IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA Ass.

(TRANSVAALSE PROVINSIALE AFDELING)

SAAKNOMMER: CC 482/85 DELMAS

1987-04-02

DIE STAAT teen: PATRICK MABUYA BALEKA EN 21 ANDER

VOOR: SY EDELE REGTER VAN DIJKHORST EN ASSESSOR : MNR. W.F. KRUGEL

NAMENS DIE STAAT: ADV. P.B. JACOBS
ADV. P. FICK
ADV. W. HANEKOM

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

TOLK: MNR. B.S.N. SKOSANA

KLAGTE: (SIEN AKTE VAN BESKULDIGING)

PLEIT: AL DIE BESKULDIGDES: ONSKULDIG

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HOF HERVAT OP 2 APRIL 1987.

MNR. DE VILLIERS : U Edele, ek vra verlof om aan u op te handig ons betoogshoofde asook afskrifte van tersaaklike passasies wat ons na verwys.

Die beswaar van die Staat teen die toelaatbaarheid van die betrokke verklaring is gebaseer op drie gronde.

HOF : Laat ons nou net kyk watter verklarings behandel u. Op die oomblik het mnr. Chaskalson net behandel 'n derde verklaring wat ek nie gesien het nie. Behandel u die ander ook, waarvan een half voor die Hof is? (10)

MNR. DE VILLIERS : Ja, ek behandel die verklaring van die beskuldigdes waarvan 'n afskrif aan u opgehandig is.

HOF : Die een met die aangehegte verklaring van prof. Joubert wat nie opgehandig is nie?

MNR. DE VILLIERS : Ja en my submissie is dat beide van daardie verklarings, dié van die beskuldigdes sowel as die een van prof. Joubert wat nie ingehandig is nie, ontoelaatbaar is en die gronde is dan dat die verklarings nie relevant is ten opsigte van Bede 1 nie. Tweedens, dat die verklarings op grond van die openbare beleid en openbare belang (20) ontoelaatbaar is en derdens, dat die verklarings en in besonder prof. Joubert se verklaring wat by wyse van verwysing in die applikante se verklaring ingelyf word, ontoelaatbaar is omdat dit poog om die verklaring van U Edele van 30 Maart 1987 te weerspreek.

Wat grond A betref, relevantheid, is ons submissie dat die verklarings nie relevant is ten opsigte van Bede 1 nie. Bede 1 is die bede wat tans beredeneer word. By die aanvang van die repliek ten opsigte van Bede 1 is daar namens die applikante gepoog om daardie verklarings in te dien (30)

en/...

en is daar spesifiek gemeld deur My Geleerde Vriend dat dit betrekking sou hê op Bede 1.

Bede 1 is op drie alternatiewe gronde gebaseer, te wete "The dismissal was made without power and was wrong in law." Dan tweedens, "The dismissal constituted a material irregularity which was such a gross departure from established rules of facts and procedure that the accused can no longer be properly tried" en derdens "The failure to hear the accused whether or how the discretion given to him by Section 147 should be exercised, constituted a material (10) irregularity." Dit is die drie gronde wat hulle noem en in ons submissie is elkeen van daardie gronde in werklikheid regsgronde.

Dit word bevestig in ons submissie deur die applikante se hoofde van betoog. Daar is op regsgronde betoog dat daar onreëlmatighede in die prosedure was en dat die Agbare Hof derhalwe die proses behoort te vernietig.

Ons Geleerde Vriend het vermeld dat die verklaring van prof. Joubert antwoord op die verklaring wat U Edele op Maandag, 30 Maart gemaak het en sonder om op die inhoud(20) van die verklaring van prof. Joubert in te gaan, kan ek meld en ek glo My Geleerde Vriend sal met my saamstem, dat dit 'n korrekte opsomming is. Daardie verklaring van prof. Joubert gaan oor die beraadslagings en besprekings tussen lede van die hof oor die saak wat voor die Hof dien. So 'n verklaring van prof. Joubert kan geensins relevant wees in ons submissie met betrekking tot enigeen van die drie regsgronde waarop die applikante steun nie.

Dan wat grond (b) betref, artikel 202 van die Strafproseswet is ter sake. Gerieflikheidshalwe om die (30)

vertaalwerk/...

vertaalwerk te verkort, sal ek uit die Engelse teks lees:

"Except as in this act provided and subject to the provisions of any other law, no witness in criminal proceedings shall be compellable or permitted to give evidence as to any fact, matter or thing or as to any communication made to or by such witness if such witness would on 30 May 1961 not have been compellable or permitted to give evidence with regard to such fact, matter or thing or communication by reason that is should not on the ground of public policy or from (10) regard to public interest be disclosed and that it is privileged from disclosure, provided that any person may in criminal proceedings adduce evidence of any communication alleging the commission of an offence if the making of that communication prima facie constitutes an offence and the judge or judicial officer presiding at such proceedings may determine whether the making of such communication prima facie does or does not constitute an offence and such determination shall, for the purpose of such proceedings, be final." (20)

Die voorbehoudsbepaling is in ons submissie nie ter sake nie, maar die hoofbepaling is wel ter sake in ons submissie.

Die vraag wat na aanleiding van die artikel nagegaan moet word is of die betrokke deponente toegelaat sou gewees het om getuienis af te lê met betrekking tot 'n feit, aangeleentheid, saak of mededeling uit hoofde daarvan dat dit op grond van openbare beleid of met inagneming van die openbare belang nie openbaar gemaak behoort te word nie. In ons submissie, die antwoord op daardie vraag is dat die deponente nie toegelaat sou gewees het om dit te doen nie. (30)

Dan/...

Dan behandel ek die regsposisie. Dit is die gevestigde beginsel van die Engelse Reg in ons submissie dat regters van die Hooggeregshof nie verplig kan word om getuienis af te lê oor aangeleenthede wat in verrigtinge voor hulle plaasgevind het nie.

Die eerste passasie in die bundel wat ons na verwys is Cross on Evidence, Vyfde uitgawe, as u op die tweede bladsy van die bundel kyk en u sal sien onder Section 2 word daar gesê :

"The Judges of the superior courts cannot be compelled(10) to give evidence concerning evidence tried by them and more or less closely analogist rules exist concerning the evidence of arbitrators, jurors or barristers."

Dan sê hulle onder die opskrif (a) :

"The evidence of judges of the superior courts. In R v GASSARD it was held that a chairman of quarter sessions ought not to be compelled to go before the grand jury in order to depose what a witness had said in a previous case tried by him. PATTERSON, J. said it would be dangerous to allow such an examination (20) as the judges of England might be called upon to state what occurred before them in court. It has since been held that the judges of inferior courts can be compelled to do this, but the remarks of PATTERSON, J. suggest that a privilege based upon the dignity of their office is conferred on the judges of the superior courts although it is impossible to say exactly how far the privilege extends, because there are very few authorities on the subject. As the judges do not appear to object to giving evidence at least from the well of the Court(30)

concerning/...

concerning what occurred in cases tried by them when they can assist subsequent litigation by doing so.

In BUCKLEY v METROPOLITAN BOARD OF WORKS(?) said:

With respect to those who fill the office of judge has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment to which hardly any limit could be put in relation to proceedings before them and as everything which they can properly prove, can be proved by others the courts of law discountment and I think I may say(10) preventing being examined."

Insgelyks is ons submissie dat 'n assessor, net soos 'n regter, nie toegelaat word om getuienis af te lê en in besonder nie toegelaat word om getuienis af te lê ten opsigte van die beraadslagings en besprekings waaraan hy deelgeneem het as 'n lid van daardie hof ten opsigte van die saak wat voor daardie hof dien nie.

Dan die boek Hoffman on Evidence is die volgende verwysing wat u vind daar in die bundel. Daar sê Hoffman op bladsy 221 van die derde uitgawe die volgende : (20)

"Judicial proceedings - evidence of judges.

The judges of the Supreme Court cannot be compelled by virtue of a rule of practice to give evidence of matters which occur in proceedings before them and it is probably undesirable that they should give sworn evidence in such cases even if they are willing to do so."

Dan word die passasie aangehaal uit BUCKLEY se saak wat ek vantevore aangehaal het in Cross se passasie en dan gaan hy voort : (30)

"Thus/...

"Thus in EX PARTE WOLPERDT 1917 (WLD) MASON, J. refused leave for a subpoena to issue to WARD, J. requiring him to give evidence in a private prosecution for perjury committed in an action which he tried and in R v HARVEY (Dit is 'n ou Cox beslissing) BILES, J. said that if he were subpoenaed to produce his notes of evidence, he would not appear, but judges do occasionally give unsworn evidence of a formal nature in civil actions if the parties do not object. It is doubtful whether there is any rule which prevents magistrates from being required to testify to matters which occur before them and in practice they often give sworn evidence to prove their notes. A judge remains, however, a compellable witness in law, although in civil proceedings a subpoena cannot be issued against him out of any court without its leave when an inferior court wishes to issue one the permission of the provincial division that has jurisdiction to hear appeals from it is required."

U sal sien dat ten opsigte van die stelling "A judge remains however, a compellable witness in law, verwys ons na Schmidt, Bewysreg, waarby ons netnou kom.

U sal sien vervolgens in die bundel is daar 'n uittreksel uit R v HARVEY en die tersaaklike passasie wat die skrywer na verwys is op bladsy 103 van die saak. Ek mag net meld dit is die hele saak wat afgedruk is in hierdie geval. Die tersaaklike passasie 103 'n bietjie laer as die middel van die bladsy :

"BILES, J. said that the judges of the Superior Courts ought not of course to be called upon to produce

their/...

their notes. If he were to be subpoenaed for such a purpose, he should certainly refuse to appear, but the same objection was not applicable to the judges of the inferior courts. He saw no reason why they should not be called and especially where as in this case the judge was willing to appear."

Dan die volgende uittreksel is die WOLPERDT saak van 1917 (WLD) waar ons die hele saak afgedruk het, die twee bladsye daarvan. Daar was aansoek gedoen om 'n getuiedagvaarding uit te reik teen 'n regter van die Hooggeregshof op die basis dat daar 'n private vervolging ingestel is vir of ten opsigte van meineed ten aansien van getuienis wat hy voor die betrokke regter afgelê het. U sal sien uit die uitspraak van MASON, R. het hy die aansoek geweier en die grondslag van sy weiering was dat die Hof nie jurisdiksie het nie op 'n ander grond as dié wat nou ter sake is, maar aan die einde van die uitspraak, onder aan bladsy 99 sê hy ongeveer ses reëls van onder :

"Then there is the further point that it is my opinion contrary to public policy to allow a judge to be examined and cross-examined with reference not to facts but to his performance of his judicial duties, but I refuse the application at present on the ground that the Witwatersrand Local Division has no jurisdiction in the matter."

Die volgende verwys is na Fipson on Evidence, die dertiende uitgawe omtrent die middel van die bladsy onder die opskrif "Judicial Disclosures."

"Judges of the Superior Courts cannot be compelled to testify to matters which have arisen before them in other/...

other trials, though this does not extend to collateral incidents occurring such trials, for instance the attempt to rescue a prisoner in court, but there is no objection to the judge of an inferior court being called in some circumstances although it would seem highly undesirable to call such a witness unless there was absolutely no other means of proving some piece of evidence vital to proceeding. As to unsworn explanations from the Bench (see Post paragraphs 31 to 43)"

Ons het ongelukkig nie daardie gedeelte afgedruk nie. Ek verwys na die gedeelte wat betrekking het op "unsworn explanations from the Bench". Ons het uit 'n ander uitgawe van Fipson wat ons nou tot ons beskikking het hier by die hof 'n uittreksel gemaak uit die negende uitgawe. Kan ek dit vir U Edeles ophandig. U sal sien op bladsy 484 word daar gehandel met "witnesses who do not swear or affirm" en daar onder aan die bladsy "Counsel and judges." By paragraaf 3 :

"The evidence of counsel when merely required to explain a case in which they have acted as such but not otherwise, may be given from their places without oath though they may wave their privilege and be sworn, examined and cross-examined either in their places or in the witness-box. The same rule applies to judges."

HOF : Dit lyk of dit darem baie korter is in hierdie uitgawe as in die ander uitgawe, want daar in die ander uitgawe was daar twaalf paragrawe gewees.

MNR. DE VILLIERS : Ja, dit spyt my dat ek ongelukkig nie daardie nuwe uitgawe beskikbaar het nie.

HOF : Waar is die nuwe uitgawe beskikbaar?

MNR. DE VILLIERS : Die nuwe uitgawe wat ek die afdrukke

aanvanklik/...

aanvanklik van gemaak het, is in die Baliebiblioteek in Pretoria. As u ons sal vergun sal ons die afdruk van die tersaaklike paragrawe voor u plaas.

HOF : As die moontlik is sou ek graag die hele boek kry.

MNR. DE VILLIERS : Ons sal daarvoor reël.

As ek dan mag voortgaan met Fipson, die gedeelte wat wel afgedruk is uit die dertiende uitgawe op bladsy - ek het gelees eerstens op bladsy 279, as ek dan mag aangaan. U sal sien hy behandel ook die geval daar van arbiters. "The protection of an arbitrator is somewhat narrower". Dit (10) is op bladsy 279 en dan op bladsy 280 bo aan die tweede reël sê hy :

> "But the inquiry may not extend further. Thus he may not be asked the grounds of his reward or what items it included, for the award speaks for itself and any evidence to explain, add to or contradict it, is inadmissible."

Dan onder "barristers" hoef ek nie te lees nie.

> "Jurors. Neither the testimony nor the unsworn statements or petti-jurors are receivable to impeach (20) their verdict, thus affidavits by a juryman that he did not agree to the damages awarded or by all the jury that by mistake they gave less than they intended, or that their verdict had been decided by lot or by two jurors that they did not understand English or by a juror that she did not really agree with the verdict of guilty, have been rejected."

Ek wys net in die verbygaan daarop dat selfs in die geval waar die jurie die lot gewerp het, is getuienis daaroor verwerp. (30)

Dan/...

Dan 'n bietjie verder aan op dieselfde bladsy omtrent vier reëls van onder :

"The same rule applies as to the proof of misconduct in criminal trials."

Dan gee hulle voorbeelde.

"Thus a letter from a juryman explaining the fact and explaining the circumstances under which he had separated himself from his colleagues after retiring to consider the verdict, has been rejected, but where in answer to the judge the foreman in court disclosed(10) that they had decided the case on inadmissible grounds the conviction was quashed. So a juryman was not allowed to prove that questions were put to and answers given by the clerk of assize in the juryroom which influenced their finding, not that one of the jurors stated his intention to acquit the prisoner whatever the evidence against him, nor that the majority of the jury had been in favour of acquittal until the foreman of the jury had produced a list of the appellant's previous convictions. Although, however, misconduct connected (20) with the verdict cannot be proved by extrinsic evidence, yet it may be extrinsically as by the officer in charge of the jury or by any other actual witness of the transaction, this in WILMONT the clerk of assize was allowed to report to the court what had occurred and the evidence of a juryman as receivable on collateral points for instance to show the circumstances unde which he came into the box, the matters transpiring in court so he may without leaving the box or retiring from the case be examined as to any facts material (30)

to/...

to the case which he knows of his own knowledge."

Dan is die volgende passasie wat ons aangeheg het by die bundel is dié van Schmidt, bewysreg, waar hy openbare privilegie behandel en hy sê daar onder die opskrif "Openbare privilegie":

"In hierdie gedeelte kom ter sprake die privilegies wat daarop gerig is om die openbare belang, dié van die gemeenskap eerder as die indiwidu te beskerm. Omdat die handhawing van die openbare belang aan die Staat opgedra word, is dit hoofsaaklik Staatsorgane(10) en amptenare wat dié privilegies opper en wat daardeur beskerm word. Dit is dan ook gerieflik om hulle te klassifiseer na gelang van die owerheidsgesag wat die nouste betrokke is, dit wil sê die uitvoerende, regsprekende wetgewende gesag."

Ek wil nie nou die hele passasie lees nie. Onder aan die bladsy wys ek net u aandag daarop dat die skrywer daarop wys die opvatting dat "openbare privilegie geen privilegie is nie, maar 'n uitsluitingsreël of reëls gegrond op openbare beleid, nie deur hom onderskryf word nie. Dan gaan(20) hy voort op bladsy 561 om te sê wat eintlik die grondslag na sy siening is vir die beginsel.

Dan op bladsy 572 van dieselfde boek behandel hy die geval van die regsprekende amptenaar en hy sê :

"Regsprekende amptenare is bevoegde en verpligbare getuies, maar dit is blykbaar die praktyk, een wat op gesonde beleidsoorwegings berus, dat hulle sover moontlik beskerm moet word teen getuienislewering aangaande sake wat hulle amptelik hanteer het. Hoe ver hierdie regsreël in die vorm van 'n privilegie (30)

gevorder/...

gevorder het, is moeilik te bepaal aangesien moderne gesag grotendeels ontbreek."

Maar dan verwys hy daarna dat daar nie van 'n regter verwag kan word dat hy in die getuiebank 'n vonnis wat hy gelewer het moet verdedig of verduidelik nie en dan verwys hy na WOLPERDT se saak.

Insgelyks in ons submissie sou dieselfde beginsel geld ten opsigte van 'n assessor dat hy nie verwag kan word om 'n vonnis waarby hy betrokke was te verdedig of te verduidelik nie. A fortiori, nog sterker, kan hy dus nie as assessor (10) die getuiebank betree of 'n beëdigde verklaring maak waarin hy handel met beraadslagings of besprekings wat gevoer is in die kamer van die Regter waar die aangeleentheid bespreek is nie.

In verband met die beginsel van dat "public policy" hier ter sprake is en 'n grondslag is wat aandag moet kry, verwys ek u ook net na 'n passasie wat ons nie afgedruk het nie, Hoffmann se boek, derde uitgawe bladsy 214 na 215 waar hy eintlik die aangeleentheid in breë perspektief behandel.

Vervolgens in die bundel sal u sien is daar Halsbury's(20) Laws of England, vierde uitgawe volume 17 waar in paragraaf 236 die verwysing op bladsy 5 van my hoofde is verkeerd. Dit is nie 263 nie, maar 236 :

"Judicial tribunals and jurors.

A judge of the Superior Court may refuse to give evidence as to judicial proceedings which have taken place before him."

'n Bietjie verder aan sê hy :

"Similarly, a member of a judicial body such as a medical board cannot give evidence as to reasons which prompted(30)

his/...

his decisions. The practice where a judge of the Superior Courts give evidence, is unsettled, but where he is not giving evidence about a case in which he has been concerned, there is no privilege and no reason for the unusual practice. The evidence of jurors as to what occurred during a trial or in the juryroom is not admissible."

Dan die volgende punt in die bundel is die vorige, die ou uitgawe van Gardiner en Lansdown. Die een aspek wat eerste aangehaal word sal ek later by kom. Dit is die (10) eerste bladsy, dit is 448 en dan bladsy 522 :

"Judicial disclosures.

In general judges and magistrates may not be compelled to testify to matters not of an open or public nature which have arisen before them in other trials. Nor may jurors be compelled to disclose what took place at their deliberations."

In die huidige uitgawe, die Lansdown en Campbell uitgawe, volume 5 van South African Criminal Law and Procedure word op bladsy 907 "judicial disclosures" behandel. Ons (20) het dit nie afgedruk nie. My Geleerde Vriend het gister na een aspek verwys wat daar geopper word waar die geleerde skrywers sê :

"Before the abolition of Jury's Act, evidence as to a jury's manner of reaching its decision was held inadmissible, not only because it concerns the performance of a judicial function, but also for the protection of jurymen, but the evidence of a juror was not extended where it related to an alleged irregularity in the proceedings, such as an individual juror's (30)

inability/...

inability to understand the language in which the evidence had been given."

HOF : Hoe klop dit met wat Fipson gesê het?

MNR. DE VILLIERS : Ek wil aan die hand gee dat die saak waarop My Geleerde Vriend gesteun het, as ek net by u vraag 'n moment later mag kom, ek dink ek mag die vraag op dié manier beantwoord, dit mag miskien die probleem beantwoord. Die saak wat My Geleerde Vriend op gesteun het en wat Gardiner en Lansdown ook na verwys is R v SILBER 1940 (AD) 187. Sy submissie na aanleiding daarvan, soos ek dit aangeteken het, is dat "evidence of jurors is admissible to show an irregularity during the proceedings." Maar die saak is in ons submissie heeltemal onderskeibaar van die onderhawige, want wat daar gebeur het was dat een van die jurielede onbekend aan die voorsittende regter, was nie in staat om die getuienis waarin die klaagster haar getuienis afgelê het, te verstaan nie. So, dit het daar glad nie gegaan oor beraadslagings of besprekings waaraan 'n jurielid deelgeneem het nie. Dit het gegaan dus oor die verrigtinge in die hof self wat die jurielid nie in staat was om te verstaan nie.

As 'n mens dan mag kyk na wat Fipson sê, U Edele se vraag, is ons submissie dat Fipson, dit is nou die eerste een bladsy 280 en 281 van - die eerste een wat ek ingehandig het in die bundel, die dertiende uitgawe, byvoorbeeld die geval van - onder die opskriffie "Jurors" - die feit dat die jurielede in daardie Engelse saak die lot gewerp het om hulle besluit te bepaal.

HOF : Nee, dit het eintlik gegaan oor die vraag of hulle die Engels kon verstaan.

MNR. DE VILLIERS/...

MNR. DE VILLIERS : O, ek sien wat u bedoel.

HOF : Daar staan dit was die toelaatbaar vir hulle om getuienis te lei dat hulle nie Engels kon verstaan nie.

MNR. DE VILLIERS : Dit kom my voer - u sal sien daar was twee sake, u sal sien in die voetnota 99 R v THOMAS. In daardie saak was dit beslis dat die feit dat hulle nie die taal kon verstaan nie, was nie 'n grond van aanval, dat dit nie 'n onreëlmatigheid was nie, maar dan sal u ook sien "But see RAS v KING EMPEROR" en dit is dan ook in SILBER se saak na verwys. Ek het nou gekyk na PRICE se saak, (10) R v PRICE. U sal onthou dieselfde punt van taal - of hierdie saak van RABAHERILAL v KING EMPEROR is na verwys in SILBER se saak en in PRICE 1955 (1) op 224, maar ek het elders gelees, ek sal dit net bevestig dat in die saak van THOMAS was daar eers besluit die feit dat die taal nie verstaan kon word nie, was nie 'n onreëlmatigheid nie, maar in die latere saak van RABAHERILAL v KING EMPEROR is besluit dat dit wel 'n grondslag is.

As ek dan mag kom by die volgende - as ek mag voortgaan met die bundels, die volgende saak in die bundel is (20) R v THOMPSON 1962 (1) (All E.R.) op 65. Hierdie was 'n uitspraak van The Court of Criminal Appeal. Ons het spesifiek gekyk na latere sake. U sal sien in CRASMA se saak word al die vorige sake tot 1950 behandel, maar hier is etlike sake wat ook daarna gekom het. Hy is nou net na die verwysing na Gardiner en Lansdown. Hy word na verwys op bladsy 5 van ons hoofde, die middel van die bladsy. Ek het so 'n bietjie gespring in my hoofde, as u my sal vergun. Ek het maar die bundel van dokumente gevolg.

U sal sien volgens die kopstuk wat daar gebeur het, (30)

is/...

is, in die tweede paragraaf :

"The appellant was convicted of certain offences by a jury and the sentence was postponed until the next day. In the intervening period a juryman was alleged to have told a member of the public that whilst in the juryroom a majority of the jurors had been in favour of acquitting the appellant, until the foreman produced a list of the appellant's previous convictions and that thereupon the jury agreed to convict. Leave to appeal against conviction was given. Limited so that the court of criminal appeal might rule whether there was jurisdiction to enquire into the subject of the alleged statement.

Held: The Court has no right to enquire into what occurred in the juryroom."

Op die volgende bladsy, die eerste bladsy van die uitspraak van LORD PARKER sal u sien net by paragraaf (e) sê die Edele Regter :

"The court finds it unnecessary to go through all the cases. It is sufficient to refer to a case in the court of appeal ELLIS v DE HEER."

Daardie uitspraak word nie in ons hoofde spesifiek genoem nie, maar u vind hom tog afgedruk as die heel laaste twee bladsye van die bundel, maar ek wil nie nou daaruit lees nie. Ek wil net voortgaan met wat LORD PARKER sê. Hy haal aan, sal u sien by paragraaf (f), uit die uitspraak van LORD BANKS, J. in die ELLIS v DE HEER saak waar die volgende gesê is :

"A mass of evidence has been tendered in the shape of affidavits by jurymen which are largely composed of

statements/...

statements not only as to what happened after the jury had retired to their room to consider their verdict and as to how that verdict was arrived at, but also as to what took place in the court after they had returned. As to this I desire to make it very clear that the Court will never admit for the purpose either of questioning or supporting a verdict, any evidence from jurymen of the discussion which they may have had between themselves then they were considering their verdict or of the reasons for their decision, whether the discussion took place in the juryroom after their retirement or in the jurybox itself. This has been a well accepted rule for many years. The policy underlying it being that it ought not when once a verdict has been given, to be open to an individual juryman to challenge the verdict or if it was challenged, to attempt to support is, but I think the matter goes further. Not only is there such a rule of law, but it has also been generally accepted by the public and by the press as a result of conduct that what passes in the juryroom during the discussion by the jury as to what their verdict should be, is something which ought to be treated as private and confidential."

Ons beklemtoon daardie sin.

"Speaking from myself and I am sure for a large number of other persons, I saw the other day with astonishment and disgust the publication in what are generally accepted as respectable newspapers of a statement by the foreman of the jury in a criminal case which

attracted/...

attracted much public attention as to what took place in the juryroom, after the jury had retired. I feel confident that anybody who read that statement will realise the importance of maintaining the rule as it has been generally accepted and I say nothing whether a person who invites such a statement and publishes it does or does not commit contempt of court."

Dan sal u sien verskyn die aanhaling uit die uitspraak van LORD ATKIN, J. van die Engelse Court of Appeal by paragraaf (b) op bladsy 67 en dit is dan ook 'n passasie, as ek reg onthou wat in CRASMA se saak aangehaal is. In CRASMA se saak was hierdie passasie wat ek uit die uitspraak van BANKS, R. aangehaal het, nie aangehaal nie, want dit was nie soseer ter sake nie, maar daar is wel aangehaal uit wat ATKIN, R. gesê het. Dit verskyn in CRASMA se saak wat ons ook voor u geplaas het in 'n afsonderlike afdruk op bladsy 582 onderlangs op die bladsy.

Dan verwys ek u ook na bladsy 484 van CRASMA se uitspraak waar CENTLIVRES, R. in die laaste paragraaf van onder gesê het :

"I shall assume that as Mr Coleman contended the dictum of LORD ATKIN in ELLIS v DE HEER and RABAHERILAL v THE KING EMPEROR were obiter. It seems to me, however that prima facie they correctly set forth the law as it is understood in England today and that they are in consonance with the view which was not obiter expressed in other cases."

Ek noem dit net want vir sover dit mag wees dat wat BANKS,R. en ATKIN, R. gesê het obiter was, is dit baie duidelik as u kyk nou na die volgende passasie daar uit R v THOMSON

op bladsy 67 tussen E en F dat of hulle nou obiter was of nie, het hierdie Court of Appeal daardie woorde met instemming aangehaal. Dit blyk natuurlik uit E tot F op bladsy 66 waar hy alreeds sê "It is unnecessary to go through all the cases", maar hulle haal net aan uit ELLIS v DE HEER en dan by 67 tussen E en F word daar gesê deur PARKER, R.:

> "Those are very strong words from very strong and eminent judges. The reports are full of cases to the same effect, for instance R v THOMAS decided in 1933 and while one ground of the decision of R v THOMAS (10) was criticised in a privy counsel case of the same year namely RABAHERILAL v KING EMPEROR, Lord Atkin in that case specifically approved of R v THOMAS insofar as it followed the wellknown rule of practice."

Ek mag net sê ek het nou nie die passasie uit ATKIN, R. gelees nie. Dit is die passasie wat My Geleerde Vriend gister gelees het. Miskien moet ek tog net weer daarna teruggaan vir daardie rede. U sal onthou dat My Geleerde Vriend het gesê daar is net twee redes waarom hierdie getuienis van 'n jurielid uitgesluit word en na aanleiding(20) hiervan het hy daarop gewys dat ATKIN, R. sê :

> "The reason why that evidence is not admitted (dit is by paragraaf C, bladsy 67 C) is both in order to secure the finality of decisions of fact arrived at by a jury and also which is a matter of great importance for protection of jurymen themselves to prevent their being exposed to pressure that might otherwise be put on them with a view to explaining the reasons which actuated them individually arriving at their verdict."

Dit is seer sekerlik ook basiese gronde, belangrike (30)

basiese gronde wat 'n grondslag van die reël lê, maar dit is duidelik in ons submissie dat die passasie wat BANKS, R. na verwys op die vorige bladsy ewe eens 'n baie belangrike grondslag van die uitsluiting vorm en dit is die openbare beleid dat dit wat in die juriekamer bespreek word iets is wat as privaat en vertroulik behandel moet word en dat dit in die openbare belang so is. Ek het ook My Geleerde Vriend verstaan dat hy daardie beginsel erken want My Geleerde Vriend se woorde was, soos ek dit genotuleer het

"I do accept the requirements of public policy which bear on the juryroom or discussions between assessors and judge."

Maar hy het toe gesê nee, maar, die uitsondering is dat waar daar 'n onreëlmatigheid begaan word, dan kan 'n mens dit nou na vore bring.

Die uitspraak van THOMPSON weerspreek baie duidelik daardie argument en ek het reeds ook gehandel met SILBER se saak waar hy dieselfde argument op baseer.

Dan by F tot G sê PARKS, R. dat :

"Lord Atkin in that case specifically approved of R v THOMAS insofar as it followed the wellknown rule of practice. It would appear from the report (sê hy) that the judgment was based in part upon the well established ground that for the purpose of setting aside the verdict, evidence is not admissible by jurors to prove what discussions took place in the jurybox or in the juryroom."

So, daar kwalifiseer die Edele Regter inderdaad ook wat ATKIN, R. vroeër gesê het en voeg hy eintlik daaraan toe.

Dan belangrik ook op bladsy 67 is die passasie by

paragraaf/...

paragraaf H tot I :

"The Court would also like to refer in passing to what LORD HEWITT said on the question of jurymen divulging what occurred in R v ARMSTRONG. If one juryman might communicate with the public upon the evidence and the verdict, so might his colleagues also and if they all took this dangerous course, differences of individual opinion might be made manifest which at the least could not fail to diminish the confidence that the public rightly has in the general propriety of criminal verdicts." (10)

Dit is ons submissie na aanleiding van hierdie uitspraak dat 'n assessor in 'n saak soos die onderhawige ook duidelik op grond van oorwegings wat al in ons howe vir baie jare geld nie mag openbaar maak wat plaasvind in besprekings tussen lede van die hof nie, met betrekking tot die saak wat hulle besig is om te verhoor.

Dan wat R v RHODES betref, dit is die volgende saak in die bundel, 1967 (2) (All E.R.) wil ek u aandag daar net vestig op een passasie - ek wil nie nou op die feite van die saak ingaan nie - wat ter sake is wat belangrik is, op bladsy 87 by paragrawe A tot B. Dit was ook 'n geval waar 'n jurielid na die uitspraak gesê het dat sy te bang was om te protesteer dat sy nie saamstem met die beslissing nie en daar is toe gepoog om 'n beëdigde verklaring van haar voor die hof te lê waarin sy sou sê dat sy sou nie saamgestem het met die beslissing as sy gepraat het nie. Dan op bladsy 87 A tot B word gesê : (20)

"In passing it is to be observed that HARMON, L.J. as was pointed out in the argument in this case (30)

was/...

was really prophetic of the present case. He said it would be destructive of all trials by jury if we were to accede to this application. There would be no end to it. One would always find one juryman who said that was not what I meant or one would have to start the whole thing anew."

Dan beslis die Hof in die laaste paragraaf, soos u sal sien dat die beëdigde verklaring nie toegelaat word nie.

Op bladsy 87 van daardie sal u sien - van R v RHODES - daar is 'n nota, daar is 'n uitspraak wat toe later gerapporteer is van BOSTON v BAGSHAW. Ongelukkig, weens 'n tegniese fout, het ons nie daardie uitspraak ook afgedruk nie. Met u verlof kan ons dit ook later aan u beskikbaar stel. Dit is 'n uitspraak van LORD DENNING. U sal sien ons verwys na die saak in ons hoofde waar hy ook dieselfde beginsel maar weer herhaal, maar op 'n baie duidelike wyse.

Dan die saak van R v ARMSTRONG is die volgende een in die bundel en dit is die beslissing, sal u onthou, wat LORD PARKER na verwys het op bladsy 67 by paragraaf H wat hy ook aangehaal het met instemming en u sal sien dat hier 'n aangeleentheid eintlik in die verbygaan genoem is, maar tog baie belangrik. Die tersaaklike gedeelte vind u op bladsy 156 tot 157. 156 onder. Ek hoef nie in te gaan op die ander nie. Dit is nie ter sake nie. Die derde reël van onder :

"It remains to mention a separate matter. Reference has been made in the course of the argument to the fact that after verdict there appeared in some newspapers an account of what the writer said was said to him about the evidence. With a complete lack of

reserve/...

reserve by a member of the jury, what was published was in fact said - whether what was published was in fact said, is not certain, but it is at least certain that it was published. In the opinion of this Court nothing could be more improbable, deplorable and dangerous. It may be that some jurymen are not aware that the inestimable value of their verdict is created only by its unanimity and does not depend upon a process by which they believe that they arrived at it. It follows that every juryman ought to observe the (10) obligation secrecy which is comprised in and imposed by the oath of the grand juror. If one juryman might communicate with the public upon the evidence and the verdict, so might his colleagues also and if they all took this dangerous course, differences of individual opinion might be made manifest which at the least could not fail to diminish the confidence that the public rightly has in the general propriety of criminal verdicts. Whatever the composition of the jury may be, experience shows that its unanimous judgment is (20) entitled to respect. That respect with all that it involves is not likely to be thrown away and it is a matter of supreme importance that no newspaper and no juryman should again commit the blunder to use no harsher word, which has disfigured some of the reports relating to matters connected with the trial of this case."

Dan, terwyl ons met die bundel besig is, mag ons u verwys na die volgende saak ATTORNEY GENERAL v BAKER AND OTHERS op bladsy 998 tot 999. Hierdie was 'n geval waar (30)

'n koerant/...

'n koerant stukke gepubliseer het en was die skrywers gelas om voor die Hof te kom om redes aan te toon waarom hulle nie gestraf sou word vir minagting van die hof nie. Ek haal dit nie aan in verband met die minagting van die hof nie, want dit is nie nou die punt wat ter sake is nie. Ek haal dit aan vir die rede wat op bladsy 998 verskyn, die laaste paragraaf op 998 en die eerste deel op bladsy 999 waar daar aangehaal word uit R v DAVIES. Daar word gesê deur TINDALL,W.R.P. :

> "It is well that the respondents and others should understand why such limits are set to the criticism of the administration of justice."

Die vorige sin is eintlik ook al belangrik, maar ek hoef dit nie te herhaal nie.

> "The reason was very clearly explained in the case of R v DAVIES. There it is stated the object of the discipline enforced by the Court in the case of contempt of Court, says Bow and L.J., is not to vendicate the dignity of the Court or the person of the judge, but to prevent undue interference with the administration of justice. In that judgment a statement by WILMOT, C.J. was quoted to this effect. The real offence is the wrong done to the public, by weakening the authority and influence of the tribunal which exists for their good alone. He adds that such conduct is pre-eminently the proper subject to summary jurisdiction. Attacks upon the judges, he says, exciting the minds of the people at general dissatisfaction with all judicial determinations and what ever mends allegiance to the laws, is so fundamentally

shaken/...

shaken, it is the most fatal and dangerous obstruction of justice and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatever. Not for the sake of the judges as private individuals, but because they are the channels by which the king's justice is conveyed to the people. To be impartial and to be universally thought so are both absolutely necessary for giving justice that free, open and unimpaired current which it has for may ages (10) found all over this kingdom."

Ons submissie na aanleiding hiervan is dat afgesien van die oorwegings wat reeds genoem is ten opsigte van jurieverhore wat by ons van toepassing is ook op 'n assessor, is hierdie 'n bykomende rede waarom 'n jurielid - verskoning, waarom 'n assessor nie geregtig is om enigsins dit wat in die regter se kamers bespreek is in verband met die saak na buite bekend te maak nie.

In die boek van Borrey en Louw, dit is The Law of Contempt, hy is hier afgedruk op bladsy 152 na 153 - daar sal u sien op bladsy 152 dit is in die hoofstuk onder (20) die opskrif "Scandalising the Court", die tweede paragraaf. Ek haal dit weer eens aan nie op die basis dat ek aanvaar dat hier minagting van die Hof hier ter sprake is nie. Dit is nie nou ter sake nie. Die basis waarop ek dit aanhaal is die beginsels wat hieruit spruit wat in ons submissie ook hier van toepassing is. Die tweede paragraaf net na die aanhaling uit R v GREY dit is in die gedeelte getiteld "Introduction" :

"The necessity for this branch of contempt lies in the idea that without well regulated laws, a civilised (30)

community/...

community cannot survive. It is therefore most important to maintain the respect and dignity of the Court and its officers whose task it is to uphold and enforce the law, because without such respect, public faith in the administration of justice will be undermined and the law itself would fall into disrepute."

Dan hoef ek nie weer dit voor te lees nie, maar ook die uitspraak van WILMOT, R. ook in die Engelse saak wat dan vervolgens aangehaal word en dan onder aan die bladsy vier reëls van onder :

"The same point was elaborated by Sir JAMES MARTIN, C.J. in Re THE EVENING NEWSPAPER (dit is blykbaar 'n uitspraak van Nie-Suid-Wallis - ja, daar sê die skrywer dit 1880) what are such courts but the embodied force of the community whose rights they are appointed to protect. They are not associations of a few individuals claiming on their own personal account special privileges and personal dignity by reason of their position ..."

en dan die volgende paragrafie :

"In short, the integrity of both the law and the judges must be maintained not for any personal satisfaction on the part of the judges themselves, but for the benefit of the community as a whole."

Die volgende uitspraak is 'n uitspraak wat in die bundel is van ROGERS v SECRETARY OF STATE FOR THE HOME DEPARTMENT GAMING BOARD FOR BRITIAN v ROGERS HOUSE OF LAWS. U sal sien daar uit die boonste opskriffie dit gaan oor "Evidence, admissibilty, privileged documents, drown privilege, disclosure alleged to be injurious to public interest, information obtained by gaming board, letter from police giving

information on character and reputation of applicant for certificate of consent, alleged criminal liable in letter, police under no duty to supply information to board, information essential to proper functioning of board, public interest requiring that such information be immune from disclosure, ground of immunity not properly described as a crown privilege."

Dit is dus eintlik op basis van publieke belang dat die inligting nie in daardie saak bekend gemaak is nie.

Wat daar in kort gebeur het is dat daar - miskien kan ek net die opskrif lees :

"A company of which R was a director, wished to apply for the grant of licences under the Gamings' Act in respect of certain bingo halls.
They applied to the Gaming Board for certificates of consent. The Board were required in determining whether to issue such certificates to consider whether the applicant would be capable of and diligent insecuring the provisions of the Act and the regulations be complied with and they had in particular under paragraph so and so to take into account the character, reputation and financial standing of the applicant.
In performance of that duty the Board made enquiries from the Sussex police about R. In response to that inquiry the chief constable of Sussex wrote a letter to the board. The certificates of consent were refused by the board. R claimed that he had received anonymously a copy of the letter of 15 September and instituted proceedings against the chief constable for criminal liable alleging that the liable is containing that

letter/...

letter. Two witness summonses were issued, the one against the chief constable of Sussex and the other against the secretary of the board requiring inter alia the production by the former of a copy of the letter and by the letter itself. The Attorney-General on behalf of the Secretary of State for the home department successfully moved the divisional court for an order setting aside the two witness summonses insofar as they required the production of documents on the ground that the documents called for were subject to(10) crown privilege. But on a separate application by the board relating only to the witness summons issue, the divisional court refused to make an order, upholding the Board's claim to privilege in respect of production of the letter. R appealed and the Board cross-appealed. Held: Both the Secretary of State and the Board were entitled to the orders for which they asked. Accordingly R's appeal would be dismissed and the Board's cross-appeal allowed. Neither the letter nor the chief constable's copy of it should be produced. Both (20) belonged to a class of documents which should be protected. The ground on which protection could be claimed was not that the crown had any privilege in the matter, but that the public interest required that communications to the Board about the character, reputation and financial standing of applicants for certificates of consent should be immune from disclosure in order that the Board might, in the performance of its statutory duty, obtain from varying sources the fullest possible information about applicants without(30)

the/...

the persons volunteering such information being afraid of repercussions."

Dan gee hulle die verwysings in die uitspraak waar daar na daardie punte verwys word. Ek gaan nie weer uit die uitspraak self lees nie. Die belangrike is, in ons submissie, dat oorweging van die vraag of die publieke belang ook dan regverdig dat die verklarings nie voor u geplaas word nie, is dit belangrik om te let op die beginsel dat daar vrye en onbelemmerde bespreking van die aangeleenthede voor die Hof tussen die Edele voorsittende Regter en assessore wat(10) in so 'n saak optree kan plaasvind.

Daardie funksie wat in belang is van die regspleging sou ernstig belemmer word indien 'n asssessor toegelaat sou kon word om tydens of na die verrigtinge enige besprekings te openbaar wat daar tussen hom en die ander lede van die Hof plaasgevind het. Die submissie wat ons gemaak het in daardie verband verskyn in op bladsy 6 van ons hoofde onder aan bladsy 6 waar ons na die ROGERS saak verwys.

Dan mag ek u verwys na een uitspraak wat ons nie na verwys het nie, wat wel in die hoofde na verwys word op (20) bladsy 5 is MINISTER VAN JUSTISIE v ALEXANDER 1975 (4) SA 530. Die tersaaklike passasie is op bladsy 544 tot 545 en die rede waarom ek na die uitspraak in daardie verband verwys is u sal sien in die gedeelte wat ons aangehaal het uit die boek van Schmidt dat hy verwys na ALEXANDER. U sal sien op bladsy 560 die eerste bladsy van Schmidt heel onder aan die bladsy verwys hy na MINISTER VAN JUSTISIE v ALEXANDER. Dit is nie die hele uitspraak nie, maar die tersaaklike gedeelte waarna die skrywer ook verwys is dan op bladsy 544 na 545. Die passasie wat ek na verwys is onder aan bladsy(30)

544/...

544 :

"Andersins toelaatbare getuienis mag volgens die gemene reg in die algemeen nie geopenbaar word nie, indien die openbaring daarvan in stryd sou wees met die publieke beleid."

En dan gaan hy aan om publieke beleid te bespreek. Ek wil dit nie alles nou voorlees nie. Ek wil aan die hand gee dit is ter sake tot by paragraaf G.

Met betrekking tot CRASNER se saak is dit hier ook belangrik in ons submissie dat die onreëlmatigheid waaroor(10) hier gekla is, het eintlik gehandel met iets wat van buite die juriekamer gekom het, naamlik die beampte - dit is nie in die hoofde spesifiek behandel nie - wat toesig gehou het oor die jurie. U sal sien die aard van die onreëlmatigheid word op bladsy 478 behandel in die omtrent die sesde reël van die uitspraak waar CENTLIVRES, R. sê dat die jurieverhoor het 'n dag geduur en ongeveer 16h30 die middag op die tweede dag het die jurie hulle uitspraak gaan oorweeg. Hulle het toe teruggekom teen omtrent 17h20 :

"The jury returned to the court at about 5.20 p.m. (20) and the foreman stated that they had found the appellant guilty by majority of seven to two on attempt to buy unwrought gold. Another member of the jury then attempted to address the learned Judge about the manner in which the verdict had been arrived at. He was understood to say that one of the jurors who had previously been in favour of an acquittal had changed his vote not because of any genuine change of mind, but solely because of the lateness of the hour. The learned Judge stopped the juror and said that he (30)

could/...

could not at that stage go into the matter."

Hy is toe skuldig bevind en 'n vonnis opgelê en dan was daar 'n aansoek deur die appellant vir 'n spesiale inskrywing :

"On the ground that an irregularity had occurred during the trial which he had been prejudiced, he produced an affidavit by the juror who had addressed the presiding Judge immediately after the foreman of the jury had announced a majority verdict of seven to two against the appellant. The affidavit disclosed that six jurors had voted for a verdict of guilty and three for not guilty. The affidavit also disclosed that the officer in charge of the jury made certain statements to the jury at a time when he was informed by the foreman that the jury were unable to agree and that immediately thereafter one of the juryman who had voted for a verdict of not guilty said that rather than go through all the arguments again, a course which he was not prepared to do, as it was getting on his nerves and in any event it was getting late, he would be prepared to fall in with the decision of the majoriy in order to arrive at a verdict."

Hoewel daar 'n volledige behandeling is vanaf 480 oor die vraag of die Hof getuienis kan ontvang wat gebeur het tydens die beraadslagings van die jurie, het die Appèlhof inderdaad nie op daardie punt die saak beslis nie. U sal sien op bladsy 480 'n bietjie laer as die middel dat die Appèlhof die advokate voor die verhoor gevra het :

"The Court intimated to counsel before the hearing of the appeal that he desired to hear argument on the question whether it was competent for a court to

receive/...

receive evidence as to what occurred during the deliberations of the jury."

Hy sê dan dat daar is volledige argument daaroor aangehoor en daarom vind 'n mens dat daar ook 'n volledige uiteensetting is van die sake, maar die sake word dan eintlik onderskei op die basis dat wat in hierdie geval gebeur het, is nie dat 'n mens te doen het suiwer met die beraadslagings van die jurielede nie, maar hier is die invloed, kan 'n mens sê, op die faktor van buite, naamlik die persoon wat - die beampte wat toesig gehou het oor die jurie. Ek gebruik nou (10)
K615 "toesig" in 'n wye sin en daardie persoon het klaarblyklik onreëlmatig opgetree want hy was klaarblyklik nie geregtig om vir die jurielede te sê wat hy gesê het nie en wat hy gedoen het blyk dan op bladsy 479 van die beslissing en veral uit die beëdigde verklaring van die voorman van die jurie, dit is die laaste helfte van die bladsy, so 'n bietjie laer as die helfte :

"The affidavit by the foreman stated as we could not arrive at a decision I signalled by knocking three times on the door and the representative of the (20) deputy sheriff opened the door and entered. I explained to him that we could not come to a decision and asked what the procedure was. He told us that the Judge would enlighten us on facts which were not clear and would most likely instruct us to retire to the juryroom again for the further discussion and consultation. He explained if we could not come to a decision after that, the case would have to be tried by a new judge and a newe jury. He then left and we left the juryroom for the court. It was at this stage that one of the (30)

jurymen/...

jurymen who voted against guilty said to me 'Mr Foreman, I have changed my mind and wish to vote for a verdict of guilty.' I called the representative back and informed him that we had arrived at a decision of seven to two in favour of guilty."

Dan gee hulle die verklaring van die jurielid wat sy besluit verander het en die rede waarom hy sy besluit verander het dat "I could not see the man, the accused, go through all that again." So, hier was 'n duidelike faktor van buite. Die betrokke persoon het onreëlmatig gehandel en dit was die basis waarop die uitspraak dan gegee is dat daar getuienis daaroor duidelik toelaatbaar was en dat die Hof op daardie grondslag die skuldigbevinding en vonnis ter syde kon stel.

Daardie uiteensetting is, in ons submissie, van belang want Ons Geleerde Vriend gaan dan aan die einde van sy betoog gister en hy noem vir u 'n voorbeeld van 'n tipe van - 'n voorbeeld van 'n onreëlmatigheid. Hy het dit in extenso behandel en daarom sal ek u vra om my te vergun om dit net kortliks te behandel.

Die voorbeeld wat hy aangehaal het is waar daar ook in die hipotetiese geval 'n verhoor is van 'n regter en assessore en in die hipotetiese geval het die voorsittende regter dan 'n getuie in die regter se kamer ingeroep, 'n moontlike getuie "prospective witness" en hy word opgedra om sekere ondersoeke te doen en hy word meegedeel dat "ons is voornemens om jou later terug te roep as 'n getuie om daaroor te kom getuig. Nou is My Geleerde Vriend se betoog verder dat as daar nou later 'n dispuut sou wees tussen die regter aan die een kant en die assessore aan die

ander/...

ander kant oor wat daar nou gebeur het toe hierdie voornemende getuie ingeroep is, dan kan daaroor getuienis gelewer word. Die voorbeeld wat hy aanhaal is in ons submissie baie soortgelyk aan CRASNER se saak waar daar eintlik 'n faktor van buite is, naamlik 'n handeling om 'n persoon wat - om 'n persoon in te roep in die Regter se kamers met 'n sekere opset dat daar 'n gesprek met hom gevoer gaan word en dan die gesprek met hom daar in die kamers en daardie gesprek met daardie persoon wat ingeroep word is ook nie deel van beraadslagings of besprekings tussen die Regter(10) en die assesore in daardie geval nie. Dit is 'n bespreking met 'n buite persoon. Net soos in CRASNER se geval die buite persoon 'n bespreking gevoer het met die jurielede en die jurielede na aanleiding daarvan weer sekere reaksies getoon het teenoor hom. Getuienis daarvan was toelaatbaar beskou in die Appèlhof. Eweneens in die geval wat My Geleerde Vriend postuleer sou daar in ons submissie getuienis toelaatbaar wees dat die persoon in die kamers ingeroep is en dat daar 'n bespreking in opdrag aan hom gegee is - dat 'n bespreking daar plaasgevind het. Dit is geheel dus onderskeibaar(20) van die onderhawige geval.

Dit handel dan my betoog ten opsigte van B af, beswaar B. Dan beswaar C op bladsy 6 van ons hoofde, paragraaf 5.

Ekskuus as ek net mag teruggaan na CRASNER se saak. Ek het per abuis vergeet om een aspek te noem. My Geleerde Vriend wil 'n ander beperking stel op die toepaslikheid van die beginsel wat geld ten opsigte van jurielede wat nie die besprekings kan bekend maak nie. Die beperking wat hy daar stel is, hy sê die beperking of die ontoelaatbaarheid van getuienis oor besprekings is daarop gebaseer dat waar(30)

hulle/...

hulle 'n uitspraak bereik het, daar nie getuienis gelewer kan word om daardie uitspraak aan te veg nie. Maar met eerbied, dit is nie die beginsel nie. Dit is wel waar dat in baie van die sake wat gaan oor toelating van getuienis van jurielede daar gepoog word om die uitspraak aan te val op grond daarvan dat daar nou teenoorgestelde bewerings gemaak word deur die jurielid, maar dit is nie die beginsel nie. Dit is die omstandighede waaronder daar gevalle voor die Hof kom. Die beginsel wat daar ter sprake is waarom daardie getuienis van die jurielede ontoelaatbaar is, is die breër beginsels wat ek vantevore genoem het en wat baie duidelik uit LORD PARKER se uitspraak uit blyk.

Dan in paragraaf 5 op bladsy 6 in die onderhawige geval sou dit in ons submissie nie in die openbare belang wees dat beëdigde verklarings toegelaat word wat U Edele se verklaring van 30 Maart weerspreek nie. Die redes waarom dit nie in die openbare belang is nie, hang saam met die redes wat ons vantevore betoog het. Prof. Joubert is in kort vanweë oorwegings van openbare belang nie 'n bevoegde getuie om te getuig oor die beraadslagings en besprekings tussen die lede van die hof oor die saak wat u verhoor nie. Dit is in belang van die regspleging dat daar 'n vrye bespreking van alle tersaaklike aspekte van die saak tussen regter en assessore wat moet kan plaasvind. As 'n assessor geregtig sou wees om sodanige besprekings bekend te maak, sou dit vanselfsprekend sodanige vrye bespreking belemmer en sou dit die regspleging self belemmer. Afgesien daarvan is die skade vir die regspleging en die hoë aansien wat die regbank geniet in die algemeen onberekenbaar indien 'n assessor as 't ware in geding sou kon tree met die

voorsittende/...

voorsittende Regter oor wat in kamers tussen hulle bespreek is.

In ons submissie blyk dit duidelik dat die situasie wat hier ontstaan het deur die applikante self geskep is. Die applikante se prokureurs het in die eerste instansie 'n beëdigde verklaring van prof. Joubert aangevra en hulle het gespesifiseer wat hulle wou hê hy in die verklaring moet behandel. Ons verwys na die brief op bladsy 193 van die stukke, waar daar gesê word deur die applikante se prokureurs:

"We seek information in regard to the following matters". (10)

En dan word sewe punte uiteengesit.

"1. Professor Joubert's own background, experience and standing in the legal profession;

2. The events which gave rise to the ruling by the Judge;

3. Whether or not Professor Joubert considered that it was necessary for him to recuse himself;

4. Was Professor Joubert informed by the Judge of the ruling that he intended to make and if so when and in what circumstances and how long before the ruling was it in fact made. If he was informed what was the response and in particular did he indicate to the Judge whether or he agreed with the proposed ruling; (20)

5. Did Professor Joubert consider the circumstances under which he had signed the one million signature form. such as to disable him from returning a true verdict in the case? What was his purpose in signing the form and in particular did he intend thereby anything more than the expression of his then wellknown ? public stand against apartheid, the proposed new constitution (30)

and/...

and the Koornhof Laws? Did he intend by signing the petition to indicate his support for the UDF as an organisation? Did he have any association whatsoever with the UDF? Did the Judge know his political views when he invited him to become an assessor?

6. Did he consider the fact that he had signed the one million signature form affected in any way his ability to give an independent judgment on the facts of the case or have impeded him in any way giving effect to any direction in regard to the law that the Judge might have given to the assessors? (10)

7. Did Professor Joubert seek to place on record his attitude to the Judge's ruling? Our clients impression is that he attempted to do so, but before he could speak, the Judge adjourned the court. If that is so, what will Professor Joubert have said if he had given an opportunity to speak?"

Toe die applikante se regsverteenwoordigers prof. Joubert se eerste verklaring kry, moes hulle gesien het, in ons submissie, dat prof. Joubert handel met beraadslagings en (20) besprekings tussen hom en U Edele en behoort hulle nie daardie beëdigde verklaring van prof. Joubert, die eerste verklaring by hulle aansoek aan te geheg het nie. Ons submissie is ook dat hierdie brief wat ek na verwys het van so 'n aard is dat die applikante se prokureurs moes voorsien het dat prof. Joubert as gevolg van die vrae wat gestel word noodwendiger wys moet beweeg op die terrein van besprekings en beraadslagings tussen lede van die hof in verband met die saak.

Die Prokureur-generaal het op 27 Maart 1987 'n (30)

aansoek/...

aansoek om deurhaling aan die applikante se prokureurs laat aflewer na aanleiding van prof. Joubert se eerste verklaring waarin beswaar gemaak is teen die toelaatbaarheid van die passasies wat gemeld is in daardie aansoek op grond daarvan dat dit irrelevant is. Welwetende daarvan en ten spyte daarvan het die applikante se regsverteenwoordigers voortgegegaan op 30 Maart 1987 om 'n tweede verklaring van prof. Joubert saam met hulle repliserende verklaring af te lewer. Weer eens het daardie verklaring, in ons submissie, ontoelaatbare passasies bevat, want in daardie passasies handel prof. Joubert weer met besprekings en beraadslagings tussen hom en ander lede van die Hof in verband met die saak.

Op dieselfde dag wat daardie repliserende verklaring ontvang is, het die Staat 'n tweede aansoek om deurhaling geloods teen paragraaf 6 van daardie verklaring op grond daarvan dat dit irrelevant is. Op dieselfde dag is die applikante se regsverteenwoordigers voorsien van die Staat se hoofde van betoog waarin in paragraaf 16 die beswaar teen die toelaatbaarheid op grond daarvan dat dit beraadslagings tussen lede van die Hof bevat en dat dit in die openbare belang is dat die getuienis nie toegelaat word nie, uiteengesit word. Hoewel daardie hoofde nie so volledig is as die hoofde wat ons vanoggend aan u voorgelê het nie, was dit baie duidelik aan die verdediging of moes dit baie duidelik aan die verdediging bekend gewees het op grond waarvan die beswaar gefundeer is.

Ten spyte daarvan het die applikante se regsverteenwoordigers voortgegaan om op Woensdag, 1 April te poog om die derde beëdigde verklaring van prof. Joubert aan u

voor/...

voor te lê waarin, soos ons aan die hand gegee het, daar weer gehandel word met beraadslagings en besprekings tussen hom en ander lede van die Hof.

In ons submissie moes die applikante se regsverteenwoordigers nie die ontoelaatbare getuienis vervat in die gemelde verklarings onder die beskuldigdes se aandag gebring het nie en het hulle in ons submissie ernstig fouteer deur dit te doen.

Die beskuldigdes en hulle regsverteenwoordigers kan in ons submissie dus nie nou gehoor word om te sê dat daar 'n situasie ontstaan het wat die Agbare Hof noop om die saak nietig te verklaar nie, want hulle het self die situasie geskep en in dié verband is die eerste passasie uit Gardiner en Lansdown in die bundel wat ons vroeër na verwys het van belang.

HOF VERDAAG. HOF HERVAT.

MNR. DE VILLIERS : Net voor die verdaging het ek verwys na Gardiner en Lansdown soos hy afgedruk is in die bundel op bladsy 448 van die betrokke volume onder die opskrif "Inadmissible Evidence be given inadvertently or by design." Dan ongeveer tien reëls van bo :

> "But if an accused or his legal representative should inadvertently or by design with the purpose of taking advantage of a situation on review or appeal reveal an admissible fact, for instance that the accused has a bad character or failed to take objection to an obvious irregularity, for instance the presentation by the prosecution of clearly hearsay evidence, the Court of review or appeal would not, it is submitted, find itself in a position to grant relief, save where

the/...

the illegality has influenced the trial court and was due to no gravely reprehensible conduct on the part of the defence. The Court of appeal will not likely infer that counsel has been careless in not objecting to the acceptance of inadmissible evidence. Still less will it readily infer that counsel has deliberately failed to object in order to be able to raise the point on appeal."

Dan die laaste paragraaf van die hoofde, ook wanneer u die openbare belang in oorweging neem, tesame met die (10) belange van die partye tot die geding, want u sal sien uit die uitspraak van ALEXANDER daar word daar gesê dat 'n mens na daardie belange kyk, is dit in ons submissie tersaaklik dat die Agbare Hof die bogemelde optrede van beskuldigdes se regsverteenwoordigers ook in gedagte sal neem.

So, ons vra dat u daardie beëdigde verklaring so sal uitsluit as ontoelaatbare getuienis.

MR CHASKALSON : My Lord, I assume Your Lordship would like me to deal first with the evidence point, because I have to reply both to the evidence ... (Court intervenes) (20)

COURT : I interrupted you in the middle or at the start of your application to deal with the admissibility point. I do not think you will be able to reply properly unless you know whether the document is admissible or not.

MR CHASKALSON : I think so, yes.

COURT : So, I think you should first deal with the admissibility point.

MR CHASKALSON : The starting point of My Learned Friend's argument, as I understand it, is the provisions of Section 202 of the Criminal Procedure Act, which declares that the (30)

privilege/...

privilege in regard to matters, evidence shall depend upon the law as it was at 30 May 1961.

The law as at that date was stated in CRASNER's case and SILBER's case and I accept of course neither case dealt with an issue such as that, which is exactly the same as that which has arisen in the present case and if there should have been no statement at all in relation to this issue at any time prior to 1961, Your Lordship would have to decide now what the law would have been in 1961 had that issue arisen then. (10)

I accept also the proposition put forward by My Learned Friend that it is undesirable that a judge should be called as a witness and indeed the judges are not compellable as witnesses, though from the passages referred to by My Learned Friend they are apparently competent to become witnesses. There is no suggestion that members of the Court should, as it were, subject themselves to cross-examination and be treated as witnesses. It is precisely the opposite. It is that if there is evidence relevant to a point in issue in relation to which there are differences between (20) members of the Court, then if that conflict should be fundamental to the issue, it becomes impossible for the Court to decide it, precisely because there is no procedure for taking such a decision. So, the question which then arises is first of all whether the areas of apparent conflict are first of all admissible in evidence and secondly, whether they have a material bearing on the issue which Your Lordship is asked to decide. If they should prove to be a material conflict without the resolution of which the matter could not be decided, then our submission would (30)

be/...

be that the correct course to take would be to quash the proceedings in that eventuality.

So, let me then turn to the basis upon which Professor Joubert's evidence is challenged and the argument of My Learned Friend is based upon a series of cases and upon of what he contends public policy is and every one of the cases I apprehend on which he relies, are cases in which it has been said that evidence of discussions between members of a court is inadmissible to contradict a verdict to which that member of the court has been party. (10) They have all been jury cases and of course in the case of an assessor, the assessor is in a somewhat different position, because even at the time of verdict, unlike the jurymen, the assessor can give a descenting judgment and the assessor could place on record in his descenting judgment facts with which he disagreed and observations with which he disagreed and that would be competent as part of the verdict and at the time of that, so the analogy between the assessor and juror is not entirely apposite, but leaving that aside for the moment and taking the position of a (20) juror who seeks or whose evidence is required, there is in our submission no principle and none to which My Learned Friend could point, which would exclude the reception of such evidence in relation to a matter in which the events being described did not form part of the juror's deliberations qua juror for the purposes of reaching a verdict which that juror appears to be party to. In other words, cases all deal with jurors who are in the jurybox and say I am tired or undue pressure was exerted upon me, but ultimately when they came into court and the foreman (30)

announces/...

announces that this is a verdict and that is a verdict of all of us, it is their verdict which has been announced, if is their verdict which is allowed to be announced in open court and the element of public policy to which My Learned Friend refers and the element of public policy which is directly linked in any one of the cases, is that it is against public policy thereafter to allow that verdict to be challenged and the reason being that there must be finality in verdicts and if the juror appears to be party to a decision and in open court it is stated that he is (10) party to a decision, he cannot subsequently challenge that decision. That is why there is a reference in CRASNER's case to the differences of approach whether it is properly treated as part of the parall evidence rule or whether it is properly treated as an aspect of public policy or whether indeed public policy does not underline the parall evidence rule and that the two come together in this manifestation.

If I may pause for a moment to look at some of the authorities. I do not intend to refer to more than a few to which My Learned Friend referred, but My Learned Friend(20) referred to Halsbury and he cites at paragraph 236 the last sentence on that page :

"The evidence of juror's as to what occurred during the trial or in the juryroom is not admissible."

But the footnote, there is again a reference to ELLIS AND DE GEERE. ELLIS AND DE GEERE make it quite clear that those statements are made in the context of seeking to contradict a verdict and indeed ELLIS AND DE GEERE is referred to by the Appellate Division in CRASNER's case and in the judgment of CENTLIVRES, J., I think it was (30)

before/...

before he was chief justice, the passage of LORD ATKIN stating the basis of the rule, is specifically adopted or specifically referred to should I say. It is referred to at page 482 and the reasons are given. The reason why that evidence is not admitted is twofold. On the one hand it is in order to secure the finality of decisions arrived at by the jury and on the other hand to protect the jurymen themselves and prevent their being exposed to pressure to explain the reasons which actuated them in arriving at their verdict and it all goes to the finality of verdicts and (10) the undesirability of any attempt to have a verdict once given by a jury subsequently changed by reference to what took place in the juryroom.

The case of THOMPSON to which My Learned Friend referred is perhaps a good illustration of both the reason for the rule and the limits of the rule. THOMPSON's case was a case of an attempt to set aside a verdict after it had been given. It appeared that after a verdict had been given information was obtained that juror's had been influenced by a list of the appellant's previous convictions which (20) had been made available to them and as a result of seeing that list, they decided to convict. There was in the course of the case again to the passage in ELLIS AND DE GEERE, LORD ATKIN's passage and it is once again stressed once the verdict is given nothing that took place in the juryroom should be referred to, but if one took a somewhat different example. Take the facts of THOMPSON's case and assuming that verdict is not given, jurymen come back into the witness-box and before any verdict is given or announced, a juror stands up and says "I have to inform Your Lordship that (30)

during/...

during our discussions a list of the previous convictions of the accused person was disclosed to us and that has influenced some of us and I think it wrong" could there be any doubt that that would be admissible and could there be any doubt that the judge would immediately say that the trial is not fair, that the jury must be discharged and that the case must start again and that seems clear, not only from general principles, because there would be no reason whatever for that evidence to be excluded. It is not evidence contradicting a verdict of the jury. It is relevant that (10) the trial judge would know of that and it would accord with a passage from Hume which is cited with apparent approval in CRASNER's case that jurors can speak but may not speak after verdict. Perhaps I should give Your Lordship the page number in CRASNER's case at which the passage from Hume appears. It is at page 483.

Again the case of RHODES to which My Learned Friend referred and the reason for the rule, the reason for the public policy is that it would be, stated at page 87 of that judgment in RHODES, it was an observation of LORD HARMON: (20)

> "It will be destructive of all trials by a jury if we were to accede to this application. There would be no end to it. One would always find one jury who said 'That was not what I meant' and one would have to start the whole thing anew."

That is why the rule is that jurors may say what is relevant provided they say it before verdict, but that they may not say it after verdict.

That sort of rule, there will be very little occasion if I may suggest, in the case of assessors, the sort of (30)

fears/...

fears which are expressed by My Learned Friend, would I suggest if one looks at the reality of the situation, are not the type of fears which one has with jurors who might after the event be sought to give reasons for their judgment which confound an application for saying that the judgment was wrong. Assessors after all are elected personae. They are summoned by the judge. They are not taking at random of a list. They are trained in the law and not lay people. So, the position is really very different and the facts of this case are very different because the purpose for which the evidence is being tendered is to - it is being tendered for two purposes. At the moment we are concerned with the first application which relates to the order made or the ruling of Your Lordship on 10 March.

COURT : And it is only confined to the first application?

MR CHASKALSON : No, it is not. The moment we dealt ...

(Court intervenes)

COURT : How are you going to dissect it?

MR CHASKALSON : I realise that and I have to tell Your Lordship of the basis of the other - of the evidence which will be tendered what the other purpose would be. It would be that it is relevant to the question that the accused, having been informed of what is said in the affidavits, have a basis for the belief which is the foundation of their second application and I think Your Lordship would accept that, because Your Lordship's interpretation of the affidavits, as I understood what Your Lordship had to say, does not suggest that the interpretation which the accused have put on the affidavits, is an unreasonable interpretation. And it would be tendered not as proof of the facts contained

therein/...

therein but as reason for the belief and I think that is in fact what happens in all recusal applications, judges have not often but it is wellknown that judges had been asked to recuse themselves and the only basis of recusal is that there is a reasonable belief that there may not be a fair trial and that that runs counter to the presumption that there will always be a fair trial. So, when a judge recuses himself, he does not say "I cannot try you fairly" not does he say that"indeed I would be bias". On the contrary he says "I am not bias and you have no reason to fear, but in the particular circumstances of this case I cannot say that your fear is an unreasonable fear and therefore in the interests of justice, unless anyone should be thought that a trial which would be fair, is in fact not going to be fair, I recuse myself." That I think comes through all the recusal applications. So, that would be the purpose for which that evidence would be tendered.

If I could come back to the evidence relevant to the first prayer relating to the alleged irregularity. The point here is that Professor Joubert was not party to that ruling. The evidence is not tendered to contradict a ruling by Professor Joubert. On the contrary, the evidence is tendered to make clear that he was not party to that ruling and that he does not believe that the factual circumstances were such that that ruling ought properly to have been made against him. That evidence, in our submission is not touched by the rule in ELLIS AND DE GEERE. Not only is it not evidence tendered to contradict a verdict, because this is not a verdict, it is an interlocutory ruling, but it is not tendered to contradict anything to which

Professor Joubert was party. If he had recused himself, if he had come into court and said "I recuse myself" and had gone out, that would have been the end. He could not afterwards have said "I recuse myself in circumstances where I should not have recused myself" because it would have been his decision, but he did not recuse himself and that was part of the evidence as to show that he did not recuse himself and that it was therefore competent to challenge the ruling made by Your Lordship and all the circumstances relevant to it, then become relevant for that purpose. (10)

So, there really are two bases for dealing with My Learned Friend's argument. The first is - let me put it differently. When I argued to Your Lordship yesterday, I gave the example of the calling in of a potential witness. My Learned Friend accepts that that evidence would be admissible, notwithstanding the fact that it took place between judge and assessors. He said that would be admissible, but the reason is because it involves an outsider and he argues that it is distinguishable on that basis and I suggest to Your Lordship that there are two answers to (20) that.

First, in relation to Section 147 inquiry, Professor Joubert was in the position of an outsider. His evidence in relation to what took place, because there the Court, if I may call it that for the moment because it is not clear to me whether Your Lordship takes that decision as My Learned Friend has argued, he seems to suggest it is of a nature of some form of quasi administrative discretion vested in Your Lordship and I do not want to get involved in that, but assuming Your Lordship takes that decision (30)

as/...

as a court, the court consists of one person, Your Lordship and the outsider is Professor Joubert. He is not a member of that court. So, his evidence will therefore be admissible for that purpose.

Also it cannot be a rule, an absolute rule that discussions between members of a court are excluded simply because it happens to be between members of the court during the course of a case and it bears on the case. Your Lordship gave me an example, I think it was on Monday of the case of the bribe and assuming there was no outsider present, (10) assuming those were just discussions between judge and assessor, if one takes examples like that, it is clear that evidence relating to such discussions would be admissible and should be admissible and should be brought out before verdict and if indeed they are brought out before verdict, and if there then becomes a conflict, the consequence of the conflict is that the trial cannot proceed, not because the evidence may be true or untrue, but because there is no way of resolving that conflict which is material to the trial and the proper holding of the trial by that parti- (20) forum because it is a conflict within the forum and if that were to happen, the judge would have to discharge the court.

So, it is out submission to Your Lordship that none of the cases relied on by My Learned Friend established the proposition which he argues for here.

Your Lordship will remember a reference to Gardiner and Lansdown's sixth edition I think it was. My Learned Friend read a passage at page 522 referring to the case of WOLPERDT and CRASNER about judges and magistrates not (30)

being/...

being compelled to testify in matters not of an open or public nature, but it goes on to say they may, however, be called upon to testify to any foreign or collateral matters occurring before them and which subsequently become relevant to the issue in a criminal trial.

So, the evidence of foreign or collateral matters would be admissible and I suggest that the evidence here tendered falls into that category.

My Learned Friend has referred to the correspondence passing between attorneys for the accused and attorneys (10) for Professor Joubert. Perhaps I might draw Your Lordship's attention more fully to that correspondence. You will find it at page 193. The third paragraph says :

"It is important for the purposes of the application which our clients intend to bring to have accurate information concerning the circumstances relevant to the judge's ruling. We do not consider it appropriate for us to approach Professor Joubert ourselves and we are therefore writing to you to enquire whether you will ascertain from your client whether he would (20) be willing to provide us with information."

COURT : Are you telling me that this is the first, the absolute first indication between these two gentlemen of these two firms of attorneys on this issue?

MR CHASKALSON : Yes.

COURT : Only in writing? Nothing on the telephone? It would be extremely strange.

MR CHASKALSON : Than I will have to find out whether somebody may have been phoned up. It was known that Professor Joubert had gone to an attorney. That was in the newspaper. (30)

COURT/...

COURT : Go ahead.

MR CHASKALSON : I will find out for Your Lordship if there had been any communication between the attorneys on the telephone before this letter was written. Then I would let Your Lordship know.

COURT : The normal position would be, he would phone him and set out his case and the chap would say to him "Well, write me a letter."

MR CHASKALSON : It may have been. I do not know. I do not know what took place between them and how it was established(10) and I will establish that for Your Lordship.

COURT : It is not necessary.

MR CHASKALSON : But the letter asks :

> "Whether you will ascertain from your client whether he will be willing to provide us with information and if so requested, would verify such information on affidavit."

The reply is at page 195:

> "We thank you for your letter. It is correct that we are acting for Professor Joubert in relation to his (20) position as assessor in the abovementioned case. Your client's intentions have been noted and we have considered your client's request for information with our client. We can inform you that he intends at the earliest opportunity to complete a report concerning his position in the case. The report will contain only such information as he considers to be essential in the interests of the proper administration of justice and that report will be made available to all interested parties. Our client does not think it (30)

would/...

would appropriate to furnish information to any one interested party. He also believes that it would not be proper for him to assist any one party or to be seen or to appear to do so. We will in due course let you have a copy of the contemplated report."

That report became available and is referred to in the evidence that was first mentioned, the report was first mentioned in court by Mr Jacobs. It is at page 10 150 of the record. There was some discussion about the "regspunte". It is volume 195:

"Op die oomblik het mnr. Bizos ons 'n baie kort skets gegee van nege regspunte wat ter sprake gaan kom in hierdie aansoek. Dit is afgesien van die verklaring wat oorhandig is van prof. Joubert."

Your Lordship will remember that that morning - well, I am not sure when, but it had come to the attention of both Your Lordship and Mr Jacobs that a report had been received from Professor Joubert and copies were asked of those reports. Those copies were made available and I understand that they were available before the Court adjourned that day and I think Your Lordship will see on the record at page 10 153, Your Lordship says - it is a question of the date for the postponement:

"As far as the document is concerned which you have mentioned I have perused it, because you have given me a copy and I would like to inform counsel that I and my assessor do not agree that it is factually correct in all material respects. I would not take it any further. I have not considered the position as to whether I should do something about it and

what/...

what I should do about it, but do not take it for granted that was is stated therein is factually correct."

Now that was before any - no affidavits had yet been deposed to.

My Learned Friend has suggested, had gone further and suggested, he stated that the legal representatives ought not to have made the report available to the accused. I have never understood that a legal representative has the right to conceal from the client information which may be relevant to a case, no matter how unpleasant the consequences of (10) such information may be for the legal representatives concern and indeed that suggestion that no one should have seen these reports and that everybody should have known that it was against public policy and the implied suggestion in My Learned Friend's argument that there may have been a deliberate attempt to make available evidence known to be inadmissible, is made without any any foundation and is totally contradictory to every bit of evidence that there is in this case. When the report was read by Your Lordship, it was not suggested by Your Lordship at that time that that document (20) may be contrary to public policy. Your Lordship did not raise that with Mr Bizos or Your Lordship did not say anything in court the day that Professor Joubert's report was first referred to and first seen by Your Lordship. Your Lordship did not call in Mr Bizos and asked him to consider that question and indeed when the State applied for that evidence to be struck out, they did so on the basis that it was irrelevant, not on the basis that it was contrary to public policy. Their notices of exception alleged that it was irrelevant, inadmissible on the grounds that it was (30)

irrelevant and when Your Lordship came into Court on Monday Your Lordship did not suggest at that stage that the evidence should be struck from the record as being contrary to public policy. What Your Lordship did when you came in was to make a statement before any objection had been heard. My Learned Friend had not argued his point which he might have argued and in limine had he chosen to do so. Your Lordship came in and made a statement and said what your response was to that report and by so doing actually incorporated that report as part of the record, because it deals with it and even then(10) My Learned Friend did not stand up and ask before this case goes ahead and before anything be done that he would like to be heard on the issue of the relevance of the evidence or on public policy and it seems that it took My Learned Friend by surprise yesterday or some of the issues took My Learned Friend by surprise yesterday because he asked for an adjournment. Though it is clear that he referred to CRASNER's case in his argument and suggested it should be excluded from that. Whatever it was, something which Your Lordship raised yesterday, seemed to take My Learned Friend(20) by surprise sufficiently. Though he had formulated the notice of objection and had raised matters in his heads of argument, he needed more time. It seems to me that in those circumstances the evidence, even if it were inadmissible initially and we do not accept that for the reasons which we had advanced to Your Lordship but that evidence, if it were inadmissible, in our submission, has become admissible because of Your Lordship's report which is read into the record and incorporate such evidence by reference.

I think I should inform Your Lordship that the third(30)

report/...

report, the one which was received yesterday, was not a report requested by the defence. It is a report which is prepared by Professor Joubert on his own initiative and which was made available yesterday morning. Professor Joubert, to my knowledge has been represented by an attorney or has had an attorney in court since Monday and the attorney would have heard Your Lordship's statement and would no doubt have taken the matter up with Professor Joubert since then.

So, the suggestion that the legal representatives (10) of the accused persons have in some way deliberately been guilty of bad faith in seeking to obtain evidence which they know to be inadmissible and seeking to use that evidence for an improper purpose, is in my submission totally without a foundation.

There is a good and proper argument put up for the admissibility of that evidence. It is to be inadmissible it is for Your Lordship to rule so. If Your Lordship had wanted the argument in limine and had wanted to strike it from the record before it became part of the public (20) record, it could have been done and if My Learned Friend had wanted that done, it could have been done, but to say that where there is a good and proper argument to be put up or evidence that the legal representatives of an accused person should refrain from doing so because there may be an objection to the evidence on the grounds of public policy, an objection which was taken for the first time by Your Lordship or mentioned for the first time by Your Lordship, perhaps it was mentioned in My Learned Friend's heads of argument which were made available to us after (30)

we have completed our first argument. I think it was mentioned there in CRASMA's case. Not in any of his notices, but it was mentioned after we had completed our argument. That was the first indication that we had that there would be an objection on these grounds.

COURT : And you had never thought before that it might possibly be against public policy?

MR CHASKALSON : I had taken advice myself in relation to what could and could not properly be done. I had thought to advise myself and I had thought to advise myself through consultation with colleagues and I had read CRASMA's case and I had formed the view that there was a good and proper reason for arguing the case to Your Lordship. I must say Your Lordship's statement took me by surprise on Monday morning. I had not anticipated that a statement was to be made. I had thought after seeing the notices, that My Learned Friend would argue in limine for the exclusion of the evidence and after Your Lordship's statement I assumed that that argument would not be taken, because it seemed to me that Your Lordship having made a statement with regard to what had happened and having incorporated into the evidence that that would be the end of the matter or into the record. I specifically mentioned to My Learned Friend when we were handed that third report from Professor Joubert what our intentions were. I mentioned it when he had finished his argument and asked him to consider what his position was and whether he wanted to deal with it.

I think I have covered all the points in My Learned Friend's argument on the admissibility that I have wanted to. I have nothing further to add on the law point.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DELMAS

1987-04-02

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHER

RULING ON ADMISSIBILITY OF THIRD REPORT OF DR JOUBERT

VAN DIJKHORST, J.: I make the following ruling:

The third report of Dr W.A. Joubert is inadmissible and so are all direct or indirect references to it.

I do not rule on the previous two reports of Dr Joubert as I have not yet heard argument thereon.

Reasons will be given later.

MR CHASKALSON : I do not know whether Your Lordship is inviting argument on the ... (Court intervenes)

COURT : Well, you have a right to start your application.

MR CHASKALSON : My Lord, the basis of My Learned Friend's argument was that what happened on 10 March was not that Your Lordship ordered the recusal of Professor Joubert but that Your Lordship formed the opinion that he was unable to act as an assessor.

May I refer Your Lordship to what was said by Your Lordship that morning as it appears on the record, at page 56 of the record. After setting out the background Your Lordship says this :

> "I have regretfully come to the conclusion that there is no option but to rule that Dr W.A. Joubert has to recuse himself. I hold that Dr Joubert has become unable to act as an assessor and in terms of Section 147 of the Criminal Procedure Act, I direct that the trial proceed before the remaining members of the court."

As I understand that ruling, what Your Lordship said was that Dr Joubert had to recuse himself and that he was then treated as if he had recused himself and that in consequence had become unable to act in terms of Section 147 of the Act.

There is of course a very substantial difference between the situation where an assessor has recused himself and having done so, says "Having recused myself, I am unable to continue to act as a member of the court. That was not be a strained use of the word "unable", if that were to have happened. If he said "I have recused myself and having recused myself, I am unable to act." That would not be a

strained/...

strained use of the word "unable". Whether such a situation would fall within the frame work of Section 147 having regard to the legislate of history, the statutory context and the common law is not a matter that needs be considered in the present case, because that did not happen. If it had happened, one would have to argue whether Section 147 dealt with the case of recusal or whether it dealt only with the case of physical or mental incapacity, but that does not arise in the present case, because it now seems clear that Prof. Joubert did not recuse himself. And it also seems (10) clear from what Your Lordship said that Your Lordship acted as you did because you considered that there were grounds on which Professor Joubert ought to have recused himself. He disagreed and the question which then arose was what were Your Lordship's powers in such a situation?

We have submitted to Your Lordship that according to common law Your Lordship had no power to initiate recusal proceedings yourself. That has not been disputed. My Learned Friend seemed to accept that in his argument and I suggest that there would be good reasons for that as (20) well, because the party with an interest in deciding whether or not there is a reasonable apprehension of bias is a party who wishes to object to it and that if the party does object there is a recognised procedure to be followed, but that did not happen in the present case and what we have submitted to Your Lordship is that Section 147 does not confer on the presiding officer, presiding Judge power to recuse an assessor, simply because the presiding Judge has formed an opinion that the assessor ought to recuse himself. If the assessor declines to recuse himself, he is able to act. (30)

The question then is, should he had and that in our submission to Your Lordship is dealt with by the common law and that there was no need for a statute to deal with that sort of situation. At the most it could have been said that a statute might have been necessary to deal with what happens once recusal has taken place. In other words, if an assessor does recuse himself, should he be treated in the same way as an assessor who has died or is it a different situation? One could understand the argument that if an assessor has recused himself that it may be that he should be treated (10) in the same way as an assessor who dies, though in GUBUDELA's case there is a suggestion that that is not the case and that the correct remedy when that happens would be for the court to discharge itself.

As I have said, that is not necessary for Your Lordship to decide, because it is not what happened in the present case.

My Learned Friend referred at page 9 of his argument to Joubert's Law of South Africa, volume 5 and the reference is to page 428. My Learned Friend says that the chapter(20) is written by PREISS, J. In fact it seems to be written by HIEMSTRA, J.

COURT : Does that make it any stronger?

MR CHASKALSON : No, it is just that he cited two references.

COURT : Oh, you mean because it is the same author in that one and in the other one?

MR CHASKALSON : Yes. It is not two people who say so. It is the same person who is repeating a view which he has addressed elsewhere and what he says is - the passage cited there is the suggestion that the Judge may hold the assessor(30)

unable/...

unable to act and secure his recusal rather than have a verdict set aside on the ground of irregularity, but it does not deal with where the Judge is unable to secure the recusal and it is interesting that Hiemstra who writes this in his third edition suggested that the Judge might have the power under Section 147 to act to discharge the assessor and in his fourth edition deletes that. There was a passage - he puts it somewhat tentatively in his third edition. He says - it is at page 306 of the third edition :

"Dit is verdedigbaar dat hier nie net liggaamlike onbekwaamheid bedoel word nie. As daar benadelende ontoelaatbare getuienis tot die kennis van 'n assessor kom of iets wat sy oordeel onregmatig kan beïnvloed, behoort hy hom te rekuseer, anders sal die uitspraak bloot staan aan tersydestelling. Daar word aan die hand gegee dat as 'n assessor hom in sulke omstandighede nie wil rekuseer nie, die Regter van hierdie artikel gebruik kan maak om hom onbekwaam te verklaar."

Now, in his fourth edition, the author deleted that sentence suggesting that the Judge could make use of Section - of the section to declare him unable.

The author cites no authority for what he says. He does not refer to GUBUDELA, he does not in the fourth edition investigate what would happen if the Judge takes steps to secure the recusal of the assessor and the assessor declines to recuse himself. Also there is a very big difference in our submission between the refusal of an assessor to recuse himself in circumstances in which there would be mistrial because of inadmissible evidence having come before the assessor and the circumstances in which

that/...

that could not happen. There was not the slightest risk in our submission to Your Lordship of a mistrial in the present case. The fact that Professor Joubert had signed the million signature declaration could never have led to an application for the setting aside of the verdict. It would not fall within the rule protecting the accused against any belief that the trial might not be a fair trial. The most that could have happened is that there may of may not have been an application for recusal which would have been dealt with in the ordinary way. (10)

If I could then move from there to the way My Learned Friend approaches the question as to whether or not the application as formulated could be brought before Your Lordship. He says Your Lordship is functus officio. That may be so if we had asked Your Lordship to reverse the ruling and re-appoint Professor Joubert. If we had come to Your Lordship and said "What you did in our submission is wrong, we would like to be heard and we would like you to reverse the ruling, which you had made." The question would then be whether the ruling was interlocutory or final. If it (20) were interlocutory it could in accordance with the ordinary rule have been changed. It if were final it could not. But that is not what has happened. Your Lordship is not functus officio in relation to the trial. Your Lordship is presiding over the trial and what we have done and indeed on the authorities it would be our duty to do this, is to take the first opportunity to bring to Your Lordship's attention a material - what we submit is a material irregularity which may vitiate the trial. I think it has been said more than once that if counsel feels that that has (30)

happened/...

happened, it is their duty to raise it promply and not to wait until the end of the trial so as that there might be, if the trial goes against them, a point on appeal.

What we are saying to Your Lordship is this, that Your Lordship made the order without hearing us and without having the advantage of the many days' argument which has been addresses to Your Lordship on the issue which I suggest must at the very least be a difficult question and that if Your Lordship after consideration of that argument and in reference to the authorities, comes to the conclusion (10) that a material irregularity has in fact been committed, then, far from being functus officio, Your Lordship, in the exercise of your powers to control the course of these proceedings ought properly, in our submission, to hold that it would be wrong to continue the proceedings, it will be wrong to continue with a process which, if Your Lordship would on reflection come to that conclusion, is or may well be a nullity and Your Lordship would then exercise the power which Courts always have to quash proceedings, so that the ultimate futility should not be gone through(20) unnecessarily.

Then I would like to turn to deal with the section in My Learned Friend's argument in which he deals with provisions in the Criminal Procedure Act which refer to matters which are left to the opinion of the Attorney-general or to the discretion of the presiding Judge. He talks - he drew attention first to the fact that the Judge summonses the assessors and he says, quite rightly, that an accused person has no right to be heard on that issue. And that is clearly so. It is not the right of an accused(30)

person/...

person to claim that. One could not suggest that the section should be construed in the way as to require the judge to call in the parties before selecting assessors, but it is a very different thing to say that once a court has been chosen, that it can be changed thereafter without the consentof the accused. That is a very different situation and which is simply in our submission not comparable with the analogy which My Learned Friend seeks to draw from the situation where a Judge elects to call assessors. (10)

K616 A large number of the provisions which My Learned Friend referred to in the Criminal Procedure Act deal with matters such as the form of the trial, the tribunal before which it shall be heard, the venue at which it should be heard and these are all decisions to be taken, either by the Attorney General or Judge within the parameter as defined by the statute. They are all matters which are objective and in a sense administrative in character and in relation to which an opinion can be formed without hearing the parties. (20)

If Section 147 is to be construed as My Learned Friend would have it as being comparable with these sections, then all the more reason we suggest to construe it as we have submitted it ought to have been construed. In other words, as construing it, as applying to matters such as death and physical disability which are readily understood to be matters upon which an ad hoc opinion can be formed without hearing any evidence or without hearing any legal argument. So, if My Learned Friend suggests that one has to construe Section 147 in the light of the other sections (30)

of/...

of that nature, our submission to Your Lordship is that that would be a very strong argument for construing it narrowly as we have suggested it ought to have been done and not for construing it broadly so as to contain within it a power to deal with a much more complex decision, such as recusal where parties interests are vitally affected and where one cannot simply, as it were administratively, form an ad hoc opinion. There are difficult questions of law and of fact which can arise in relation to recusal applications and these are traditionally matters which (10) our law has always left to the parties themselves. They have always been dealt with in a particular manner. The application is brought, argument is heard and it is dealt with by the person whose recusal is sought and if the wrong decision is taken an appeal is noted or can be noted and we submit to Your Lordship that very much clearer language would be required than can be found in Section 147 to hold that this whole common law procedure has now been substituted by vesting in the presiding Judge an ad hoc power to form an opinion without a full and (20) detailed investigation of the type which is ordinarily conducted in such matters.

My Learned Friend developed that argument and he said that in the type of section to which he had referred, the exercise of the opinion was one which was done in circumstances in which audi ulteram partem would not be applicable. He said the rule of audi ulteram partem in fact has no application to the type of situation where the Judge or the Attorney-general is vested with an opinion or a power to do something according to his opinion and he has referred (30)

to/...

to a number of sections including Section 61 which dealt with the question of bail, the refusal of bail by the Attorney-general. I submit that that might indeed - it is a very different case and it does not help us to consider that situation here, but indeed, it is a matter of very considerable dispute as to whether the audi ulteram partem principle does apply in that situation. There has been a decision on a statute slightly differently worded, one where the Attorney-general has given a discretion and I think the words are not in exactly the same form as the words of Section 61, but I do not think, I think it may have been a word not in the opinion of the Attorney-general. I cannot remember the exact formulation.

But at the moment there are four judges who say that there should be a hearing and two who say there should not.

COURT : Where is that?

MR CHASKALSON : If Your Lordship would look at the case of BUTHELEZI v THE ATTORNEY GENERAL 1986 (4) SA 377. It collects the judgment - an earlier judgment was arose in this case, the case of BALEKA in the Transvaal where Transvaal Bench decided by two to one that there ought not to be a hearing. Well, there was no need for a hearing.

COURT : Are you counting reasons or heads?

MR CHASKALSON : I think on this issue I am counting heads. There were two heads there who said that the audi ulteram did not apply. One head which said it did. The three judges in BUTHELEZI decided that it did apply, but I make nothing of it because for two reasons. First of all the statute of wording is different to the one cited by My Learned Friend. It does not say in the opinion of the

Attorney-general. I think it says "The Attorney-general may", I cannot remember the exact wording. Your Lordship will find that there is a different wording.

Secondly, I do not think it really helps us to decide the question in this case by looking at what might be the position in other provisions of the statute, because in each instance one has to ask the question did the legislature - is the presumption of audi ulteram partem excluded by the legislature and that will depend - in deciding that one has to look at each section on its own, the purpose of the Section, the way people are affected by exercise of the Section and why there might or might not be need for the exclusion of audi ulteram partem. Usually the exclusion is justified on the grounds of urgency or on the grounds of a party does not have an interest. It is either something which has to be done very quickly or that the party does not have a right which requires to be protected and it can be left to some form of usually administrative discretion.

There may be, but I am not sure that I am able to think of any situation in which a judicial discretion by a Judge is exercised or is ever exercised without the application of audi ulteram partem, but there may possibly be. I have not thought of it.

Even in the case of a postponement which dealt with in Section 168 of the Act the Courts have always heard argument as to whether and how that discretion should be exercised. On the question as to whether a trial should or should not take place in open court under Section 153 the Courts have always heard argument and the reason, if one is looking

for a reason, is because rights are affected and if one looks at the wording of Section 274(1) dealing with sentence. It provides that a court may before passing sentence receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. Of course, that was expressed in a discretion. The Court could always give opportunities to the parties to follow that section.

So, the submission which we make to Your Lordship is that it does not really help you to look through the Criminal Procedure Act and look at sections in which there may not(10) be audi ulteram partem and that the only way in which Your Lordship can solve the problem is by looking at this particular section in its context and asking whether rights are affected and if it does - we submitted in our argument to Your Lordship that affected two rights. It affects the assessor who has a reputation and it affects the accused who have the right to a verdict from the Court and that both are entitled to a full and proper hearing before any action is taken.

I think there is another factor which Your Lordship (20) will bear in mind too. I may have to give Your Lordship the reference later and I may have it elsewhere in my argument, but I will find it for Your Lordship. The case is S v CHAANE. In accordance with the decision in that case, it seems that this was a case in which there was an obligation on Your Lordship to sit with two assessors. That too is a factor which in our submission should have a bearing on the rights of the parties. If the accused person prima facie has the right not only the ordinary common law right, to a verdict from the Court but a statically right to be tried by a (30)

judge/...

judge and two assessors, the accused ought not to be deprived of that statutory right without being heard thereon. Nor should they be required to submit to the continuation of a trial conducted in contrary - or put it this way, contrary to that statutory right without being heard thereon.

In My Learned Friend's argument he dealt with the, what he described as the bribe situation and he suggested that on the - if somebody were bribed or a bribe was offered before the trial had commenced, that it will be possible, he says if the day before everything begins or the assessors are (10) sworn in, the bribe is discovered, then it will be competent for the judge to withdraw the invitation to the assessor and look elsewhere, but he says it cannot be that if that were to happen a day after, that the judge would be without remedy, but that in fact begs a question. The question as to whether a bribe has or has not been offered. The question as to what the circumstances are during the course of the trial may be quite complicated and the whole argument which has been put to Your Lordship is that that above all others would be the sort of case on which Your Lordship would not(20) form an opinion on the vital issue. Not form an opinion that the person who is suspected of taking a bribe is unable to act, because it is only if he has in fact taken the bribe, that he is unable to act. One may have to conduct an investigation into that issue and that one of two things can happen. Either the relevant information can be put before the parties and they can act as they think fit or the Court decides that the matter is too troubled for that sort of investigation, it can discharge the Court.

That is not an every day situation. It is an extraordinary (30)

situation which My Learned Friend has postulated. What he is saying is that the statute does not really provide for such an extraordinary situation and the answer is, well, there is no need for it. Statutes do not seek out extraordinary situations to deal with, unless the event is one which is appropriate to the formation of a summary opinion without hearing people and without hearing the parties. Then the common law provides the remedies. The common law gives Your Lordship the power to stop the trial, the common law gives the parties the power to take objection and there (10) is no need for the exercise of a statutory power where an assessor is in fact able to carry out his duties but there may a legal impedent or some grounds upon which he ought to recuse himself.

Then there was an argument by My Learned Friend that "onbekwaam" has a meaning wide enough to include matters other than physical and mental incapacity, but the question is what does it mean in the context and the context includes a legislate of history where GUBUDELA gives us an indication and the other matters to which we have referred. In(20) other words a selection from being incapble of the one meaning or one of its meanings unable. So, if "onbekwaam" means "unable" as it does and if that meaning has been selected by the legislature through its use of the English language, that is the meaning which in our submission must be applied in the statute and I stress again the difference between saying that someone who is able to act, should be treated as if that person had in fact recused himself. There is a very substantial difference between those two situations. (30)

The/...

The question really is not one of semantics. The question is did the legislature intend to vest in the Court the power to recuse another member of the court without a full investigation or hearing legal argument thereon or did it merely tend to vest in the court the power to continue without a person who was for clear reasons in fact unable to do so and not as it were liable to be objected to.

My Learned Friend dealt with the fact that the assessors are a creature of statute and he says that the right to appoint and dismiss must be found in the statute, but of (10) course one has to add to that that the statute says that they are members of the court. So, as members of the court they become liable to applications to recuse themselves and in the legislate of history I am not sure whether Your Lordship has the fact that the proviso to the assessors' section, there was a time when the summoning of assessors was obligatory in certain cases, irrespective of any opinion formed by the judge. That was deleted by Act 75 of 1959 and it was at that time that the corresponding provisions of the old, I think it was Section 110, the section (20) which no correspondents to Section 147. It was as a result of that that there were changes, but in 1977 the proviso came back in a somewhat different form and I think I can give you the CHAANE case reference now. I have it here in my heads. It is 1978 (2) SA 891 (A). There the Appellate Division indicated that there were circumstances in which the summoning of two assessors are obligatory or is obligatory.

COURT : I am not quite clear on this 1959 amendment. I thought that at a stage Section 110 which had a sub-section 1 and a sub-section 3 was combined because the sub-section (30)

3 was no longer, or actually sub-section 1 and 3 were no longer necessary because there was just one contingency that was provided for and that was that the Court should take assessors in certain circumstances.

MR CHASKALSON : I think there was a time, but I may be wrong, between 1959 and 1977 where the Court was under no obligation.

COURT : Where there was nothing at all?

MR CHASKALSON : Nothing at all.

COURT : Could you just give me that reference to the 1959(10) Act?

MR CHASKALSON : It is Section 5 of Act 75 of 1959.

COURT : What does it say?

MR CHASKALSON : It says :

"Section 109 of the principle act is hereby amended by the deletion to the proviso so sub-section 2."

COURT : But I thought it was in Section 110?

MR CHASKALSON : I think Section 109 was, the proviso to sub-section 2 of Section 109 read as follows :

"Provided that if the accused is to be tried upon a (20) charge of having committed or attempted to commit treason, murder, rape or sedition, or in any case in which the Minister has given a direction under Section 111 the judge shall summon to his assistance to assessors."

That provisio was deleted. So, there was never any obligation to summon assessors from 1959 through to 1977. In 1977 in accordance with the decision in CHAANE's case, it is clear that there are circumstances on which there is an obligation to summon assessors. (30)

COURT/...

COURT : Yes, a sort of a rule laid down by the Appellate Division.

MR CHASKALSON : Yes. No, I think that the Appellate Division actually says, I would have to get CHAANE's case, I have read it, but I have read so many cases, I hope I am putting it to Your Lordship rightly. My recollection of CHAANE's case is that the Appellate Division says that if the judge has formed the opinion on reading the indictment, he is under an obligation to call assessors.

COURT : But there are also cases which say that if he (10) does not do it, it is not an irregularity.

MR CHASKALSON : It depends upon whether the indictment should have led him to do that. I think what CHAANE's case makes clear as I remember it, is that ex facie the indictment, it appears that the obligation exists, it then becomes compulsive. In other words that if you look at the indictment, there may be circumstances where ex facie the indictment there is an obligation. There may be other circumstances where there is no obligation, but events take a course which lead to an outcome which was not originally anticipated (20) and then the failure to have two assessors is not an irregularity. I think that is the distinction that CHAANE's case draws, but what happened was that in 1977 the obligation to have two assessors is brought back in a limited form. When it was brought back there was no corresponding amendment made to Section 147. So, whereas previously there was an obligation to have two assessors, the statute actually vested in the accused person the power to object to the trial continuing, I think the accused person had to consent. Now where there is a statutory obligation to have assessors (30) we say that the very minimum that is involved there, is a

statutory/...

statutory right in the accused to be tried by a judge and two assessors subject obviously to the statute itself, but that that position ought not to be changed without at the least hearing argument thereon, and without an inquiry which would satisfy the requirements of justice that the court has been reduced from three to two after hearing everything which could have been said in favour of the accused as to why it should remain at three.

COURT : Could I just come back. Section 5 of Act 75 of 1959, did it delete the whole of Section 109(2)? (10)

MR CHASKALSON : Just the proviso. That was the obligation to summon assessors. So, we do submit to Your Lordship that at the very least, the accused were entitled to be heard assuming the power and we have argued to Your Lordship it is not there, but assuming the power, if that power were to be exercised in circumstances that Your Lordship felt that it might be appropriate to exercise that power, the accused have the right to say "This is a case where it should be but I am entitled to three assessors, two assessors, a court of three." Before that is changed, the very (20) least that an accused person should, in our submission, be entitled to, is a full investigation in open court of the circumstances why the change is necessary and the hearing of full argument thereon, so as that they can be heard in protection of the right which they have.

My Learned Friend also dealt with a number of sections dealing with jury trials and he sought to draw an analogy and indeed on some levels there is an analogy and on others there is not and I had mentioned some. The fact the jurors come off a common roll, but there is also the fact that (30)

jurors/...

jurors were subject to challenge. The right to look at a juror and say "I do not want you." I may be wrong, but I think there were some peremptory challenges and then there were some challenges for cause.

COURT : Yes, that is right. I think you a right to three challenges and the rest were just cause.

MR CHASKALSON : Well, that does not apply any more. The jurors are really in a different sort of position. Also it is interesting that in the jury trial the power to - the question of bias was a ground for challenge before a trial.(10) But according to GUBUDELA once the trial has commenced, the remedy is then , if bias would become manifest, discharge the jury.

So, if My Learned Friend were to be correct that the purpose of Section 214(3) was to bring the law as it applies to assessors into line the law as it applies to juries, the consequence of that would be that the question of bias of an assessor would have to be raised initially and if the issue arose during the trial, according to GUBUDELA the remedy is to discharge the court, because the juror's(20) provision was only made for challenge for bias before.

I would not put my case that high, because unlike a juror and an assessor is a member of court and so there would be the additional remedy of an application for recusal, the question would then arise if that happened, what the consequence would be if there was a recusal. AS I say to Your Lordship, we suggest that that does not arise in the present case, because that is not course which events followed.

The case of RABAHERILAL, My Learned Friend referred(30)

to a statement by LORD ATKIN in the judgment where the word used was "incompetent" and he seemed to develop some argument on that word and I am not entirely sure exactly what the argument was, but all I would like to point out is that the RABAHERILAL case had nothing whatever to do with the interpretation of the statute, any statute. The RABAHERILAL case was concerned solely with the circumstances in which it is open to an accused person who has been convicted to challenge the verdict of the jury notwithstanding the fact that the verdict has already been given in open court and not descented from by any member of the jury.

So, all that RABAHERILAL shows is that the ordinary rule that verdicts cannot be challenged once given in open court, is a general rule, but that it is subject to certain exceptions and the RABAHERILAL exception dealt with a situation where one of the jurors did not understand the proceedings. The judgment of the privy council spesifically overruled the earlier case which said that that was not relevant and that judgment has been specifically adopted by our Appellate Division. So, the rule of challenging the verdict is in South Africa at the moment at least subject to the RABAHERILAL exception. In other words there are certain circumstances were a verdict is given in open court where a juror does not challenge the verdict and where after the event has it shown by both CRASNER and SILBER the verdict actually given can be challenged.

COURT : Depending on your constitution, I would prefer to continue a bit more and to sit a bit later this afternoon to make up for loss time, but if you have difficulty with either your legs or your throat, tell me and we will stick

to the normal hours.

MR CHASKALSON : Thank you. I would like to take my argument through to its conclusion today. I think I can.

COURT : Well, if we do not get to the end of it, it does not matter so much. I would like to have your argument today and Mr De Villiers's tomorrow possible and see where we get. So, you are at liberty to continue for another half an hour if you feel like it, otherwise we can take the adjournment now and start a little earlier.

MR CHASKALSON : I would prefer to take the adjournment now if Your Lordship has no objection.

COURT : What time would suit you to recommence?

MR CHASKALSON : Would 13h45 be in order?

COURT : That would be in order.

MR CHASKALSON : May I say that when I say I am ready to take my argument through to its conclusion, I am talking about my argument in relation to the application for the irregularity, the question as to whether or not the trial has been vitiated. In regard to the other application, there may be a question of evidence which will arise and it may be necessary for me still to give very careful consideration with the accused which I have not had an opportunity yet of doing of the full statement issued by Your Lordship.

COURT ADJOURNS. COURT ADJOURNS.

K617 MR CHASKALSON : MATSEGO's case, My Learned Friend suggested that we ask that the members of the court be put on trial. That is not the case. What we are saying is that if there is information which is relevant then the fact that that information cannot be rejected without cross-examining a

person/...

person makes it impossible for the court to reject the information. In other words in MATSEGO's case what happened was the assessor made an affidavit saying that he had forgotten about the conversation and the Court said that there is no way of cross-examining the assessor on it and it was not for the judge to enquire into whether he had or had not forgotten about the information as soon as it appeared that he had had information, the trial should then have been stopped. It should have been stopped not because it was necessary to conduct an inquiry but because you could not conduct an inquiry. (10)

Then My Learned Friend relied on the Defence and Aid case in relation to the interpretation of Section 147 suggesting that the presiding Judge has the power not only to form an opinion, but to decide upon the interpretation of the statute. In other words, he can form an opinion that the situation covered by the statute in fact applies and once he has formed that opinion, whether it is right or wrong, it has to be accepted. So I understood his argument based on the Defence and Aid case. (20)

The submission to Your Lordship is that the Defence and Aid case or that the question really in each case is that an opinion can only be formed within the framework of the statutory power. So, the first requirement is to interpret the material in relation to which the statute says that the person concerned may form an opinion. In this case the presiding judge and it is only after one has interpreted that statute and that becomes a question of law, having interpreted that statute, one then decides whether or not the power to form the opinion exists. (30)

Put /...

Put differently, one cannot create a power by misinterpreting the statute. A misinterpretation of the statute, a presiding Judge by misinterpreting the statute cannot confer upon himself a power which the statute does not give him. So, the first inquiry is one of interpretation of the statute to determine the parameters within which the presiding Judge is entitled to form the opinion and it is only if the subject matter falls within that, that he can then form the opinion.

I think that is clear from the Defence and Aid case (10) itself, but it is also made clear from another judgment where the facts are somewhat different. It is judgment of KAYALUMA v MINISTER OF DEFENCE and Your Lordship will see that there is a report of the KAYALUMA case in 1984 (4) SA 59 (SWA) where the South West African Court upheld the argument that My Learned Friend has advanced to Your Lordship and the appellate Division very recently handed down a judgment where it said that that was wrong, holding that it does not actually refer to the Defence and Aid case but it refers to the passage in the South West African Court's(20) judgment which was based on the Defence and Aid case and its approach shows that you have first to construe the statute to see what the power is. If I could hand up to Your Lordship the section. Like everything else, it is a different section. If Your Lordship would look at the Defence Act in sub-section 4 where it says that :

"If any proceedings have at any time been instituted in a court of law against the State, the State President, the Minister and member of the South African Defence Force or any other person in the service of the State(30)

and/...

and the State's presidence is of the opinion (a), (b), he shall authorise the Minister of Justice to issue a certificate."

The South West Africa Court ruled that the State President was entitled to form an opinion whether (a) and (b) existed and the Appellate Division said he could only form the opinion if (a) and (b) existed.

The facts are very different, the statutory provisions are different, but the principle in our submission would still be the same. It will be a question of construing(10) the statute as to whether the statute limited the frame work within which the opinion could be formed or whether it authorised the court to go beyond a frame work and as it were left it to form an opinion whether it was within the power of the statute or not.

The second question which arises in relation to that is even if the Court has the power to form the opinion, assuming for this purpose of my argument that the Learned Friend is right, that the statute does not limit or does not prescribe the frame work within which the opinion (20) can be formed, can the opinion be formed otherwise than in accordance with the requirements of procedure or fairness. That of course raises the full question of audi ulteram partem.

So, even if the statute were to be construed as enabling the presiding judge to decide whether or not he could form an opinion without limiting the subject matter of his inquiry, we submit that that opinion must still be formed in accordance with the requirements of procedural fairness and that this did not happen in the present case. (30)

My/...

My Learned Friend addresses an argument on the case of R v DAVIDSON suggesting that it was - that in a jury case the power of a judge is to discharge the jury. I am not sure that I understand the distinction he seeks to draw because it seems clear from our cases that it is precisely that power of quashing proceedings and discharging the court that a trial judge always has according to our procedure. So, whether it is a jury trial or not, that right to stop proceedings is always there.

My Learned Friend says we asked the wrong question and therefore we got the wrong answer and he says the question we asked was because it was related to the question of recusal and he said recusal had nothing whatever to do with the case and so if we asked whether there were circumstances in which Professor Joubert ought to have recused himself, naturally when we come up with the answer that there were not, we have got the wrong answer because we have asked the wrong question, but the question which we put was does a presiding judge have the power under Section 147(1) to order the recusal of an assessor or not and the whole of the first part of our argument was directed to that question and it is really that question which determines the first part of the inquiry. If he does, then it falls within 147 subject to the question of how the power should be exercised . If he does not, then that in our submission will be the end of the matter.

Then My Learned Friend proceeds from there to say well, what took place was not an irregularity. He said that the basis of his argument was that a trial judge has the power to do what Your Lordship did and that there was

no/...

no irregularity firstly because that power existed and secondly because the parties affected by the ruling do not have the right to notice nor the right to a hearing. Of course, if My Learned Friend is right on that issue, there would be no irregularity, but if he is wrong, then he does not suggest that if what happened was indeed an irregularity, it would not have been an irregularity which vitiated the proceedings.

As he suggested, if it was an irregularity, it was not of the character as to have been so prejudicial that it (10) could no longer be put right. My Learned Friend seemed to develop some argument on the basis that or seems I think, to have misunderstood one of the arguments or one of the points in the founding papers and that is that the continuation of a trial despite a request for a postponement is referred to. It is not suggested in the papers and it is made clear that the continuation of the trial does not prejudice the argument which has been put to Your Lordship today. the prejudice is that the trial has been continued, if the argument is correct, before an improperly constituted (20) court. So, if indeed the court is not properly constituted the continuation of the trial could sit beyond Your Lordship's power if Your Lordship ever had the power to re-constitute the court properly.

It is doubtful in view of what My Learned Friend has argued to Your Lordship earlier today and I accept that that is probably right, that if the - that Your Lordship would not have a power to reverse an order. In other words, that having ruled that the court now consists of two persons Your Lordship would not probably, I think, have the (30)

power/...

power to change that ruling, but by continuing the trial, that is no longer an option and so the question must be now was that power there or was it not and if it was not there, then our submission is that the irregularity simply cannot now be remedied.

I do not think I can usefully add anything to the argument on this part of the case, but it is important for me to have a ruling from Your Lordship on the evidence.

COURT : On what evidence?

MR CHASKALSON : The first, the earlier reports of Profes-(10) sor Joubert.

COURT : The first and second reports?

MR CHASKALSON : Yes. My Learned Friend tells me that he intended to object to them as well and asked for them to be struck out. It is important to me that I should have a ruling in relation to that. I should tell Your Lordship that I do not believe I can usefully add anything to the argument I have already addressed to Your Lordship this morning, but I would like to know from My Learned Friend and from Your Lordship - I would like a ruling in relation(20) to that issue.

HOF : Mnr. De Villiers, het u iets by te voeg by u argument? Ek wil nie weer deur al die sake geneem word nie.

MNR. DE VILLIERS : Nee, ek wil net een aspek met u opper. Op die stadium toe u die verklaring gemaak het Maandag het u nog nie die tweede verklaring van prof. Joubert ter insae gehad nie, want dit was aangeheg by die repliserende verklaring. As my herinnering is was die repliserende verklaring pas ingehandig waarby die tweede verklaring aangeheg was en voordat U Edele die geleentheid gehad het om dit te (30)

lees/...

lees, is die verklaring gemaak.

Dan wat die eerste - U Edele se verklaring was dan gerig met eerbied na aanleiding van prof. Joubert se eerste verklaring. Wat daardie verklaring betref, het ons in ons aansoek om deurhaling gevra vir deurhaling van sekere paragrawe. Die paragrawe is op bladsy 37 van die stukke. Paragraaf 17, paragraaf 18 en dan ook op bladsy 40 paragrawe 21 tot 25 en op bladsy 43 paragraaf 26 en 27 en ook 28 op bladsy 44 en dan op bladsy 45 die laaste twee sinne vanaf die tweede reël op bladsy 45 van die woorde "I was given (10) no opportunity" tot die laaste woorde van daardie paragraaf.

Ons aansoek was gedoen ten opsigte van daardie paragrawe voordat U Edele die verklaring gemaak het in die hof of ons aansoek was van kennis gegee. Ten spyte van die feit dat U Edele die verklaring gemaak het, is ons submissie dat die beginsel nog sou bly dat daardie paragrawe in beginsel ontoelaatbaar sou wees, maar 'n verdere faktor het nou bygekom as gevolg van U Edele se verklaring en dit is dat U Edele klaarblyklik in ons submissie in belang van reg en geregtigheid en ten einde die verkeerde beeld wat in prof. Joubert(20) se verklaring geskep is reg te stel, dit goed gedink het om die verklaring te maak in die hof ten opsigte van sekere van daardie paragrawe, insluitend die paragrawe waarteen ons beswaar het. Ek het vanoggend aan u genoem die saak van ALEXANDER en op bladsy 545 van ALEXANDER se saak word verwys na 'n uitspraak van die Court of Appeal CONWAY v RUMMER. In daardie passasie - dit mag 'n House of Lords beslissing wees, ek is nou nie heeltemal seker nie.

HOF : U is besig om my op 'n lang pad te neem. Kan u my nie die einddoel gee van hierdie lang reis nie? (30)

MNR. DE VILLIERS/...

MNR. DE VILLIERS : Ek vra om verskoning. Die einddoel is om te sê dat in daardie passasie op bladsy 545 F tot G sê die Hof dat by die oorweging van die openbare belang daar 'n opweging plaasvind van die onderskeie belange en die submissie wat ek maak is dat die Hof klaarblyklik geregtig was om gesien die omstandighede die onderskeie belange wat daar ter sprake was op te weeg teen mekaar.

HOF : Nou dat u dit gesê het, gaan u voort met u aansoek vir deurhaling van die betrokke paragraaf?

MNR. DE VILLIERS : Ons submissie is dat in beginsel dit(10) ontoelaatbare getuienis is, maar in die lig van die benadering wat U Edele gevolg het ten opsigte van die verklaring en die opweging wat ek so pas na verwys het, laat ons dit in U Edele se hande of u daardie betrokke ontoelaatbare getuienis - dit bly nog ontoelaatbare getuienis.

HOF : Nee, ek begryp die argument. Wat sê u van die antwoordende verklaring?

MNR. DE VILLIERS : Wat die antwoordende verklaring betref, u bedoel die repliserende verklaring?

HOF : Die repliserende verklaring? (20)

MNR. DE VILLIERS : Die repliserende verklaring. Wat die repliserende verklaring betref geld die betoog wat ek so pas voorgelê het nie, want U Edele se verklaring was klaarblyklik nie gerig op enigiets wat spesifiek in die repliserende verklaring staan nie. U het dit nog nie gelees gehad nie. Ten opsigte daarvan het ons toe op dieselfde dag 'n aansoek om deurhaling geloods of van kennis gegee en ingehandig by U Edele en ten opsigte staan ons by die benadering dat die paragraaf wat ons daar teen beswaar maak, dit is paragraaf 6 van die beëdigde verklaring van prof. Joubert.(30)

Dit/...

Dit is op bladsy 201. Dit is paragraaf 6 op die getikte bladsy 4. Dit was na ons oordeel alleen paragraaf 6, die hele paragraaf 6 wat betrekking het inderdaad op beraadslagings en besprekings van die Hof.

COURT : Would you wish to reply, Mr Chaskalson?

MR CHASKALSON : No, My Lord, I have said all that I could usefully say about that this morning.

MNR. DE VILLIERS : Mag ek u aandag net vestig op een passasie in die beantwoordende verklaring. Ek verwys na die getikte bladsy 17 van die beantwoordende verklaring(10) van die Prokureur-generaal paragraaf 33. Daar in paragraaf 33 ongeveer ses reëls van onder word die paragrawe genoem waarteen ons beswaar het in die eedsverklaring en dan word die submissie gemaak, ek voer eerbiediglik aan dat dit nie in die openbare belang is dat besprekings wat lede van die hof vertroulik met mekaar voer. Ek maak net die submissie na aanleiding van My Geleerde Vriend se betoog in repliek netnou. Ek wil net die rekord regstel. Hy het gesê hulle het geen idee gehad dat ons 'n beswaar opper op grond van openbare belang nie en hier staan dit dat dit inderdaad (20) verskyn.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINSIAL DIVISON)

DELMAS

1987-04-02

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

RULING IN RESPECT OF SECOND REPORT OF DR JOUBERT

VAN DIJKHORST, J.: I make the following ruling:

In respect of paragraph 6 of the second report of Dr W.A. Joubert, I make a ruling similar to that which I have made in respect of the third report.

His first report is admitted.

My reasons for this decision I will file later.

MR CHASKALSON : Can I ask for clarification of one of Your Lordship's rulings? Your Lordship ruled tat the third report of Dr Joubert was not admissible?

COURT : Yes.

MR CHASKALSON : Your Lordship put it to me yesterday that it is not permissible to produce evidence which my contradict Court's statement in regard to events which have occurred during the trial.

HOF : Yes.

MR CHASKALSON : Am I to understand that that would form part of Your Lordship's ruling? (10)

COURT : Yes.

MR CHASKALSON : Then I would like to have regard in the light of that ruling, in the light of the decisions today, to consider carefully Your Lordship's statement.

COURT : You are asked to go ahead with your arguments on the application for my recusal. I will give you no further postponement. You have had enough time now.

MR CHASKALSON : I must tell Your Lordship I am not in a position to do that, because I had to wait for certain rulings and to take instructions from my clients in regard to the effect of Your Lordship's rulings and I had to consider with them Your Lordship's statement. I have not had an opportunity of doing that. I simply have not had an opportunity of doing that. (20)

COURT : You have got a team assisting you and no doubt you can start with your argument on all these instances in the record where you say that there has been cross-examination from the part of the Bench and then overnight you can consider your position. (30)

MR CHASKALSON/...

MR CHASKALSON : No, I am not in a position to carry on without an adjournment and I must ask for one.

COURT : Well, my ruling is that you continue your argument.

MR CHASKALSON : I must tell Your Lordship that I cannot without considering the implications of Your Lordship's ruling and without discussing and taking very precise instructions and taking - getting some advice to know what to say to Your Lordship now.

COURT : Which ruling is it that you have difficulty with?

MR CHASKALSON : I have difficulty with two rulings. (10) The one ruling is the ruling that Your Lordship has made which excludes some of the information from Professor Joubert's second paragraph.

COURT : One paragraph.

MR CHASKALSON : Yes, but it is an important paragraph in relation to something that appeared in the affidivat.

COURT : That you knew was in the offing and you had known that for a couple of days.

MR CHASKALSON : The other ruling which I need to take instructions on is the detailed statement that Your (20) Lordship made in the light of Your Lordship's second ruling to me.

COURT : Because I made that statement on Monday, I granted you the indulgence that we had this whole argument out of turn. That is to give you an opportunity to consult with your clients on the statement. If you did not avail yourself of that opportunity, I cannot help it, but I am ...

(Mr Chaskalson intervenes)

MR CHASKALSON : I had not consulted.

COURT : Well, I cannot help it. You are requested to (30)

continue/...

continue with your argument. That is my ruling.

MR CHASKALSON : Is Your Lordship not even going to allow me five minutes?

COURT : I will allow you quarter of an hour.

COURT ADJOURNS. COURT RESUMES.

MR CHASKALSON : My Lord, the accused have had regard to Your Lordship's ruling and in particular to the fact that they cannot rely on Professor Joubert's report insofar as it has been contradicted in order to establish the iusta causa recusationis or at least an essential part of that. (10) In the circumstances we have been instructed in the light of that ruling not to proceed with the application for the recusal.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINSIAL DIVISION)

DELMAS

1987-04-02

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

ORDER ON APPLICATION FOR RECUSAL

VAN DIJKHORST, J.: I make the following order:

The application in toto is dismissed.

My reasons will follow later.