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(TRANSVAALSE PROVINSIALE AFDELING)

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DELMAS

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DIE STAAT teen:

PATRICK MABUYA BALEKA EN 21

ANDER

VOOR:

SY EDELE REGTER VAN DIJKHORST

ASSESSORE: MNR. W.F. KRUGEL

PROF. W.A. JOUBERT

NAMENS DIE STAAT:

ADV. P.B. JACOB

ADV. P. FICK

ADV. W. HANEKOM

83

NAMENS DIE VERDEDIGING:

ADV. A. CHASKALSON

ADV. G. BIZOS

ADV. K. TIP

ADV. Z.M. YACOOB

ADV. G.J. MARCUS

TOLK:

MNR. B.S.N. SKOSANA

KLAGTE:

(SIEN AKTE VAN BESKULDIGING)

PLEIT:

AL DIE BESKULDIGDES: ONSKULDIG

KONTRAKTEURS:

LUBBE OPNAMES

VOLUME 83 (IN CAMERA-GETUIE NR. 12)

(Bladsye 4 234 - 4 288)

COURT: Mr Bizos you were to address me on the objection to the use of the video material.

MR BIZOS: Yes My Lord. My Lord may I at the outset place on record that Mr Matlole, accused no. 17, has a recurrence of an earlier complaint and he has been taken to the doctor.

COURT: Has he gone to the doctor?

MR BIZOS: He has gone My Lord, but may we proceed?

COURT: Yes, we proceed in his absence.

MR BIZOS: As Your Lordship pleases. Your Lordship will recall what happened yesterday, that My Learned Friend (10) produced in court an envelope with many seals on it, police seals, which he ceremoniously opened before Your Lordship and the Learned Assessors and Your Lordship told you that there was certain writing on the envelope and certain writing on the tape and there was some suggestion of the word original having been written on it by somebody. Now Your Lordship will recall that I suggested that I might ask one or two questions of the witness and Your Lordship indicated that Your Lordship thought that I did not have the right to do so. I would submit, with respect, that questions of the admiss- (20) ibility of evidence this often happens, not in precisely this situation but in parallel situations such as the admissions of statements as to, the Magistrate comes in and he reads a portion of the statement and then he is cross-examined before the statement itself is read. That is what I had in mind.

COURT: Well should one not do it the other way around and object on the basis that there is an inadequate basis for the production of the video material and then the State can decide whether it will lead further evidence or whether it has got (30) no further evidence.

MR BIZOS:/.....

MR BIZOS: Well My Lord perhaps that, I would accept that suggestion but with the greatest respect this is, leave aside the fact that it is a tape or a video, no proper basis has been placed by the State whatsoever for the production of this. May I refer Your Lordship to page 314 of the South African Law of Evidence, third edition, by Professor Zeffertt at page 314.

COURT: Yes I have got it thank you.

MR BIZOS: "Real evidence is seldom of much assistance unless it is supplemented by the testimony of witnesses. In (10) a stabbing case for example the production of a knife is irrelevant unless there is evidence tendered to show that it was used by the accused and medical or other evidence that it could have caused the injuries in question. It goes without saying that the witness's explanation of an exhibit should be recorded so as to be intelligible to a reader of the transcript. Appeal courts tend to be puzzled and frustrated when the evidence of an expert speaking about a complicated mechanical exhibit is recorded in the form of, like this, (20) this bit goes in here ..."

Something that Your Lordship, with respect, has tried to avoid in this case with meticulous regularity. And then a number of examples are given. But now we do not know where it was found, we do not know where it was found, we do not know who made it, we do not know who sealed it, we do not know who wrote anything on it.

COURT: Could we relate this to the question of the knife which is more concrete. Say for example the State produces a knife and it is lying on that bench there is not the (30) normal procedure that the knife is shown to the witness and he/.....

he is asked "Do you know this knife", then he says "Yes I know this knife, that is the knife". That is the normal procedure.

MR BIZOS: Yes.

COURT: Now in this case they want to show the video to the witness and say "Do you recognise what is on the video", would that be incorrect?

MR BIZOS: Your Lordship, with respect, has hit the nail on the head so to speak. It may be that a video may be produced as an exhibit for a specific purpose, and could I relate it (10) to the facts of this case. If I read the evidence of the witness correctly he was, he said that he was standing against some pole or other, it may be that if the State wants to show through a video that he was standing against a pole at this meeting then it would be admissible, through this witness, for that limited purpose, but not for any other purpose. I am sure though that My Learned Friends are not tendering this exhibit for the purposes of showing the witness against the pole.

COURT: It might be that you are disputing that he stood (20) against a pole.

MR BIZOS: Well My Lord I will have no objection for the video to be shown if that is the purpose for which it is being tendered, and this is why, with respect, and this is the reason why we cannot really have a fully fledged argument before Your Lordship and a judgment that will really cover the whole situation. It may be, it may be, and this is why Mr Chaskalson is not here, one of the reasons why he is not here, it may be this I feel that I can handle.

COURT: Do you want a judgment on that Mr Bizos? (30)

MR BIZOS: We may have another situation, that the accused appears/.....

appears, that the accused appears on the, one of the accused appears on the video. Well that may be on a different footing.

COURT: Could I put to you a problem I have with your objection. Say for example it had not been a video but it had been a photograph and the State produces the photograph, shows it to the witness and says "Is this the banner you saw, the banner you saw behind the speakers on the platform" and it shows the platform and the speakers. Would he not be allowed to identify it then?

MR BIZOS: Yes My Lord, for that purpose we will withdraw (10) our objection, for that purpose.

COURT: No, just a moment. Now the moment he identifies the banner would he not be entitled to say "And I see on the platform Mr X, I recognise Mr X on the platform"?

MR BIZOS: What we submit is that it would be akin to an album that is, that may be shown to a witness. But a video consists of two parts. It consists of pictures and of a voice. Now the witness does not purport, and has not yet given any evidence as to what was said at the meeting. Presumably the State wants to prove what was said at the (20) meeting, if it is allowed to show the video. The authorities are clear that there are inherent dangers in the admissibility of tapes and videos which require proper foundation to be laid.

COURT: Is the objection, let us accept for the moment that this Court is eventually convinced that the video has not been tampered with, that is number one. On the basis that the video is a true video, it has not been tampered with, is the objection that you make that there would be, that the video might refresh the witness's memory? (30)

MR BIZOS: No My Lord, again the State is in difficulty in relation/.....

relation to that. The, unless the witness took the tape himself he would be shown a document, and I use it in the widest possible sense, for which he is not responsible in order to refresh his memory, which is not permissible.

COURT: But the same would apply to a photograph, because the photographer would have taken it and then somebody else will say "Well I am on the picture".

MR BIZOS: Yes, My Lord assume the issue was, assume the issue was whether the accused was next to the complainant and there was a photograph. I have no doubt that the complainant (10) would be able to say that "I was next to the accused as is shown on this photograph" but we have not got a complainant here and we have not got an accused. We have got parties who are not immediate parties to these proceedings and before even a photograph, but certainly a tape or a photograph, or a cinematographic recording, which a video is, would have to be the original, there would have to be evidence that it is the original and evidence that it has not been tampered with. It has been recognised that in the face of objection in relation to a photograph, that, or any photographic material, (20) that if objection is taken it has to be shown that it is the original taken and that it has not been interfered with, and it is not so

COURT: Need that be shown before it is admissible or need it only be shown to convince the Court that the Court can eventually rely on it?

MR BIZOS: No, on admissibility My Lord.

COURT: Have you got authority for that?

MR BIZOS: My Lord if we are going to argue the whole case there are numerous cases and I will not address Your Lord- (30) ship on it. Mr Marcus will address Your Lordship on the cases/.....

cases. But, with the greatest respect, I submit that we are primarily concerned here with a fundamental question, before we get to that, that an exhibit cannot just be handed in by a person who has no connection or knowledge with it for the purpose for which the State is tendering it, namely that Your Lordship should see a moving picture and hear what the persons who were supposed to be there have said. As I say it may be...

COURT: But now Mr Bizos if part of the proof that it has not been tampered with is this witness how can we keep the witness from the witness box? Say for example the State puts (10) it to the witness, it is played to the witness and the witness is asked "Is this correct or incorrect, do you think it has been tampered with, are portions left out or has anything been included", why would that not be permissible?

MR BIZOS: Because if he has not made it, if he has not made it and he is in-chief in chief the State cannot put any leading questions to the witness, nor can it put any material before a witness which has otherwise been rendered admissible because the showing of a video and saying "Is this what Mrs Kwadi said" is clearly a leading question which the State (20) cannot put. I am not unmindful of what I did with the Brigadier, I am not unmindful of that, it was a considered matter. First of all you can do things in cross-examination that you cannot do with your own witnesses, firstly. Secondly the Brigadier was asked questions on information available. If this is not properly proved before Your Lordship you may, Your Lordship may disregard it. But I did promise at the time I think that we would prove, that we will prove it properly in due course. But to show the video and say "Is this what Mrs Susulu said" or Mrs Kwadi ... (30)

COURT: So the objection is then that it is a leading question?/.....

question?

MR BIZOS: If it shown for the witness to adopt.

COURT: If it is shown first and the witness then adopts it?

MR BIZOS: Adopts it then

COURT: A leading question is not a question of admissibility, it is a question of propriety. It is a question of the conduct of the case. A leading question, having been allowed by the Court, can never be a foundation for the setting aside of the judgment.

MR BIZOS: I do not know My Lord. (10)

COURT: Unless the proceedings are so irregular but the leading question would merely tend to indicate that one cannot rely on that evidence because the witness has been reminded of the things by what led him.

MR BIZOS: But here it would be, here it would be, the analogous situation would be that a witness was at the meeting, the secretary took the minutes, we do not ask the witness what happened at the meeting. What we would be asking the witness in chief is in paragraph 1 of the minutes the secretary has written that Mr X stood up and he said that the Managing(20) Director was incompetent. Is that correct. That would be an objectionable question on an issue of whether there was a defamation in the boardroom or not. So that, and

COURT: That would be hearsay also. Yes.

MR BIZOS: So would this, so would this. It is a record kept by a person who has got to show, if Your Lordship wants the full argument, who has got to show many things.

COURT: Mr Bizos I would like at some stage to have the argument because I must now make a ruling on it, if I allow it. I mean the objection is your objection, you can leave the (30) State to go a bit further and then object if you want to but at/.....

at some stage I will have to make a ruling on it and I would like to make the ruling on full argument.

MR BIZOS: My Lord I did indicate yesterday, but because it appeared to us that the State really, with the greatest respect, has not addressed its mind to the problems that it has in relation to these videos but may I also assure Your Lordship that we are not being difficult for the sake of being difficult. I do not know what our attitude is going to be in relation to the couple of videos in which a couple of the accused are involved. There may not be problems and it may(10) be a distinguishable case. What we are really hoping to do is to cut these proceedings short because to this particular meeting none of the accused were there.

COURT: Well I do not know yet. They have not been mentioned so far.

MR BIZOS: Well the witness, and because a transcript has been given to Your Lordship and us which, with the greatest respect, is a mess. And on the authorities as we understand them, may I for, may I just give Your Lordship a couple of examples of why I say this, because (20)

COURT: Was is the reference to the transcript?

MR BIZOS: V11 My Lord. Your Lordship recalls that the witness spoke of a meeting that was held at a hall.

COURT: Yes this is a women's meeting.

MR BIZOS: A women's meeting. Now If Your Lordship has a look at V11 Your Lordship will see who the speakers appearing on this tape are. Your Lordship will see it on the cover.

COURT: Yes.

MR BIZOS: You see there are three unknown people and Kate Mboweni, Benedicta Nonamo, Albertina Susulu, Amanda Kwadi (30) and Dorothy Nyebo. But I invite Your Lordship to have a look.

First/.....

First of all that it does not appear to be the meeting that the witness has spoken about because he gave dates in July and this is supposed to have taken place on 28 and 29 June. Your Lordship was given the name of the hall, Your Lordship was given the name of a hall at which the meeting is supposed to have taken place. There were four initials but they were certainly not Y.M.C.A. hall, which appears on the masthead of EXHIBIT V11.

COURT: Yes.

MR BIZOS: Then we have decided, with respect, to ask (10) Mr Marcus to address Your Lordship in full but if Your Lordship sees these purported transcripts they are full of blanks, they are full of inaudibles

COURT: Well that may be analogous to a photograph which has a blot on it, some ink has fallen on it.

MR BIZOS: Well it goes a little bit further on the authorities. On the authorities these new instruments of assisting proof so to speak have been said to actually do the opposite because we may now spend much more time in trying to decide what the video is, so that in the same way as Judges (20) have been known to throw documents out on the basis that they lack accuracy, clarity, they are copies, there are other problems that we have and that is this, there was a ceremonial breaking of the seal. We have been shown copies of these videos, or some of us have been shown copies of these. Now we do not know who wrote this "Original" thing. There is no evidence. Where was it found, who made it, on what basis is it being tendered?

COURT: You mean the video?

MR BIZOS: The video. Your Lordship will hear that there (30) are

COURT:/.....

COURT: Well that would make no difference Mr Bizos. If a knife is tendered it is not necessary to show that the policeman found it in a bush before you lead the evidence of the identification of the knife.

MR BIZOS: No, if the person can identify it. But here we have the

COURT: Is this not an attempt by the person to identify this video?

MR BIZOS: Right. There are no special rules in relation to the admissibility of knives as murder instruments. There (10) are special rules in relation to the proof of tapes and cinematographic material.

COURT: Well my difficulty at the moment is that I am not au fait with those special rules. So I am afraid you will have to tell me.

MR BIZOS: Yes My Lord, I think that, with the greatest respect, we will avail such learning as we have been able to find to Your Lordship and the State and ask Your Lordship to decide on that basis. Would Your Lordship hear Mr Gilbert Marcus My Lord who has been (20)

COURT: Yes but before Mr Marcus starts I would just like to ask Mr Jacobs what exactly he intends to prove with this evidence.

MNR JACOBS: Edele die eerste aspek wat My Geleerde Vriend eintlik uit die oog verloor en waarop ek weet nie hy is taanlik sarkasties is teenoor die Staat is dat die getuienis word aangebied om hierdie dokument te identifiseer. As ons, My Geleerde Vriend dit self hieruit, gelees uit Hoffman uit, in daardie selfde passasie, dit is real evidence waaronder hy dit geklassifiseer het. Nou "real evidence" soos Hoffman(30) op 314 sê:

"The/.....

"The evidence is usually intended for the Court to look at but it may also listen, smell, taste or feel it."

Dit is vir, hierdie videoband word nie vir die getuie hier aangebied om hom sy geheue te kom verfris nie Edele. Daardie videoband word aangebied by hierdie Hof as "real evidence", as reële getuienis wat die Hof sal inspekteer en dan na die toesprake luister. Daar is kritiek teen hierdie transkripsie wat hier gemaak is maar dit is sekondêre getuienis. Daar is veel gesag daaroor. Dit is gemaak vir gerief vir almal om te probeer om prosedure te versnel sodat as daar (10) geluister word na die tape wanneer die Hof kan, die Hof kan dit heeltemal weggooi en die Hof se eie maak Edele. Ons het net gedink om dit te bring om die Hof behulpsaam te wees as daarna geluister word. Maar die feit wat die Hof daardie band gaan aanbied is dat die Hof sal daarna kyk, die Hof sal dit inspekteer, die Hof sal na die gesprek luister. So dit is "real evidence", dit word nie aangebied hierso om 'n man se geheue te verfris of 'n man om hier te kom sê of hoorsê of leidende vrae te vra nie. Hy moet daardie ding kom identifiseer en die Staat sal nog verder die getuienis (20) lei van waar dit gekom het, hoe dit gekom het, hoe dit tot hier by die Hof gekom het. Die seël wat met seremonie oopgebreek is, reken die Staat is van belang omdat dit moet een van die aspekte wat My Geleerde Vriend opgehaal het, is dat daar nie gepeuter is nie. Waar hy gekry sal getuienis aangebied word en hoe dit gehanteer is daar totdat die seël hier in die Hof gebreek is. So om te, en daar sal die Staat dan probeer om te bewys die hele skakel dat daar nie met hierdie ding gepeuter is nie en waar hy gekry is, soos hy gekry is, is hy hier by die hof aangebied. So met alle (30) respek kan ek hoegenaamd nie die beswaar van die verdediging

verstaan/.....

verstaan of insien teen hierdie getuienis nie. My Geleerde Vriend het ook hier gesê daar is baie gesag oor tapes en rolprent dokumente Edele maar die hele grond van videos is braakgrond in die reg wat moet uitgelê word. Nou ek wil nie op hierdie stadium ook vooruitgaan op my argumente nie, dat die argumente gaan maar ek dink die basis waarop dit aangebied is en waarop hierdie getuie is, en hy is geregtig om daarna te kyk om te sê "Ek bevestig hierdie, ek "

HOF: Ek was daar en dit is wat ek gesien het?

MNR JACOBS: En dit is wat hy gesien het. Ek identifiseer (10) hierdie videoband en dan kan die Hof hom, as die Hof tevrede is dan kan die Hof hom kyk. Sodat Edele dit kan nie gaan oor die toelaatbaarheid van die ding nie. Enige ander kritiek wat die verdediging mag hê kan gaan oor die getuieniswaarde daarvan, selfs waar hy verwys het hier na 14 meer. Dit mag ander aspekte wees dat die Hof kan vind ek kan nie veel getuineswaarde daar hê nie. Dit sal 'n beslissing wees wat die Hof later kan doen. Maar op die toelaatbaarheid van hierdie ding kan die Staat nie sien dat die verdediging op hierdie stadium kan beswaar maak daarteen nie. Dit gaan (20) oor die identifikasie van daardie, en dat hy kom sê dit is 'n videoband van, ek identifiseer hom as wat 'n band van daardie gebeure was en dan kan die Hof dit ondersoek.

MR BIZOS: My Lord may I just say that, before Mr Marcus addresses Your Lordship, that if the State concedes that it has to show other matters before this is produced, placed before Your Lordship ...

COURT: That was not the concession. The State merely says I produce this witness as a first step, that may be the only step, in the identification of this material before Court. (30) Of course if there are no other steps and this step is inadequate then/.....

then the identification fails and the material is excluded.

MR BIZOS: I merely stood to say that we are not to be understood to consent to any sort of provisional admission.

COURT: I have not heard any sounds remotely sounding like a consent from your corner Mr Bizos.

MR BIZOS: As Your Lordship pleases. Now if Your Lordship hears Mr Marcus.

MR MARCUS: My Lord I will be referring to certain authorities and articles which might not be readily available to Your Lordship and to My Learned Friends. We will endeavour in (10) the appropriate adjournment to have some of these materials copied. My Learned Friend has now made it clear on what basis he tenders this particular video in evidence, he has made it clear that he tenders it as real evidence and it is not tendered simply to refresh the witness's memory. My Learned Friend Mr Bizos has also already addressed Your Lordship on the question of the tendering and proof of exhibits and I do not intend to traverse that terrain again.

COURT: Is there any other terrain to traverse?

MR MARCUS: Yes My Lord there is. (20)

COURT: What is the other terrain to traverse?

MR MARCUS: The other terrain which, with respect, must be traversed is I wish to say something to Your Lordship about the comments firstly of, in South African cases concerning tape recordings and I will argue to Your Lordship

COURT: On the admissibility of tape recordings?

MR MARCUS: On the admissibility of tape recordings.

COURT: Yes?

MR MARCUS: And I will argue to Your Lordship that there is an appropriate analogy between tape recordings and videos, in (30) fact let me say at the outset to Your Lordship that a video

is/.....

is really a combination of a tape recording on the one hand and visual images on the other. So at least in part a video contains the entire elements of a tape recording. I also wish to submit to Your Lordship at the outset that there may well be different considerations relating to admissibility in respect of different videos. The problem that we are faced with in this particular matter is that I have been led to believe that there are approximately ninety hours of videos which have been tendered by the State. Now the difficulty is this that Your Lordship and the Learned Assessors might be (10) faced with the position, unless the issue of admissibility is decided at the outset, of going through what may well be a month or more of evidence watching these videos and at the end of the day they might well not be admissible. This I might add

COURT: How do you mean they might not be admissible? The moment the witness has seen five or ten minutes of the first video I will stop the video and ask him is this the situation, you were in and if he says no I will not listen to the video any more. (20)

MR MARCUS: Well My Lord.

COURT: Do you think I am impractical?

MR MARCUS: Certainly not My Lord. The difficulty is this, and I may also mention that MILNE, J. was confronted with a similar difficulty in Pietermaritzburg and that is why for some weeks now there has been evidence led to establish the originality of certain tape recordings and videos in question there as well as the fact that they have been unedited.

COURT: But did the Learned Judge there give a ruling in the case? (30)

MR MARCUS: No My Lord, the matter as I understand it, is going/.....

going to be argued this week. In fact I think it might be being argued today.

COURT: Argue it before the videos are shown? Has he not looked at the videos yet?

MR MARCUS: As I understand the position, I cannot be absolutely certain, what has happened is that they have called the forensic expert, a Colonel Janson, who has examined the videos and tapes.

COURT: Yes well that is one of the pieces of evidence. But now has nobody said "I looked at these videos and I identify(10) them as videos of this particular meeting"?

MR MARCUS: As I understand the situation that has not occurred at Pietermaritzburg.

COURT: Now the question which arises is why should one have the evidence in a particular sequence? Why can one not start with the major evidence, that being not being that the tape has not been tampered with but the major evidence being the person who identifies the video?

MR MARCUS: In the sense of identifying the video there have been cases, as I have suggested to Your Lordship, relating (20) to tapes and by analogy

COURT: Well let me put to you a difficulty on the tape issue. Say for example a piece of music is played on the radio it becomes relevant to show that that particular, to prove that that particular piece of music was played. A tape is brought to court and the tape is played to the witness and he is asked is that the music. He says yes. Would that be objectionable? You cannot make him sing the music first.

MR MARCUS: My Lord in the context of the present case it would be objectionable on the basis that My Learned Friend (30) Mr Bizos put to Your Lordship, namely that it would be tantamount to/.....

to a leading question.

COURT: No, no. No, no it is not produced for the purpose of refreshing the memory of the witness. It is for the purpose of identification. A tape was played on the radio, a tape has been taken by the police, the witness is to identify it.

MR MARCUS: With respect there are particular problems with identifying a tape. It is not the tape as such which is being identified, as I understand it, by this witness. He cannot look at this cassette and say "This is it" and the reason why he cannot do that, I assume, unless My Learned (10) Friends correct me, is because in order to do that, in order to tender that as real evidence, as My Learned Friend suggests, what is required is to establish precisely how this piece of real evidence came into existence and there is a chain of events and causation which must be established before this is presented as real evidence.

COURT: Well we are busy with one link. We are busy with one link.

MR MARCUS: My Lord with respect

COURT: It could have been done the other way around by (20) the witness looking at the video outside without the Court present and then coming to court and say "Here is a video I looked at, I hand it in". But what is wrong with this procedure?

MR MARCUS: Well My Lord what is wrong with this procedure is simply this that there are a number of dangers inherent in the presentation of this sort of evidence.

COURT: Yes but that goes to the weight of the evidence, not to the admissibility of the evidence.

MR MARCUS: No, with respect My Lord I would submit to (30) Your Lordship that it is not simply a question of weight, it

is/.....

is a question of admissibility as well. On the analogy of the tape recording for example, if I may in fact refer Your Lordship to a Natal decision of S v SINGH, 1975 (1) SA 330 (N).

In that case LEON, J. cited with approval, this was a case on the admissibility of a tape recording. He cited with approval the, first of all he cited with approval the comments emanating from Hoffmann, as it then was, on evidence that there are particular problems associated with the admissibility of tape recordings and the one major problem is that tapes, and this is the quote: (10)

"Tapes can be easily edited or altered so as to make the person whose voice has been recorded seem to say something quite different."

He then goes on to refer to the English case of R v STEVENSON. This you will find Your Lordship at 333H-334A. LEON, J. cited STEVENSON's case where the issue of a possible fabrication of a tape recording was raised. The court in that case, STEVENSON's case, laid down two rules. The first rule was that before the Court would admit them in evidence it had to be established that they were the original recording. If (20) sufficient doubt was raised by the defence to indicate that it was likely that they were not the originals and so not the primary and best evidence the Court had not alternative but to reject them.

COURT: Just pause there a moment. In the process of proving that they have not been tampered with would it not be permissible to hand in the exhibit, well actually would it not be necessary to hand in the video as an exhibit and say this has not been tampered with?

MR MARCUS: My Lord it most certainly would be necessary (30) to do that.

COURT:/.....

COURT: Then it is before Court as EXHIBIT X.

MR MARCUS: Yes My Lord.

COURT: Then in the cross-examination of proving that it has been tampered with the video has to be shown?

MR MARCUS: Not necessarily, with respect.

COURT: On what basis can the witness give evidence that it has not been tampered with, he is an expert, he has to show the video to the Court to indicate why he says it has not been tampered with?

MR MARCUS: No My Lord, the nature of the scientific (10) expertise necessary to establish absence of tampering and originality is such, as I understand it, is that these tapes or videos are processed through highly sophisticated scientific instruments which read the wave patterns and the impulses and in fact a demonstration of originality or absence of tampering, deliberate interference, is something, as I understand it, which can be demonstrated without actually viewing the visual images. There will be obvious examples, I concede, where tampering or editing will be visible on the face of the video itself. In fact some of the videos in question which (20) we have seen are clearly edited on their face. That is quite apparent to an ordinary observer, but from a technical or scientific point of view it is a highly sophisticated process requiring expensive and sophisticated scientific equipment which does not actually necessitate a visual viewing of the material in question.

COURT: Yes?

MR MARCUS: In the absence of doing it that way one is confronted, as I suggested to Your Lordship, with the potentially prejudicial scenario of the presentation of many many hours (30) of evidence which might, with respect, at the end of the

day/.....

day be

COURT: Well whether it is many hours or one hour of half an hour in principle can make no difference, even if it takes a year the principle remains the same, is it admissible or is it not admissible to do it this way. So do not attempt to frighten me. And we must approach this on a legal basis. I think of the analogy where the Court at a stage had to decide about the admissibility of say for example confessions and though the confession was not before Court in the sense that the contents of the confession was placed before Court the (10) confession was placed before Court to determine whether it was voluntarily made or not. Now do you not have the same sort of situation here? The tape is being placed before Court, the video is being placed before Court to determine whether it is a proper piece of material and whether it has been tampered with.

MR MARCUS: Yes that is so. My Lord My Learned Friend Mr Bizos advises me that that particular procedure which Your Lordship has described was considered to be highly irregular by the Appellate Division in a recent case. (20)

COURT: Yes it was followed in a number of cases. The law does change.

MR BIZOS: May I My Lord? That a Judge relied on seventeen years of experience of doing it that way in committing the irregularity.

MR MARCUS: My Lord if I can get back into the principal submissions which I wish to address to Your Lordship, it is this that at common law when one is dealing with tape recordings there are two fundamental requirements of admissibility, namely proof of originality and secondly absence of tamper- (30) ing and I refer in that respect to SINGH's case which, as I have/.....

have suggested to

COURT: Will you read to me what the Learned Judge said in SINGH's case.

MR MARCUS: Yes My Lord. This is at page 333F where LEON, J. says the following:

"The matter raised by Mr Skwehia is one of great importance. As pointed out by Hoffmann the use of tape recordings has given rise to some difficulties. One of these is that 'Tapes can be easily edited or altered so as to make the person whose voice has been (10) recorded seem to say something quite different'. In R v STEVENSON & OTHERS 1971 (1) AER 678 where the issue of a possible fabrication was raised the following rules were laid down:

1. Before the Court would admit them in evidence it had to be established that they were the original recordings. If sufficient doubt was raised by the defence to indicate that it was likely that they were not the originals and so not

COURT: What does that mean? The "originals"? (20)

MR MARCUS: By that is meant is that there must be evidence which is led to establish, in the case for example of a video, that a cassette was taken on which there was nothing else recorded, it was placed in a particular camera, that the camera-man attended a particular meeting, that he filmed certain sequences, that the cassette was thereafter not used for any other purpose and that the history of the cassette from the time of the taking of the video to the time of its production in court is such as to give rise to a reasonable degree of certainty that there has been no outside interference. (30)
That is what is

COURT:/.....

COURT: Now, apply that now to a photograph. Would one require the Court to establish that it is the original photograph and not a reprint of a photograph?

MR MARCUS: There might well be different considerations which apply in the case where for example a photograph is printed from the original negative on the one hand, that is as I understand it would constitute an original photograph. That might well be different from a case where one is dealing with a photograph of a photograph. In the latter case one would not be dealing with an original. (10)

COURT: Well actually Mr Marcus I have a difficulty with the objection and that is this that in setting about to prove this video, that is in setting about to get it before Court, certain steps are taken. This witness is one of those steps. Another step, if you are correct, would be to show that this has not been tampered with. Now why should one necessarily take one step first and then the other?

MR MARCUS: My Lord in the, if this is the road along which My Learned Friends wish to go they are obviously entitled to prove the admissibility of this video in the manner they (20) deem best but with respect we are dealing here with questions of admissibility and not weight. What they have to do, and as I understand it they are not going, this witness is not in a position to do so, is to establish that this is the original recording for example and secondly to establish that it has not been tampered with.

COURT: Well I am at present in the process of having to decide whether that video is admissible. This is the first witness, maybe the only witness, I do not know, on that aspect. When he has testified on that aspect I will decide (30) on the admissibility of the video. If it is not to be before Court/.....

Court I will exclude it. But how can I exclude the witness when he is part of the process of proving the admissibility?

MR MARCUS: With respect you cannot do that, but also with respect I am addressing argument to Your Lordship on what is required to render a video of this nature to be admissible.

COURT: Well I do not want to hear that argument at this stage because I do not think I have reached that stage yet.

MR MARCUS: The other aspect, with respect, that I have alluded to is it might be prejudicial to see the video in advance before the necessary foundation of its admissibi- (10)
lity is laid.

COURT: It may or it may not be, that depends to what extent a Court and Assessors can be influenced by inadmissible material. In the circumstances where there is a question of admissibility I can decide, whether I decide this sitting on my own or whether I decide it sitting with Assessors, I am sure that if it is going to take 90 hours of viewing nobody would ask me to do that on my own and eventually then do it all over again with the Assessors. So for practical purposes the Assessors have to be present and I think one can rely on (20)
the fact that they are mature enough to exclude this material from their mind should it be inadmissible and when they have to decide the matter.

MR MARCUS: I accept that Your Lordship and the Learned Assessors

COURT: If you want to address me further on the aspect of the sequence of the evidence yes, but on the eventual admissibi-
lity of that evidence you cannot address me now because at this stage I am in the process of having evidence placed before me upon which I can then eventually be addressed as to (30)
whether this video is admissible or not.

MR MARCUS:/.....

MR MARCUS: My Lord as I understand this particular witness's evidence, unless My Learned Friends intend to do otherwise, he has not yet, it is not simply intended that this is going to be evidence to establish admissibility.

COURT: Well this witness has told us he was at a certain meeting and the State informs me that this evidence was tendered to prove this video. Obviously there was other evidence as well of the witness but that is immaterial at the moment. But as far as this video is concerned the evidence was led that this witness was at this meeting, that he sat (10) against a pillar and at this stage the video is to be produced. Now obviously the State is going to ask him "When you sat against that pillar did you see what is shown on the video, is this a reflection of what you saw". Now on what basis can you object to that?

MR MARCUS: Well one objection is the one that My Learned Friend Mr Bizos has put to Your Lordship already and that is that it would be akin to leading the witness.

COURT: No. Because I am not going to take his evidence as such on what happened at the meeting. I am asked to take (20) the video as such as to what happened at the meeting. Whether I do that or do not do that eventually is a different matter. That relates to the argument. But that is what the purpose of the video is for.

MR MARCUS: Yes My Lord. My Lord would you bear with me?

COURT: Yes.

MR BIZOS: My Lord would Your Lordship allow the sort of musical chairs again.

COURT: Well actually I thought you were doing it in tandem.

MR BIZOS: My Lord if the State is tendering this merely (30) for the purposes of identification that the witness to

identify/.....

identify the scene so to speak, and that this piece of material appears to be, appears to be material which he saw, what he saw on the video corresponds in some respects with what he saw. We do not think that there can be any serious objection in relation to that. But that is not the purpose for which the video has been, we have understood that is not the purpose for which it has been tendered. The video is being tendered in order that Your Lordship may hear what Mrs Susulu and others said at this meeting.

COURT: Yes now just a moment Mr Bizos, I see it the other (10) way round. I see it that the witness is tendered to prove the video. When the video is proved I must from the video see what Mrs Susulu said and did, for example Mrs Susulu. That is the purpose of the evidence as I see it. So we will be asked to draw conclusions from the video eventually, and not from the evidence of this witness but the evidence of the witness is there to prove the video.

MR BIZOS: But My Lord if Your Lordship is to see the video for the purposes of the witness saying "Yes I recognise them dancing around the hall" and it stops there, and it stops (20) there I do not think there can be any serious objection to that. With the greatest respect it would be irregular, and I was in a case in which an experienced Judge in the Natal Provincial Division invited the Prosecutor Mr Slabber to read out the accused's confession.

COURT: Confession?

MR BIZOS: Confession. For the purposes, because His Lordship said that the case is available, I think it is either January or February it was reported.

COURT: I never had that done in court, I can tell you (30) Mr Bizos, reading it out in court.

MR BIZOS: /.....

MR BIZOS: Well His Lordship said he had been doing it for seventeen years, and the Appellate Division, Your Lordship is correct that under certain circumstances it may be brought to the Court's notice where the accused goes into the box in a trial-within-a-trial and says this is not my statement, this is what has been told me by the police then obviously in order to challenge that you can cross-examine and you have to bring it to the, but the reading out of this was held to be a serious irregularity in the case and we would like during the adjournment to refer Your Lordship to it. (10)

COURT: Let us accept that for the moment Mr Bizos. What objection can there be to this video being shown up to a stage where the witness can identify it and that the witness then tells me yes this is a video of the proceedings. Now if there is no objection to that part should the witness then not see the whole thing and tell me that the whole thing is a picture of the proceedings?

MR BIZOS:/.....

MR BIZOS: My Lord, with the greatest respect, if Your Lordship had an assurance that this witness would be able to tell Your Lordship that this is a complete record of the proceedings, that it has not been interfered with, that it is the original and everything else, then this maybe because it would have been tantamount to his evidence making it admissible.

COURT: And say for example there are three witnesses who tell me the same thing and this is the first one?

MR BIZOS: But with the greatest respect one would have expected before the tape was tendered for the witness to be asked did (10) you know that there was a tape being taken, do you know what its - judging by the language of the cases - what its prominence and authenticity is because in the absence of that evidence, the way we understand those cases, the real evidence is inadmissible and to see the film on the basis of the witness identifying it when he will not be able to speak about what the cases speak about, would really be seeing the or examining the real evidence without the necessary prerequisites having been complied with and before Your Lordship embarks on that course in my respectful submission, if Your Lordship will want to be satisfied that it is not an (20) irregular way in which it is being done, because it would really be having the real evidence on record on the - without any disrespect, intended the pretext of being busy with the identification of the video. We know, to be practical, that these were proceedings which lasted a long time from the transcript, that is not complete, that it has been interrupted and that it would not pass the test that the case has required it to pass before it becomes admissible. There is evidence on these transcripts that there are stops and starts and these videos contain - again these videos contain Mr A speaking and then someone else (30) spoke, someone else in the video and then the speaker continue -

not/..

not in this particular video, but in others, and there is - by merely seeing it on a basis of identification, what we would really be doing is sort of - for the State trying to get Your Lordship to see it through the pretext of identification when we are reasonably certain, on the information available to us, that it will not be able to satisfy the other requirements and that this is a case when that sort of shortcut should not and ought not to be taken, but that Appellate Division judgment can be made readily available to Your Lordship.

COURT: I would like to hear the conclusion of Mr Marcus' (10) authorities on this aspect because I would like to read them in good time.

MR MARCUS: Thank you, My Lord. If I could revert to Singh's case which seems to be the most comprehensive South African authority dealing with the admissibility of tapes. I had read to you the first requirement of admissibility which His Lordship LEON, J. relied upon, on the authority of Stevenson's case. The second requirement of admissibility ...

COURT: Could you just tell me, was Singh's case a case where the State attempted to place before Court a tape-recording? (20)

MR MARCUS: Yes.

COURT: Can one differentiate between a tape-recording and a video tape because in a video tape one has, as I understand it, visual material and sound material which have to correlate, I take it, otherwise it does not work. So, is the danger of interference not less on a video tape than on a normal tape?

MR MARCUS: On the contrary, My Lord, the danger, as I will submit in due course is possibly even greater. From Your Lordship's own experience of film or television Your Lordship will be aware that the ingenuity of cameramen knows few bounds, for example (30) I will give you a practical example. Let us assume that the

issue/..

issue to be tried was what constitutes a cricket-match, for example. Now, we know that a cricket-match can last up to five days. Now, if you knew nothing whatsoever about cricket and you were shown the half hour summary of the match Your Lordship would, with respect, be non the wiser. The examples are legend. For example a particular scene purporting to emanate for example from the second world war can be played out with all the authenticity as if it were actually being taken on site, but is in fact being produced in 1986 in a Hollywood studio. There is a further, for example - from Your Lordship's own experience (10) we know from television recordings that the sound-track can be dubbed and an experienced dubber will be able to reimpose not only different words but words in an altogether different language as if the person depicted were actually saying those words.

COURT: Yes, let us accept that, all that, but is that not a question of a danger inherent in this type of evidence which does not fall in the field of admissibility but falls in the field of cogency?

MR MARCUS: With respect it falls within the realm of admissibility because the courts have recognised, certainly in re- (20) spect of tape-recordings that there are these inherent dangers.

COURT: But is that recognition correct? Logically speaking.

MR MARCUS: With respect it is correct and if I could give you an example to demonstrate precisely why the Courts have recognised these dangers, I will do so. This is an article which appears in the 1964 Criminal Law Review. It is actually referred to in a footnote in Hoffman. We will endeavour to have a copy of this made available to Your Lordship. It is an article titled "Recording as testimony to truth." It is - excuse me, 1954 Criminal Law Review at page 97. The Learned Author gives the (30) following practical examples. He says:

"Turning/..

"Turning for a moment to a hypothetical recorded confession it is apparent that a remark originally 'I am not guilty' could be altered fairly easily to 'I am guilty' and .."

I do not want to read this whole thing to Your Lordship, but he goes on to give this example. He says

"Now because the context of any remark - the context of any remark - colours its meaning, this facility for altering the order could be made to have a marked effect on the meaning of the text. Consider the (10)
following example: I am not guilty but Jones says I am. This can be divided into three sections. I am not guilty but Jones says I am .."

COURT: Yes, you need not read me that. Where does the author deal with the distinction between admissibility and weight?

MR MARCUS: That goes back to Stevenson's case, which is relied upon by ...

COURT: What does Stevenson's case say?

MR MARCUS: Well, Stevenson's case says that before the Court would admit them in evidence it had to be established that (20)
they were the original recordings. So, originality is a criterion of admissibility.

COURT: Yes?

MR MARCUS: He goes on to say -

"If sufficient doubt was raised by the Defence to indicate that it was likely that they were not the originals and so not the primary and best evidence, the Court had no alternative but to reject them .." and

COURT: Yes, but I have not admitted them in evidence. I understand the process to be - part of the process to decide (30)
whether they should be admissible in evidence.

MR MARCUS/..

MR MARCUS: With respect, as part of that process of establishing admissibility we would submit to Your Lordship that the necessary foundation of originality and absence of tampering must first be laid.

COURT: Well, on that basis then the witness will have to look at the video on his own and come and tell me is this the video and then on what basis does - is this a video of what happened and he says yes, on what basis does Mr Bizo then cross-examine him? Because Mr Bizo has not seen the video?

MR MARCUS: With respect, it would be relatively easy to cross-(10) examine the witness of this nature along the following lines: Who took the video, is it the original video.

COURT: He says I do not know.

MR MARCUS: It is inadmissible then.

COURT: On what basis?

MR MARCUS: On the authority that I have just referred Your Lordship to.

COURT: But on what basis is it inadmissible if this is part of the process of deciding whether it should be admissible?

MR MARCUS: Well, My Lord, once the witness gives those answers .. (20)

COURT: But he is not the only witness.

MR MARCUS: Well, unless My Learned Friend can fill those gaps ..

COURT: So we are back where we started. Why would you prescribe to the State the process by which it wants to prove the admissibility of a certain document or film?

MR MARCUS: My Lord, it is, with respect, an attempt to the analogy that My Learned Friend, Mr Bizo, gave of the reading of the confession. There are certain potentially prejudicial elements in proceeding by way of proof in this manner.

COURT: So, to preclude that, do you suggest I look at the (30) video myself with the witness and hear a full cross-examination

on this/..

on this aspect and eventually decide the admissibility and we do it all over again?

MR MARCUS: No, I do not ...

COURT: If it has to be done I will do it.

MR MARCUS: That would be impracticable but if one can revert to practicalities, there has been evidence that this particular meeting, as I understand it, spanned a number of days. The transcript with which we have been furnished is a very thin transcript. It is quite apparent that ..

COURT: The transcript has not been proved before me. (10)

MR MARCUS: My Lord, I am just dealing with the practicalities of the situation. I am sure this is not prejudicial to My Learned Friend. It is clear that from a practical point of view that this particular video, and indeed to my knowledge all of them, do not purport to be a continuous unedited, untampered record of the proceedings in question.

COURT: On that basis you will never get a witness who was over a period of five days in a meeting for every second of that meeting. Sometimes he leaves the room, but still he is allowed to give evidence. Now, on what basis would this not be allowed, (20) if it is only on a portion of the proceedings?

MR MARCUS: Well, it would require in addition proof of originality and proof of absence of editing.

COURT: Well, if I do not get that I may have to decide on what you put before me that it is inadmissible.

MR MARCUS: Correct.

COURT: At the moment I am attempting to get the evidence before Court to see whether it is admissible or not. I have not decided on the admissibility yet. You are attempting to block that evidence. (30)

MR MARCUS: My Lord, I am also attempting to establish the

foundations of admissibility of that evidence.

COURT: But you do not want to give the State a chance to establish the foundations.

MR MARCUS: My Lord, it would be of great assistance if the State would give an indication to us as to how they intend to go about this procedure because if they did do so, it might save a great deal of time and energy.

COURT: I do not think so, Mr Marcus.

MR MARCUS: With respect, if we could be ...

COURT: You have been informed by the State that the State (10) tenders this evidence to prove the video, that you have been informed.

MR MARCUS: Yes.

COURT: Now, the States says if necessary I will prove the other aspects as well, that it was not tampered with, et cetera, et cetera.

MR MARCUS: My Lord, I can proceed with this argument setting out to Your Lordship the ...

COURT: You can proceed a long time, but it seems to me we are going in circles. (20)

MR MARCUS: With respect, if that is the road along which the State wishes to go, well presumably they are entitled to do so. I would, however, wish to persuade Your Lordship that in addition to that the State has a long way further to go as well. I am not sure whether it would be appropriate for me to continue ..

COURT: Mr Marcus, if the State does not go along the long way that you foresee the State to go, no doubt you will inform me then, and I will decide that it is inadmissible, but I have not got to that stage yet.

MR MARCUS: As Your Lordship pleases. (30)

COURT ADJOURNS. COURT RESUMES.

MNR. JACOBS: U Edele, net voordat ons begin, ek is jammer vir die vertraging. Die videostel wat buitekant opgestel was, was vanoggend reggemaak, maar ongelukkig in die breuk het iemand dit weer afgetrap en hy is stukkend. Ons kon hom nie regkry in die tydjie tot ons beskikking dat hy nou buite speel nie. Ek wil ook 'n vriendelike versoek rig, 'n mens wil nie die indruk skep dat ons wil nou nie dat mense met die beskuldigdes gesels nie, maar die drade loop daar uit by die punt van die beskuldigdebank en dan ongelukkig trap die mense daarop en dit is hoe dit nou gebeur. Ek wil net 'n vriendelike versoek rig net dat die Hof ook weet (10) as ons mense keer, dat hulle nie op die kop meer daar staan nie. Die persmanne staan, as dit die verdagting is, daar met die beskuldigdes en gesels, dat ons dan net vriendelik versoek dat hulle nie meer daardie kant staan nie, miskien op 'n ander kant, juis met die feit dat die drade daarlangs loop en wat afgetrap is wat nou gebeur het.

HOF: Nee, ek is nie hier teenwoordig wanneer dit gebeur nie, so u moet maar self die drade oppas.

MNR. JACOBS: Ek sal probeer, maar ek noem dit net aan die Hof dat daar nie die indruk geskep word dat ons wil nou weer keer (20) dat die mense met die beskuldigdes gesels nie. Dit is glad nie die bedoeling nie. En dan sal ons weer - ons kon hom nie regkry nie, die tegnikus sal weer - in die middagbreuk sal hy probeer om dit weer in orde te kry. Ons kon nie die Hof langer opgehou het nou nog om te sukkel nie. Dankie.

COURT: Yes?

MR MARCUS: My Lord, the authority that My Learned Friend, Mr Bizos, referred you to earlier in connection with the confessions, the one before Your Lordship, S v XABA ...

COURT: Well, it is a difference in connection with confession of this that the Learned Judge said it could be done but (30)

it was/..

it was inadvisable, that confessions encompass such a wide field in the sense that they are so material in a case that they should not be placed before the Court unless admissible and that it does not necessarily mean that that statement can be utilised in support of an argument where one objects to merely a fraction of the evidence which is to be placed before the Court.

MR MARCUS: With respect, our reliance on that case is placed on the principle which appears to be annunciated by the Appellate Division, namely that when dealing with questions of admissibility the groundwork or the preconditions for admissibility must (10) first be laid before the contents of that which it is sought to adduce are presented before the Court. In that particular case the Court was of course concerned with a confession which un-oubte doubtedly is of material importance to the guilt or innocence of the accused. With great respect, we are also concerned here with a major conspiracy concerning charges of treason and other charges. Presumably the evidence is being led because the State regards it also as material and by reason of the same considerations which influenced the Appellate Division in that case, we would urge Your Lordship to take those self same considerations (20) into account in determining the procedure to be adopted on the issue of the admissibility of these videos. With respect the rationale underlying the Appellate Division's admonition to prosecutors in adopting that approach, is with respect equally applicable to the questions of admissibility of videos in this case. It is not only practical considerations which, I submit, ought to induce Your Lordship to follow that line, but also as in that case questions of prejudice as well. The prejudice in this case, in addition to the factors outlined in XABA's case also include prejudice in relation to the time which might (30) be taken up in relation to the watching of videos which might at

the/..

the end of the day be admissible. This is, as Your Lordship well knows, a lengthy case, and a case in which the accused are in custody and with respect if it is possible, on the basis of practical considerations, to forestall any waste of time. That is a factor which Your Lordship ought to take into account. My Lord, the analogy which we urge upon Your Lordship is an appropriate analogy. It is an analogy which has both the merits of practicality and the merits of avoiding potential prejudice to the accused. If I may complete this argument - I keep on reverting back to Singh's case which placed reliance upon Stevenson's (10) case - I would also, with respect, refer Your Lordship to the summary of the position in English Law which is set out in Cross on Evidence. I will endeavour to make this available to Your Lordship. My Lord, Cross summarises the position as follows:

"At a trial by jury the party relying on the tape-recording must satisfy the judge that there is a prima facie case that it is the original and it must be sufficiently intelligible to be placed before the jury. The evidence must define and describe the prominence and history of the recording up to the moment (20) of its production in court .."

COURT: Why is that limited to cases before juries?

MR MARCUS: I do not know the answer to that.

COURT: Is there not a very good reason for that? That is because juries cannot discern between admissible and inadmissible evidence.

MR MARCUS: That may well be the case, but with respect the requirements of admissibility must still, nevertheless, remain the same. My Lord, that is the extract from Cross on Evidence. It is in the light of these considerations that I would submit (30) to Your Lordship that the necessary foundation for

admissibility must include the following: There must be satisfactory evidence that the tape-recording or video by analogy is the original. Secondly there must be a showing that the recording device was capable of picking up the relevant signals. There must be a showing that the operator of the device operated the particular machine in accordance with the proper functioning of that device. There must be a demonstration or a showing that changes, additions or deletions have not been made. There must be a showing of the manner of the preservation of the recording. The next requirement that there must be identification of the (10) speakers is one which has in fact also been laid down in South African case law and I refer Your Lordship ...

COURT: How does one do that? How does one identify the speakers?

MR MARCUS: This is in relation to a tape-recording.

COURT: How do you do it?

MR MARCUS: Presumably one does so on the basis of a person who has knowledge that the device picked up the voice of a particular person.

COURT: Yes, by putting a witness in the witness-box, exactly what we are doing now. (20)

MR MARCUS: No, this is in particular relation to tape-recordings.

COURT: Yes, go ahead.

MR MARCUS: My Lord, that is what I would submit to Your Lordship constitutes the requirements of what the English cases describe as the prominence and authenticity of the particular tape-recording. My Lord, I have suggested to you that there is an appropriate analogy between the use of tape-recordings and the use of videos because videos necessarily encompass the element of tape-recordings and in addition there are certain other dangers which I have already eluded to. My Lord, for example apart (30) from the possibility of cutting or excluding particular episodes there/.

there is also the possibility - that might carry the connotation of a deliberate tampering with a video, but that is not necessarily the only problem. The problem with a video and indeed with a recording is not simply the question of deliberate tampering. There is also the possibility of distortion arising out of the failure to film certain key episodes. In that respect there is a problem of distortion or of being misled. My Lord, in relation to specifically the question of video apparatus, I submit to Your Lordship that there ought to be evidence of the type of equipment used, the operator in question ought to be called (10) to describe precisely what he did and in what manner he went about doing that. There must be evidence relating to the originality of the video material and there must also be evidence concerning the preservation of the particular cassette to obviate any possibility of tampering. My Lord, it is not necessary for me to emphasise to Your Lordship that the dangers inherent in videos are, with respect, as great as they are with tape-recordings, but there is in addition the possibility of a compounded distortion in the manner in which I have suggested to Your Lordship. It is for these reasons, and again also (20) placing certain reliance on the analogy in Xaba's case, that we would submit to Your Lordship that the proper approach to the whole question of the admissibility of videos is for the State to lay a proper foundation in that regard and that foundation must, with respect, include a proper demonstration of the factors which I have outlined to Your Lordship. My Lord, that is in substance the argument. I am instructed that accused no. 17 is back in court.

COURT: I make a note of that.

RULING/..

RULING SENT IN FOR REVISION

COURT: This Court is in camera and the public are requested to leave the court-room.

IN CAMERA-GETUIE NR. 12 v.o.e. (Deur Tolk)

VERDERE ONDERVRAGING DEUR MNR. JACOBS: Ek gaan nou vir die Hof verlof vra dat ons hierso 'n videoband speel en ek wil hê jy moet daarna kyk en vir die Hof sê of dit 'n videoband is van die vergadering op hierdie betrokke dag waaroor jy getuig het.

HOF: Is dit die videoband wat ons voorlopig BEWYSSTUK 11 genoem het?

MNR. JACOBS: Dit is so. Ek wil ook vra as daar iets kom (10) waarop jy hom spesifiek identifiseer, as jy dit net aan die Hof sal uitwys. -- Ja, ek sal so maak.

Ek sal die band net daar insit en speel. Kan die beskuldigdes sien? Kan ons hom net lig, net daardie een lig op die ander.

HOF: Kan u net die drade 'n bietjie verwyder wat hier dwars voor die prent is.

MR BIZOS: My Lord, it will be difficult for me to see Your Lordship and the Assessors with this arrangement which I want to do.

COURT: Mr Bizos, there is one over there, so that portion (20) of the accused can look at that one. If we turn this one in the direction - can't you sit over there, Mr Bizos, where your attorney is sitting? And we turn that a little that way and you sit over there.

MR BIZOS: Yes. I think that that is a solution. I will change back to my original seat and we will adjust it. My Lord, may I suggest that we possibly put that one on there, then I will have a view of Your Lordship.

COURT: On top of that one there?

MR BIZOS: On top of that one. (30)

COURT: Yes. Kan die getuie goed sien of is die operateur se

kop/..

kop voor? -- Ja, ek kan goed sien.

Ja, begin maar. (Video word gespeel - stop.) -- Ek herken die banier daarop, dié van "release Mandela". Dit was op gewees net onderkant 'n plek bekend as "balcony", as ek reg is.

HOF: Die banier, om presies te wees is "Release Mandela Campaign." Dit was net onder 'n plek "balcony". Dit is die balkon? -- Ja, waar die mense sit.

Het u ook gesien die dansery daar? -- Ja, die singery ook is dié wat ek van gister gepraat het soos hulle nou daar sing en beweeg. Ons kan verder gaan. (10)

(Video word gespeel - gestop.) -- Ek wil nog iets gesê het. Gister het gepraat van die liedere wat daar gesing was. Die lied wat daar gesing word is een van hulle, dié se bewoording praat oor Tambo. Ja, gaan aan. (Video word gespeel - stop.) Soos ek nou hier staan, van waar ek staan op die linkerhoek bo is daar 'n banier van die Soweto College of Education.

Is dit die banier wat die opskrif het AZASO? -- Ja.

MR BIZOS: My Lord, could I make a suggestion which may be of some assistance in future. The tape has got a number on it as it runs. Every time we stop perhaps the operator could (20) give the number to ..

COURT: Well, he can give it to me and I can record it. You do not want it recorded?

MR BIZOS: No, we can have it recorded, but the machinest can record it on the side of the record, can make a note for the typist to put the video running number on it in case we ever have to go back for it, otherwise ...

COURT: Well, we are getting comments as we go along and I have had difficulty in figuring out how we could place the comments against the video should another Court have to replay the (30) video. So, if there is a number where we stop it we can just give

the/..

DELMAS TREASON TRIAL 1985-1989

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