in no way to be mentioned by the press that he is a reporter or that he works for the SABC. As far as the record is concerned my Assessors and I have considered the aspect of the name of the witnesses who give evidence in camera and this was also (20) tentatively discussed with counsel and it seems advisable that they should be given numbers rather than names, on the record. This witness will then be known as in camera witness no. 9 and appropriate steps will be taken to erase the names of the previous witnesses from the record, so far. We will take steps to have the master copy corrected and counsel are to see to it that their copies are properly blotted out.

It should further be stated that the witnesses who have already given evidence in camera will henceforth be referred to by their numbers of appearance. The names (30)

can/.....

can be got from me and the numbers will correlate with the names. I would further like to place on record that Advocates Mailer and Morane, who are appearing in a treason trial in Natal, have approached me in Chambers and that I have lifted the embargo on the record insofar as Volume 5 page 250, Volume 9 page 456 to 469 and Volume 10 page 510 to 515 are concerned provided that the name of the witness be blotted out. That is in camera witness no. 6. That embargo was lifted solely for the purpose of the trial they are in at the moment in Pietermaritzburg. (10)

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC 482/85

DELMAS

1986-01-24

THE STATE

versus

PATRICK MABUYA BALEKA & 21 OTHERS (10)

J U D G M E N T

VAN DIJKHORST, J.: Mr McCamel I have seriously considered your position and you must understand that I have got a lot of sympathy for all the witnesses that testify in this case and that have to go back to their communities where often people are misinformed and polarised. I have attempted to consider the matter first of all from your point of view and secondly from the point of view of the administration of justice. I hold the view that from your own point of view (20) it would be better for you to stand up and be counted as a leader in the community, speak out forthrightly and truthfully and say exactly what you have to say openly and there can then be no question of rumours as to what you may or may not have said because whatever happens in any event there will be rumours that you testified in this case.

Also from the community's point of view it is better for the community of Sebokeng that their leaders, and undoubtedly you are a leader, stand up and be counted and openly tell the truth as they see it. It is true that all leaders (30)

of the community always come in for a lot of criticism, be they political leaders, be they cultural leaders and even be they religious leaders or even be they Judges. That is the way things are and the highest trees catch the most wind. To what I have said to you one should add the following and that is that the administration of justice, unless there are clear exceptions to be made, has to be in open court. There is a good reason for this and the reason is that the public as a whole should know exactly what is going on in a court before a judgment is passed. (10)

Now having said this I request your co-operation and I assure you that in my view from your own point of view this decision of mine that your evidence be conducted in open court is the best, and do not think that this Court is without sympathy for your situation. Mr Bizos I accept that the cross-examination will be conducted in such a way that there will be no reaction from the community upon statements made by him. That as far as I am concerned should be understood.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

SL

DELMAS

1986-02-28

THE STATE

versus

P.M. BALEKA AND 21 OTHERS

JUDGMENT ON APPLICATION FOR AMENDMENT OF INDICTMENT

C93.38 VAN DIJKHORST, J. : Mr Jacobs, for the State, applied for an amendment to the further particulars. This amendment is (10) opposed by the defence. It is an amendment to various pages of the further particulars and one can say that the amendments proposed fall into three categories. Firstly, certain dates are to be amended; secondly, certain additional organisations are mentioned and it is requested that they be added to the particulars and then further in respect of accused no. 19 and 20 certain acts are alleged to have been committed. In respect of the one certain acts at Thumahole, Seeisoville and Welkom are alleged, additional to what we already know and in respect of the other as far as Thumahole is concerned(20 and what happened on the Parys road.

Now, it is common cause between the State and the defence that the Court has a discretion in terms of Section 86 of the Criminal Procedure Act to grant the amendment or not and it is also common cause that the only relevant factor is whether

... / there