1455.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(TRANSVAALSE PROVINSIALE AFDELING)

SAAKNOMMER: CC 482/85

DELMAS

1987-04-01

DIE STAAT teen: PATRICK MABUYA BALEKA EN 21 ANDER

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

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

KONTRAKTEURS: LUBBE OPNAMES

VOLUME 198

(Bladsye 10 298 - 10 342)

HOF HERVAT OP 1 APRIL 1987.

MNR. DE VILLIERS : Mag ek u net verwys na twee paragrawe in my hoofde wat ek op bladsy 8 ongelukkig oorgeslaan het, paragrawe C en D op bladsy 8 en 9. In die jongste uitgawe van Hiemstra op bladsy 320, juis waar hy artikel 147 bespreek is sy aantekening na aanleiding van die artikel onder die hoof "Onbekwaamheid" :

> "In die buitengewone omstandighede dat albei assessore nie meer beskikbaar is nie, sal dit daarvan afhang of assessore verpligtend was of nie. Hulle sal verplig-(10) tend wees in die omstandighede bedoel in die voorbehoud by artikel 145(2). Hier word nie net liggaamlike onbekwaamheid bedoel nie. As daar benadelende ontoelaatbare getuienis tot die kennis van 'n assessor kom, of iets anders wat sy oordeel onregmatig kan beïnvloed, behoort hy hom te rekuseer anders sal die uitspraak bloot staan aan ter syde stelling."

In Joubert se Law of South Africa, volume 5 in die hoofstuk wat geskryf is deur PREISS, R. op bladsy 428, ek lees van bladsy 429 bo aan van die hoofde waar hy met die (20) artikel handel :

> "The expression 'unable to act as assessor' is wide enough to embrace circumstances other than physical ones. The facts adverse to the accused have come to the knowledge of an assessor extracurially, the Judge may hold him unable to act and secure his recusal rather than have the verdict set aside on the ground of irregularity."

Albei hierdie passasies ondersteun dus in ons submissie die argument wat ons reeds voor u geplaas het. (30)

As ek wat die geskiedenis betref net mag teruggaan. Daar is twee ander artikels wat betrekking het op jurie-verhore wat in ons submissie ook ter sake is, wat ons nog nie vir u genoem het nie wat ek per abuis oor die hoof gesien het en wat ek nou gevind het. Dit is artikels 136 en 137 van Wet nr. 56 van 1955. Ek sal die Engelse teks van 136 lees. Dit is op bladsy 1 120 :

"If before or after a juror has been sworn, it appears to the Court from his own statement that he is not impartial as between the prosecution and the accused(10) or that for any other reason he ought not to be allowed or required to serve as a juror in the case, the Court may, before any evidence is given, without discharging the whole of the jury, discharge that particular juror and direct another juror to be sworn in his place."

Ek vestig die aandag daarop dat hier het 'n mens die situasie waar die jurielid ingesweer is, maar daar nog geen getuienis in die saak gelewer is nie. Daardie artikel moet in ons submissie saamgelees word met die artikel wat ons (20) gister vir u aangehaal het uit dieselfde Wet, naamlik artikel 149(3)(a). U sal onthou dat artikel 149(3)(a) lui soos volg :

"If at any time during the trial a juror dies or becomes in the opinion of the Judge incapable of continuing to serve as a juror or is absent, the Judge may in his discretion discharge the jury under the provisions hereinbefore contained or may, if he thinks fit at the request of the accused and with the consent of the prosecutor discharge the juror who (30)

so/...

so becomes incapable or is so absent and direct that the trial shall proceed before the remaining jurors."

Artikel 149(3)(a) in kontras met die ander artikel 136 het dus te doen met 'n onbekwaamheid van 'n jurielid wat gedurende die verhoor begin, dit wil sê nadat die getuienis gelei is of in ieder geval gedurende die verhoor. Hy het dus 'n wyer trefkrag as 136.

U sal u herinner dat ek u gister verwys het na O'HAGAN, R. se verwysing na volume 1 van die ou Gardiner en Lansdown die sesde uitgawe in die saak van GUBUDELA waar ek verwys (10) op bladsy 9 van ons hoofde. U sal herinner dat die Edele Regter verwys het na Gardiner en Lansdown en dit is die passasie op bladsy 390 wat hy na verwys. Bo aan die bladsy staan "Procedure from plea to verdict" en dan in die sesde reël op bladsy 390 word - sê die skrywers die volgende :

"If before or after a juror has been sworn it appears to the Court from his own statement or otherwise that he is not impartial or that for some other reason he should not act in the case, the Court may discharge that juror and sworn another in his place provided(20) that no evidence has yet been given."

Hy is klaarblyklik besig om na 136 te verwys wat hy net 'n bietjie verder noem. Dan 'n bietjie verder aan sê hy of in die volgende sin :

"If evidence has already been given, then in the discretion of the Judge the whole jury may be discharged or at the request of the accused and with the consent of the prosecutor the trial may proceed with the remaining jurors if they are not less than seven in number." (30)

Dan/...

Dan gee hy die verwysing na die twee artikels wat ek gelees het, 136 en 149(3) en net om die geskiedkundige verband van daardie artikels vir u te toon. Wat artikel 136 betref sy eweknie in die Wet 31 van 1917 - dit is 201 en 202 van Wet 31 van 1917 soos afgedruk uit die gekonsolideerde Union Statutes. Ek gaan nie die artikels nou weer lees nie. Dit kom my voor dat die artikels wesenlik dieselfde is as soos hulle verskyn in artikels 136 en 137 van die Strafproseswet van 1955.

Die voorganger van Wet 31 van 1917 was Ordonnansie (10) nr. 1 van 1903 wat ons ook in hierdie bundel wat ons nou voor u geplaas het afgedruk het. Die eweknieë van artikels 136 en 137 van Wet 56 van 1955 was in Ordonnansie 1 van 1903, artikels 200 en 201.

HOF : So, dit was in Wet 31 van 1917 201 en 202 en hier was dit 200 en 201?

MNR. DE VILLIERS : Dit is korrek. Artikel 200 kom vir my wesenlik voor soos wat hy later 201 voorkom in die 1917 Wet, maar 201 lui 'n bietjie anders:

> "If a juror is personally acquainted with any relevant (20) fact it is his duty to inform the Judge that such is the case whereupon he may be sworn, examined and cross-examined in the same manner as any witness."

En daar word daar nie bygevoeg dat "the judge may discharge him as incapable" in so 'n geval nie.

Terwyl ek op Ordonnansie 1 van 1903 van Transvaal is, mag ek u aandag ook vestig op die volgende artikels wat ook afgedruk is. Artikel 184 en 185. Hulle is die eweknieë van die ander artikels wat ek vroeër vir u aangehaal het gister. Artikel 184 lui : (30)

"If/...

"If the presiding Judge becomes incapable of proceeding with the trial or directing the discharge of the jury it is the duty of the senior officer of the Court to discharge the jury."

En dan 185 :

"Incapacity of juror."

Daar weer eens word gesê dat :

"If a juror becomes in the opinion of the Court incapable of continuing to act as a juror, the Court may in its discretion discharge the jury or may if it thinks fit(10) at the request of the accused and with the consent of the prosecutor discharge the juror, so becoming incapable or being absent."

Dan wil ek net u aandag ook vestig en dit is ook afgedruk voor u, die kommentaar van Swift en Harcourt se tweede uitgawe na aanleiding van artikels 136 en 137. In sy kommentaar op artikel 136 onder die "general note" na aanleiding van die bevoegdheid van die Hof daar, haal die skrywers aan uit R v HEPWORTH 1928 (A) 265 op 277, 'n bekende passasie, maar ons wil aan die hand gee dat daardie passasie ook ter(20) sake is met betrekking tot die Hof se benadering onder artikel 147:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side and the Judge's position in the criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice and he is not merely a figurehead. He has not only to direct and control the proceedings according to recognised rules(30)

of/...

of procedure, but to see that justice is done."

Dan sal u sien verwys die skrywers na die uitspraak van CENTLIVRES, A.R. in R v A 1952 (3) SA 212 (A) op 222 waar - daardie bladsy is ook afgedruk in die stukke voor u - CENTLIVRES, R. op bladsy 222 na hy HEPWORTH se saak aangehaal het verwys na Wigmore waar hy sê :

"It is interesting to note that Wigmore under the heading of questions by the Judge deprecates on page 152 the degenerate tendency in the United States to relegate the Judge to the position merely of umpire(10) presiding over contestants in a game."

Dan verder met betrekking tot Swift en Harcourt mag ek u aandag net vestig op bladsy 203 van die stuk wat voor u afgedruk is, so 'n bietjie hoër as die middel van die bladsy onder die opskrif :

"When application for the discharge of juror must be made."

Hier sê die skrywers :

"Once evidence has been given, it would appear that this section ceases to govern the position and the (20) provisions of Section 149(3) will apply provided that if the jury is discharged in terms of that section and a new jury empanelled this section will again come into operation."

Dan wat 137 betref is die kommentaar van die skrywers van belang op bladsy 203 net onder die opskrif "Notes," waar die skrywer die volgende sê na aanleiding van 137, die geval waar 'n jurielid bekend is met 'n relevante feit en die artikel sê :

"He shall inform the judge thereof." (30)

Die/...

Die skrywer sê :

"In terms of this section where a person is appointed a juror, a positive duty is imposed on him if he is acquainted with any relevant fact to inform the Judge that such is the case. The words 'relevant fact' are very wide and it is submitted will cover a jury's acquaintance with facts which occurred both before trial and during the trial and they relate to the facts relevant to the facts in issue and any matters in connection with the trial should properly be brought to the notice of the Judge." (10)

In ons submissie is artikel 137 eintlik 'n kodifisering van die gemeenregtelike verpligting dat waar een van die bevinders ten opsigte van feite bewus is van 'n relevante feit, persoonlik bewus is van 'n relevante feit, hy dit behoort te openbaar. Uit die aard van die saak waar 'n regsprekende beampte bewus is van so 'n relevante feit, behoort hy dit aan die partye openbaar te maak en te sê "Ek is bewus van hierdie relevante feit en as u voel dat daar optrede na aanleiding daarvan behoort gedoen te word, dan staan dit (20) u vry om dit te doen."

Ek vestig ook u aandag op die kommentaar van Swift en Harcourt op 205 tot 206 waar hy verwys onder aan bladsy 205 na "The effect of mere knowledge" waar die teenstelling tussen byvoorbeeld 'n jurielid wat bekend is met berigte wat in 'n koerant verskyn het of feite wat algemeen bekend is en feite wat meer van 'n direkte en relevante aard is.

Dan net ter aansluiting by die geskiedkundige agtergrond wat ons aan u voorgehou het, wil ek u verwys en dit is ook afgedruk voor u, na Gardiner en Lansdown se volume 4 waar (30)

hy/...

hy handel met "The history of South African Criminal Procedure." Op bladsy 31 verwys hy na die 1903 Strafproseswet wat ek aan u aangehaal het en hy beskryf dit op daardie stadium as "the most comprehensive code of criminal procedure in Southern Africa, enacted for Transvaal in 1903" en dan op bladsy 36 verwys hy, die opskrif van die bladsy is "The History of South African Criminal Procedure" en dan wys hy daarop in die tweede paragraaf van bo :

"Undoubted the greatest and most contraversial changes affected by the 1917 Act were in respect of the trial by jury" (10)

en dan wys hy daarop dat hoewel die beginsel van 'n jurieverhoor behou is, daar sekere aanpassings daaraan gedoen is.

As 'n mens die Engelse Reg vergelyk oor die posisie van die jurie, ons het dit vir u ook afgedruk Halsbury, volume 11 van die vierde uitgawe op bladsy 305 tot 306, die opskrif van die bladsy is "Trial of indictments." Die bladsynommer is 177.

HOF : Dit klink nie reg nie. Dit is paragraaf 305? (20)

MNR. DE VILLIERS : Paragraaf 305. U sal sien die geleerde skrywers neem die beginsel soos volg saam :

"The trial judge may discharge the jury at any stage of the trial if he should deem it proper and may swear a fresh jury and start the case again. Whether or not to discharge the jury is a matter for the Judge's discretion on the particular facts of the case. A court of appeal will not likely interfere with the exercise of that discretion nor may it be challenged by prerogative order." (30)

Die/...

Die saak van DAVIDSON wat ek vroeër vir u aangehaal het is waarskynlik deur hierdie latere benadering gekwalifiseer dat die Hof sal nie ligtelik inmeng met die diskresie nie.

As u kyk na paragraaf 306 "Reasons for discharge during the trial" dan gee hy verskillende redes . Ek het ongelukkig nie die betrokke statutêre bepalings ter insae kon kry nie, maar waarskynlik is hierdie deur die gemene reg gereël, maar 'n mens kry nie die indruk uit die twee paragrawe, 305 en 306, dat daar enige bevoegdheid in die Engelse Reg (10) bestaan om 'n enkele jurielid wat byvoorbeeld partydigheid getoon het te ontslaan nie. Dit skyn asof daardie bevoegdheid ingevoeg is in die 1917 Wet, minstens in Wet 1 van 1903, Ordonnansie 1 van 1903 artikel 185 waar hy handel met "incapacity of juror" en dan mag ek u ook verwys na die Engelse Reg in verband met "Discharge of a jury in the course of a trial" na The English and Empire Digest waarvan 'n afdruk ook voor u is, volume 14(1) wat verskyn het in 1977 waar ons vir u bladsye 403 tot 406 afgedruk het en waaruit ook nie blyk dat 'n jurielid afsonderlik onbekwaam(20) verklaar kan word nie. Die gemeenregtelike posisie in Engeland skyn te wees dat indien daar onpartydigheid of partydigheid van 'n jurielid geblyk het in die loop van die verhoor, dat die Hof dan die hele jurie ontslaan.

Hier is een ander Wet, verskoon dat die argument in 'n opvolgorde is wat ietwat deurmekaar is. Ons moes die argument in redelike haas voorberei, waar die wet ook voor u afgedruk is, Wet 34 van 1969, die Wet op die Afskaffing van Juries. In my submissie is daar nie iets besonders in hierdie Wet wat u aandag ... (Hof kom tussenbei) (30)

HOF/...

HOF : Is dit die Staatskoerant?

MNR. DE VILLIERS : Die Staatskoerant, ja. Daar is nie iets in daardie Wet wat besonder u aandag benodig nie, behalwe wat van belang is, is dat artikel - u sal sien dat artikels 109 en 110 van Wet 56 van 1955 is weer daar herverorden. Daar is nie op die oog af enige wesenlike afwykings wat tans in ons submissie uitligting nodig het nie.

Mag ek met u verlof dan net by die hoofde van argument van beskuldiges - namens die beskuldigdes kom. Ek wil net u aandag daarop vestig dat die sake vanaf veral bladsy 3(10) MOODIE se saak, handel met afwykings van die bekende en gevestigde reëls van prosedure. Al die sake wat daarna genoem word vanaf bladsy 3 tot by bladsy 10 is almal sake wat handel met afwykings van prosedure wat onreëlmatighede daargestel het.

Die kern van die saak in ons submissie is dat al hierdie sake is ontoepaslik want daar was in ons submissie geen onreëlmatigheid in die prosedure hoegenaamd nie. Die antwoord op die vraag wat op bladsy 11 gestel word in paragraaf 10.1 "Was an irregularity committed?" is die (20) antwoord in ons submissie 'n duidelike nee en as die antwoord op 10.1 nee is, dan verval paragrawe 10.2 en 10.3. Ek het reeds gister daarop gewys dat die vraag wat dan op bladsy 11 gestel word nie 'n tersaaklike vraag is nie en 'n verkeerde vraag is.

Die volgende vraag in die hoofde wat aldus so onderstreep word, vind u op bladsy 18 net voor paragraaf 29. Dit lees :

"If the presiding Judge had the power to order Professor Joubert to recuse himself, was that power properly (30)

exercised/...

exercised?" Aan die hand van my betoog gister is my submissie dat die vraag ook weer van die verkeerde veronderstelling uitgaan. Die vraag is nie of die voorsittende Regter die bevoegdheid, of U Edele die bevoegdheid gehad het om te gelas dat prof. Joubert homself rekuseer nie, want dit is nie 'n bevel inderdaad tot rekusering in die gemeenregtelike sin van die woord nie, maar dit is 'n optrede in terme van artikel 147. Onder daardie vraag gaan My Geleerde Vriend voort om die audi ulteram partem beginsel te behandel. Hy kom 'n bietjie later daarby in paragraaf 36 en volgende. Ek het reeds gister gehandel met sekere artikels in die Strafproseswet en vir die gerief van U Edeles het ons die Engelse teks van daardie artikels wat ek gister aangehaal het ook in die bundel voor u geplaas. Die Afrikaanse en Engelse tekste. Ek wil nie weer teruggaan na daardie artikels nie.

Wat die kwessie van audi ulteram partem betref, het ek reeds submissies gister aan u gemaak dat dit blyk uit die Wet as geheel dat daar baie artikels is waar dit duidelik is in ons submissie dat dit nooit die bedoeling van die wetgewer was dat 'n audi ulteram partem beginsel toegepas sou moes word deur die Hof nie. Op bladsy 18 van die hoofde in paragraaf 3 is ons submissie dan dat op 'n behoorlike uitleg van artikel 147 is die reg om aangehoor te word in ons submissie uitgesluit en ons verwys na die tersaaklike gesag waarna My Geleerde Vriend ook verwys het.

Ter ondersteuning van daardie submissie verwys ons u na wat ons vroeër gesê het oor die geskiedkundige agtergrond van artikel 147 en die uitleg van die artikel en

in/...

in besonder vestig ons u aandag op die doelbewuste weglating van die woorde wat ons in artikel 110(3) onderstreep het. Daardie weglating bevestig in ons submissie dat die wetgewer bedoel het dat die voorsittende Regter die besluit oor die bekwaamheid van die assessor sou neem en sou besluit of die verhoor voortgaan, al dan nie, sonder om die Staat of die verdediging daarin te ken. In ons submissie is daar dus geen onreëlmatigheid begaan nie.

Wat die feitlike aangeleenthede betref ten opsigte van die rol wat die Million Signature Campaign vervul het in die Staatsaak, ondersteun die Staat met eerbied die uiteensetting in U Edele se uitspraak van 10 Maart. In ons submissie op die feite wat vermeld is in die uitspraak van 10 Maart was die Hof met eerbied volkome geregtig en inderdaad verplig om die optrede te gevolg het wat hy inderdaad gevolg het. Dit sou inderdaad in ons submissie 'n onreëlmatigheid daargestel het om voort te gegaan het met prof. Joubert as 'n assessor sonder om enige stappe te doen soos wat U Edele gedoen het.

Wat prof. Joubert betref, ek wil nie nou op die - op al die punte ingaan wat daar ter sprake kom nie, maar een belangrike punt staan vas, waar u gesê het, ek lees van bladsy 55 die sewende reël :

"When I approached my learned assessors to act in that capacity I enquired whether they had any relationship with the UDF. The answer was negative in both cases."

Prof. Joubert heg daardie oorkonde wat ek so pas uit gelees het aan by sy beëdigde verklaring wat op bladsy 29 verskyn en hy lewer kommentaar op sekere aspekte van U Edele se uitspraak van 10 Maart, maar een ding staan soos 'n paal

bo/...

bo water dat hy ontken nie dat u die vraag aan hom gestel het toe u hom gevra het om as assessor op te tree of hy enige verhouding met die UDF het nie. Hy handel met U Edele se versoek aan hom om as assessor op te tree in paragrawe 8 en 9 asook 13 en 14 van sy beëdigde verklaring, dit is op bladsye 33 tot 34 en ook op bladsy 36, maar nêrens daar sê hy iets daarvan nie.

Dit spreek vanself dat toe prof. Joubert die klagstaat en die dokumente in hierdie saak gesien het, sy geheue geprik moes gewees het, dat hy een van die ondertekenaars(10) van die Million Signature Campaign was en ons submissie is dat dit sy duidelike plig was as lid van die hof om dit onder U Edele se aandag te gebring het op die vroegste moontlike stadium.

Daar is in ons submissie in sy verklaring geen behoorlike verduideliking waarom hy dit nie op daardie vroegste stadium gedoen het of enigsins gedoen het voor die datum wat hy dit wel aan U Edeles bekend gemaak het nie. Eers toe daar indringende kruisverhoor was van beskuldgide nr. 6, het hy dit onder die Hof se aandag - na aanleiding van die Million(20) Signature Campaign, het hy dit onder die Hof se aandag gebring.

Dan wat betref die laaste deel van My Geleerde Vriend se betoog op bladsy 32 in paragraaf 48 sê hy na aanleiding van wat hy vroeër gesê het :

"In these circumstances there was not any real likelihood of prejudice"

en hy pas weer die beginsels toe van die sake wat handel oor rekusering. In ons submissie is die toets wat My Geleerde Vriend daar aan die hand gee as die toets wat (30)

sou/...

sou geld by 'n toepassing van artikel 147 in iedere geval ontoepaslik. Daardie is, soos ek gister betoog het, nie die toets wanneer 'n mens te doen het met artikel 147 nie. Daar is geen bewyslas soos in die geval van rekusering ter sprake nie. Die beginsel van HEPWORTH se saak dat die Hof geregtigheid moet laat geskied bo alles, is die belangrikste en deurslaggewende toets wanneer die Hof sy diskresie in terme van artikel 147 uitoefen en ons submissie is dat op die feite tot U Edele se beskikking, was dit volkome geregverdig om u diskresie uit te oefen in belang van geregtigheid. (10)

Dan op bladsy 33 paragraaf 49, die antwoord is duidelik daarop in ons submissie dat die samestelling van die hof, soos hy nou is, het geskied ingevolge artikel 147(1) se bepalings en daar is dus geen sprake van die korrektheid van die submissie wat daar gemaak word nie.

Dan is die volgende opskrif op bladsy 33 net bo 51 is "The failure to hear argument on the question whether an order should be made in terms of Section 147(1)." Ek het reeds betoog en ek wil dit nie herhaal nie dat dit nie vir U Edele nodig was om enige betoog daaroor aan te hoor nie.(20)

Dan op bladsy 34 onder die opskrif "What should the Court now do?" daar blyk dit baie duidelik wat die verkeerde, in ons submissie, uitgangspunt van hierdie betoogspunte is. Dieselfde geld vir paragraaf 54.Omdat daar geen onreëlmatighede was nie, is die beweerde vrese in die artikel 54 ongegrond. Waar 'n Hof optree ooreenkomstig die bepalings van die reg, soos in hierdie geval, is daardie bewerings ongegrond.

Op bladsy 34 paragraaf 52 is daar in die laaste sin is daar net 'n aangeleentheid waarmee ek net kortliks wil (30)

handel/...

handel. Daar word gesê "In all the circumstances the failure to hear the accused before taking a decision to act under Section 147 of the Act and thereafter to continue the trial, notwithstanding a request for postponement, constituted an irregularity." Met betrekking tot die voortsetting van die verhoor is ons submissie dat dit duidelik blyk uit die stukke wat voor die Hof is nou, ook in die aansoek, en dit is gemeensaak dat U Edele aangedui het dat die voortsetting van die verhoor inmiddels om die kruisverhoor van die betrokke getuie te voltooi, inderdaad geskied sonder (10) benadeling van enige van die regte van die beskuldigdes. Dit word inderdaad hier in die stukke beweer in die General Memorandum wat elkeen van die beskuldigdes onderskryf, bladsy 9 bo van die aansoek :

> Mr Justice Van Dijkhorst indicated that counsel could bring the application or applications as soon as they were ready and that no prejudice would be caused to us by a continuation of the proceedings."

Ons vra derhalwe onder die omstandighede dat u bede 1 van die hand sal wys. (20)

MR CHASKALSON : My Lord I think I should say that another report from Professor Joubert dealing with matters arising out of Your Lordship's statement, was handed to us this morning by attorneys acting for Professor Joubert. I understand that such a report was also handed to the State.

COURT : A report was tendered to me and I refused to accept it.

MR CHASKALSON : I think I should inform My Learned Friend that I shall feel obliged to make reference in my argument to what Professor Joubert says about the circumstances (30)

of/...

of his dismissal.

COURT : Well, whether you inform your friend of that, are you attempting to contradict what this Court has put on record?

MR CHASKALSON : My problem is that I ... (Court intervenes)

COURT : I am just asking you a clear question. I am not concerned with your problems. Are you attempting to contradict that? Let us have a clear answer, Mr Chaskalson?

MR CHASKALSON : My answer will be that I have a problem with it. (10)

COURT : Well, what will you attempt to do? Because I must warn you you might veer very close to contempt of court then.

MR CHASKALSON : I have duties to my client and I have duties to Your Lordship and I have been confronted this morning with a situation in which I had never previously been confronted.

COURT : Are you attempting to refer to the report without having it before Court?

MR CHASKALSON : No, that is why ... (Court intervenes)

COURT : Well, will you address me now on whether you should (20) be allowed to place that report before court?

MR CHASKALSON : May I know why Your Lordship ... (Mnr. De Villiers kom tussenbei)

MNR. DE VILLIERS : U Edele, ons, die Staat, het die stuk ontvang sonder benadeling van regte, met ander woorde met voorbehoud van al ons regte. Ons maak inderdaad beswaar teen die toelaatbaarheid van daardie stuk op dieselfde gronde wat ons ook die toelaatbaarheid van ander dele van prof. Joubert se verklarings aanval ten opsigte waarvan daar reeds aansoeke voor die Hof is.Op dieselfde gronde (30)

is/...

is ons benadering in die breë dat dit ontoelaatbaar is en ons bestry derhalwe die plaas van daardie inligting voor die Hof en ons bestry ook dat My Geleerde Vriend enigsins in sy argument daarna verwys alvorens daar behoorlike betoog was oor die toelaatbaarheid daarvan en die Hof beslis het dat dit toelaatbaar is.

COURT : I give you an opportunity now, Mr Chaskalson, to address me on the question of the admissibility of that report.

MR CHASKALSON : Does Your Lordship wish to see the report? (10)

COURT : No.

MR CHASKALSON : Then perhaps My Learned Friend did raise in his heads of argument the question of admissibility. He has not yet argued it, but I am ready to deal with it because I had noticed from My Learned Friend's heads of argument that ... (Court intervenes)

COURT : That aspect is Mr De Villiers's aspect and he can raise it in his own good time, because that deals with matters which are already halfway before court. The question which you should deal with is on two bases. The first basis is whether it can be allowed at all in law to place anything before the Court to contradict what the Court has stated the position to be. That is point 1. The second point is whether it can be allowed at all to disclose information pertaining to what has happened in discussions between Judge and assessors and both on the basis of public policy. (20)

MR CHASKALSON : Let me deal with the second one first. The matter has been - the case relied upon by My Learned Friend (30)

in/...

in his argument is the case of CRASMA and in CRASMA there is reference to Wigmore, to an approach of Wigmore and to certain English judgments. I think that Your Lordship should have the reference to CRASMA's case. It is 1950 (2) SA 475 and the principles stated in CRASMA is that discussions in the juryroom between jurymen for the purpose of considering their verdict, are inadmissible for the purpose of challenging a verdict once given. The rule seems to be derived from English law and it is put on two bases. The one base is that a verdict once given cannot subsequently be contradicted as a result of evidence as to why the jury reached the verdict. The alternative basis on which that is put is from Wigmore, the suggestion or so the Appellate Division considered in CRASMA's case and My Learned Friend refers to in his argument that evidence to contradict the verdict would be excluded by the parall evidence rule.

At page 484 of CRASMA's case, CENTLIVRES, J. who gave the judgment of the Court, said this. He said :

"Wigmore in his third edition deals with the point in issue at great length. He commences the discussion and says as a common formula has run, a juror's testimony or affidavit is not receivable to impeach his own verdict, but this rule of thumb is in itself neither strictly correct as a statement of the acknowledged nor, nor at all defensible upon any principle in this unqualified form. It is a mere shibboleth and has no intrinsic signification whatever. The common formula referred to by Wigmore was apparently based on Lord Mansfield's judgment in VASE v DELAWAAL and was applied

in/...

in many American jurisdictions. In Section 235(4) the learned author points out that the doctrine of Lord Mansfield was so rapidly accepted that most of the State courts have committed themselves and that they except in few jurisdictions, the rule of Lord Mansfield seems now too firmly, I think and that except in a few jurisdictions, a rule of Lord Mansfield seems now too firmly settled in most jurisdictions to be repudiated by a judicial decision. In England, however, as I have already pointed out, the more recent decisions justify the exclusionary rule on grounds other than those stated by Lord Mansfield. Wigmore discusses the exclusionary rule under the heading of the parall evidence rule whereas Fipson considers the matters in chapters dealing with evidence rejected on the grounds of public policy. It is unnecessary for the purposes of the present case to determine whether Wigmore deals with the matter on a more scientific basis in the English authorities on the law of evidence. It may be that the parall evidence rule is also based on public policy. However that may be, it is important to note that in this section Wigmore quotes with apparent approval the dictum of Lord Atkin in ELLIS v DE GEER and it legitimate to infer that he regards that dictum as sound in law".

The dictum in ELLIS v DE GEER is this and it appears at page 482 of the judgment '

"I wish to express my complete agreement with what has fallen from My Lord. In regard to the general rule that the court does not admit evidence of a juryman

as/...

as to what took place in the juryroom, either by way of explanation of the grounds upon which the verdict was given or by way of a statement as to what he believed its effects could be. The reason why the evidence is not admitted is twofold. On the one hand it is an 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 ariving at their verdict. To my mind it is a principle which (10) is of the highest importance in the interests of justice to maintain and an infringement of the rule appears to me to be a very serious interference with the administration of justice."

So, the rule is put on the basis that evidence cannot be led to contradict a verdict. In other words the verdict once given cannot subsequently be challenged on the grounds that the juryman made a mistake or no evidence can be led to show that there were discussions in the juryroom which are intended to contradict the verdict and the sort of (20) evidence which has been attempted to be led when one looks at the English cases, is a sort of evidence that well, the juryman did not really agree with it or a juryman was put under pressure at the last moment or somebody said to him let us draw lots, we cannot make up our mind. That sort of thing. It has been said that once a verdict has been given the evidence becomes inadmissible and the reason is that there has to be finality of verdicts, there has to be certainty in regard to decisions and that therefore there is a time when you do speak and if you miss that opportunity (30)

and/...

and the verdict goes without your speaking, you have lost the opportunity. At page 485 CENTLIVRES, J. says :

"Wigmore's view is that the exclusionary rule is part of the parall evidence rule which does not admit proof by jurors on such matters as fraud and duress. I should point out that the decisions in the United States appear to be conflicting. In JOHNSTON v HUNTER which is referred to in a note to Section 234(9) in the pocket supplement of Wigmore, the Federal Court held that a Negro juror was incompetent to testify that he had(10) been intimidated by eleven White jurors and that by reason of such intimidation he had agreed to a verdict of guilty. On the other hand in a note to Section 235(4) in the same supplement, reference is made to a Colorado decision in WARTEN v PEOPLE where in a murder case it was held that the affidavit of a juror that he had been coerced and compelled to act in a verdict, cast the duty upon the trial court to hear and determine the matter."

COURT : That is the trial court that had given the verdict?(20) Or is it a different trial court?

MR CHASKALSON : It is not clear to me, that is all that the quotation is and unfortunately WARTEN v PEOPLE is not available. But the distinction between evidence given to contradict a verdict and evidence given for a different purpose appears from page 483 of CRASMA where CENTLIVRES, J. quotes with approval or apparent approval, should I say, from Hume's Commentaries on the law of Scotland respecting crimes and the passage quoted is in these terms :

"If a plea of this sort in impeachment of the substance(30)

of/...

of a verdict can at all be listened to, one thing at least seems to be clear, that it can only be in those cases, comparatively but few in number, where the jury re-enter the court straight away on breaking up their private sitting. For if they dispurse and disclose their verdict, as sometimes happens, they are exposed to all those temptations from the opinions and commentaries of the world against which it is the very object of our law to guard, when it orders them to be enclosed and they may thus be prevailed with to disavow their genuine verdict on false and affected grounds. Nay though they can see (?) as they ought to do the result of their deliberations, yet still they learn the sentiments of others concerning the case and the evidence and are liable to be influeced less or more by what they thus hear passing in the world, but further, even if the assize turn straight away into court, it is far from being clear that it is competent to impeach the written verdict on the ground of irregularity and their proceedings of deliberations while they were enclosed. To withstand and control any attempt by any of their own number, to influence, constrain or misguide them was both the duty of the assize and within their power and rather if there were no other remedy, to continue enclosed till the court meets and rend to dissolve their sederunt and to state the reason to the judge though it should invalidate the whole proceedings, than to acquiesce in downright usurpation and injustice. If therefore they have wittingly allowed the verdict to be made up in their presence, such

as/...

such as it is, they have thus given their deliberate and solumn testimonty if under their own hand and such as they cannot be allowed to gainsay to the truth of this written report and the lawfulness and regularity of the proceedings in their sederunt. Any other rule would obviously lead to hurtful and indeed interminable enquiries."

Then he refers to the case of NICHOL which is not relevant to Your Lordships, so the rule as stated in CRASMA seems to be this, that evidence of discussions in the juryroom(10) are inadmissible for the purposes of contradicting the verdict, but that evidence of discussions in the juryroom may be admitted for other purposes relevant to the case and would be admitted, as I understand the passage from Hume, for the purpose of showing an irregularity in the proceedings.

The evidence in the present case - let me put it differently. Neither of those two requirements, either the contradiction of a verdict to which the juryman was a party, nor the attempting to set aside a verdict of (20) the court to which the juryman was a party, exists in the present case. The discussions and events referred to, and I want now to deal at the moment with the, what I might call the procedural, what took place between Your Lordship and Professor Joubert in relation to the recusal of Professor Joubert.

COURT : Why should we not keep it objective and talk about a judge and an assessor in a different case and let us determine the law first.

MR CHASKALSON : The discussions and - I appreciate what (30)

Your/...

Your Lordship is saying to me and I will try to do this. I may have to elude obliquely at some stage ... (Court intervenes)

COURT : You are welcome to run your argument the way you want to run it. I thought we were at present busy with the law point.

MR CHASKALSON : It is sometimes difficult to develop a law point in abstract, but let me put it to Your Lordship this way. I understand what Your Lordship is saying to me and I think I can meet that request from Your Lordship. (10)

My Lord,where and I think I should come back to it for a moment, because I do want to, before I deal with the nature of the evidence which may be admissible, I do also want to make some observation about the difference between the way a jury functions and the way assessors function. Juries after all were selected at random according to public lists. It was a statutory duty to report for jury service if called upon to do so and jurors were never members of the court. Assessors are chosen by the Judge and they become members of the court. Juries would have no contact (20) with the outside worls at all. They can only separate with the leave of the judge. Assessors are free to come and go as they please between sittings of the court.

So, when one is dealing with what takes place between judge and assessors, it is not necessarily exactly the same as what takes place between jurors. But I do not doubt that if an assessor were not to state his descent at the right time and in the appropriate way, one could not have the situation where after verdict had been given to which the assessor had been party, the assessor (30)

could/...

could be heard to say "I did not really agree."

Take the case, as was once the case, where there had to be unanimity in a special court. A judgment of a special court in a trial of treason at one stage had to be unanimous, assuming a special court consisting of a judge and two assessors. It would not be permissible for an assessor to come into court with the judge, hear the judge say this is a unanimous verdict of all of us, go out of court and a day or two later say "In fact I did not agree." He would be precluded from saying that. He could not lead any evidence as to what he had said in the judge's chambers, he could not lead any evidence to suggest he did not really agree, because he will be bound by this exclusionary rule, but he would be entitled to say, as the judge said, this is what happened, we are unanimous. He could immediately say "we are not unanimous. I disagree."

COURT : At the time?

MR CHASKALSON : At the time, yes. He could say "We disagree." I now want to come back to look - I have to come back to the facts of this case briefly for the purpose of developing the argument.

COURT : Should we not first clear up a couple of legal difficulties and that is, can it be permitted in any system of law, more so in our system, that either a judge or assessors disclose what has been their discussions prior to judgment? Is it conceivable that it can be permitted any where in the world?

MR CHASKALSON : The discussions in relation to a judgment?

COURT : To the case, which will eventually evolve into a judgment, I take it.

MR CHASKALSON/...

MR CHASKALSON : I think Your Lordship gave me an example yesterday. Your Lordship gave me an example that if an assessor who is a member of the court says "We must do this, because there is a lot of money in it for us", the judge would be under a duty to disclose that.

COURT : That is a different matter.

MR CHASKALSON : But why? It is discussion between members of the Court. Your Lordship asked me is there any situation in which it could be done and I say yes, it could be.

COURT : On the facts of the case? (10)

MR CHASKALSON : Well, it is relevant to the facts of the case.

COURT : Yes?

MR CHASKALSON : The other matter which we are concerned with in this case which makes it so different - which makes it different to anything else is that Your Lordship, the assessor in the case who was ordered by Your Lordship to cease being an assessor, that the dealings between Your Lordship and the assessor in relation to that issue are not part of the evidence in the case and the verdict or the (20) ruling of Your Lordship is not in itself a judgment. In fact when Your Lordship came into court, you said "I have to make a statement" and Your Lordship gave a statement and then Your Lordship make a ruling. In relation to that issue Professor Joubert was not a member of the tribunal of I might call that which decided that issue. Your Lordship claimed the power to decide that issue yourself. In relation to that issue Professor Joubert becomes the subject of the investigation and not a trier of the issue. So, Professor Joubert, if I may put it, I do not wish Your Lordship (30)

to/...

to misunderstand me in my choice of example, because I have to come back to that example for the purposes of illustrating why the evidence is admissible.

If in the course of a trial the judge says something, let us take the case which often comes before Your Lordship on review in the Magistrate's Court, where an accused person said that during the course of the trial, this happened. It does not appear on the record, but I tell you this happened and that is put on the record and the Court on review will have regard to that evidence. In the particular instance with which Your Lordship is now dealing, the evidence of Professor Joubert as to what took place between himself and Your Lordship is not evidence of what took place in open court. It is not evidence upon which - which was led before the accused, upon which there could have been examination and cross-examination in open court. It was a private inquiry conducted by Your Lordship pursuant to powers which Your Lordship concede that you had and which we argued that Your Lordship did not have - we may be right or wrong in that, but that is not the issue for the moment. It is a private inquiry ... (Court intervenes)

COURT : Just a moment. Let us see where you are leading to. At the moment you are not concerned with that private inquiry, because that private inquiry led to an order which order you have attacked. At the moment you are concerned with an application for my recusal on the basis of bias and that is why you want to put in that statement of Professor Joubert.

MR CHASKALSON : No, I made it absolutely clear at the moment that I am not dealing with it in regard to an application

for/...

for recusal. The question of its admissibility for the purposes of a recusal application, is an entirely different issue. In the statement and that I why I asked Your Lordship if you wanted to see it. The statement contains facts relevant to what Your Lordship put on record. It is an answer to what Your Lordship has put on record as to discussions between yourself and Professor Joubert ... (Mnr. De Villiers kom tussenbei)

MNR. DE VILLIERS : Ek maak beswaar. My Geleerde Vriend is nie geregtig om nou in te gaan op die inhoud van die dokument nie en hy het onderneem om dit nie te doen nie, soos ek hom verstaan het en ek gee aan die hand hy is besig om af te wyk van wat hy self gestel het.

K613 MR CHASKALSON : I do not understand how I can argue if I cannot tell Your Lordship I am not referring to details. I am saying there is evidence in that report as to what took place ... (Court intervenes)

COURT : Well, you are saying to me that what Dr Joubert says and what I put on record is incorrect. Is that what you are in fact saying?

MR CHASKALSON : Yes and what you put on record in relation to what took place between him and you.

COURT : What took place in relation to the, let us call it, the inquiry, is incorrect?

MR CHASKALSON : Yes and what I am saying is that in relation to that issue, which has not taken place in open court and in relation to which the accused can have no knowledge at all and in relation to which was collateral to their trial and how it affects their trial. The only evidence that we can have is to show whether Your Lordship - to show whether

or/...

or not Professor was given a proper hearing to show what was said between you and Professor Joubert at the time of that private inquiry, is what Professor Joubert initially put on record, what Professor Joubert now answers to Your Lordship. With all due respect to Your Lordship. if Your Lordship had held the view that that evidence was not admissible and if Your Lordship took the view that there should not be reference to discussions between assessors and judges, then Your Lordship should not have made a statement.

COURT : Let us just get clarity there. Had you and your side taken the trouble to place the statement before me before you used it and asked my opinion as to the factual correctness thereof, we would not have been in this situation because I would have told you straight out what my recollection was of what had happened and you would have known beforehand that there was an entirely different situation as far as I and my other assessor are concerned, factually as vis-a-vis Dr Joubert. So, this whole situation is of your own making, not of the making of this Court.

MR CHASKALSON : Again Your Lordship, it would have been sufficient for Your Lordship to have said that I do not agree, but Your Lordship must understand that information which is known to an accused person becomes information which his legal representatives have a duty to use in accordance with the instructions of the accused.

COURT : Likewise, if it is then used, there is not only a duty but a right on the part of the Court to put the record straight. Do not state that I should merely have said well, it is incorrect and left it at that. That would have not done justice either to the truth or to this

Court.

MR CHASKALSON : If Your Lordship felt the evidence was inadmissible could have asked me to address argument to Your Lordship on it. Your Lordship could have considered the argument and if Your Lordship had ruled it to be inadmissible, that for the purposes of the application which we are now making, Your Lordship would have made such a ruling and that ruling would subsequently have been enquired into if it ever became relevant or it could have been accepted, but the point is that there was - that evidence was put (10) before Your Lordship, it was conceived to be relevant, it was conceived to be in the duty, it was conceived to be our duty to our clients before Your Lordships, evidence which are relevant and which pursuant to their instructions they require us to raise. And Your Lordship knows of the duty which counsel has to put his clients' case to the Court and to do so fearlessly and to do so properly.

COURT : I have listened for three days already and I will listen for three more days.

MR CHASKALSON : I understand, but I have tried to carry (20) out that duty and Your Lordship should give me credit at least for thinking what my duty is, and how I should discharge it and if Your Lordship should also give me credit for knowing whether it was an easy or a difficult duty to discharge.

COURT : I would have liked to be able to give you credit for knowing where to draw the line.

MR CHASKALSON : Well, that is a matter which Your Lordship may feel I have drawn the line at the wrong place. I feel I have drawn the line at the right place. (30)

COURT/...

COURT : Well, let us leave us out of it and let us start on the legal argument again.

MR CHASKALSON : Yes. If we come back then to the fact that as between Your Lordship in relation to the private inquiry conducted by Your Lordship which My Learned Friend has argued is in the nature of an administrative inquiry, not a judicial inquiry, because it is conducted in private, that you can form an opinion without giving any reasons without giving any consideration to the issue. In relation to that inquiry what takes place between Your Lordship and Professor Joubert is in our submission relevant evidence to any proceedings designed to show that the inquiry was either an irregular inquiry or that it was conducted irregularly and that in relation to that inquiry what Professor Joubert says, is both relevant and admissible evidence. It is evidence to which Your Lordship has have to have regard in deciding whether or not an irregularity has been committed.

It becomes evidence which has to be placed on record because the inquiry was conducted in private and in the absence of that, there would be no record to justify this part of the application.

What has happened now is that as a result of the statement made by Your Lordship in court Professor Joubert has filed a response and the question which then arises is whether Your Lordship can refuse to have that response placed before you ... (Court intervenes)

COURT : And when it is before me I make a further statement saying it is incorrect and I get a further response saying the statement is incorrect. Where will this lead to?

MR CHASKALSON : That is one of the problems which has arisen out of what has happened in this case.

COURT : It is not a problem which has arisen out of what has happened in this case. It is a problem arising out of the manner in which Dr Joubert attempts to conduct these proceedings from outside court.

MR CHASKALSON : Well, he cannot do it from inside court.

COURT : Well, he is not entitled to conduct anything in this court. We are busy with a different trial. I am not interested in his proceedings. (10)

MR CHASKALSON : Dr Joubert was initially asked for information concerning circumstances relevant to the recusal, which were seen to be relevant to the application which we intended to make and he was communicated with through an attorney and no doubt, acting on legal advice themselves, he made that available. What has happened since then has happened under its own momentum. Your Lordship responded to the statement. Dr Joubert now, through his attorneys, has made available an answer to that.

COURT : First of all, he responded to the respondent, to (20) the State?

MR CHASKALSON : Yes.

COURT : Then I made a statement and he responds to me.

MR CHASKALSON : Yes. What is wrong with that?

COURT : What is wrong with it? It is unique, to say the least of it.

MR CHASKALSON : It is, but has a situation as this ever happened before? Has an assessor ever been dismissed in the way Dr Joubert was dismissed? If there is a unique situation, then there will be a unique response. (30)

Unusual situations lead to the sort of unusual course of events which people do not foresee at the time that they start, but of course it is unique, but what must one do if that unique situation presents itself? If in fact there are good grounds for believing that an irregularity may have been committed, surely, those representing the accused persons have a duty to them, to explore it if they are instructed to do so and surely, if that duty leads them to information which they see to be relevant to the inquiry, they have a duty to make use of that information. I would be very surprised if counsel's duty were any different to that.

I see and I understand what Your Lordship says about public policy and discussions between judges and assessors in relation to aspects of their deliberations.

Let me now deal very specifically with the objection insofar as it relates to what we are dealing with now. If at the time of the recusal application objection is taken to other aspects, I will deal with it then.

In the case of MATSEGO there were reference in the Appellate Division to discussion in judge's chambers concerning the merits of the case. There was an affidavit filed by counsel in regard to a discussion which he had had with a member of the court. At the request of the presiding judge there was an affidavit from a member of the court in regard to his position. At the request of the presiding judge there were discussions in his chambers in regard to the merits and the circumstances in which the decision was taken. The presiding judge placed on record the fact that he had made up his decision already, that

he/...

he and the assessor had had certain discussions between them and all that was put on record.

In CRASMA's case - no, in MATSEGO's case the judgment was given by CENTLIVRES, C.J. CENTLIVRES, C.J. had participated in the discussion, the judgment in CRASMA's case. He had in fact given the judgment in CRASMA's case and in the judgment in MATSEGO's case, there is a reference to CRASMA's case. So, it is quite clear that in MATSEGO's case, what was said in CRASMA's case known. It was not suggested that evidence of this nature was inadmissible. It was not suggested that evidence by an assessor relating to when he made his decision and what had taken place between him and the judge was not admissible and it was used to support the decision of the judge that the verdict, or that he was entitled to give a verdict notwithstanding the fact that he had received certain information prejudicial to the accused.

If indeed those matters are matters which may not be referred to, then they cannot be referred to either to support a verdict or to challenge a verdict. Yet there was no suggestion that the evidence was inadmissible, nor was there any evidence, nor was there any suggestion that the assessor's affidavit should be disregarded.

The only basis we suggest on which evidence of what has taken place between a judge and an assessor, which does not contradict a verdict to which the assessor had been a party, could be excluded, would be public policy. But public policy has many facets.

In the case of S v RADEBE 1973 (1) SA 796 RUMPFF, J. said :

"Regspleging/...

"Regspleging geskied by ons soos in alle beskaafde lande in die openbaar, met sekere noodsaaklike uitsonderings en met die oog op die algemene vertroue wat in die regspleging behoort te bestaan is onpartydigheid van die regter, nie net van belang vir 'n party wat by die saak betrokke is nie, maar ook van algemene belang."

This goes on to deal with a matter which may be relevant at the time of the recusal proceedings, but I wish now to confine myself to the observation by RUMPFF, J. that justice takes place openly and in the public eye, that it should (10) be seen to be fair and it should be seen to be open to public scrutiny and that is why proceedings are ordinarily conducted in open court. That is why everything material to the case is ordinarily done in open court and if there is a departure from that into private inquiries, conducted in judges' chambers, between the judge who conducts the inquiry and a member of the court, who is the subject of the inquiry, that does not occur in accordance with the ordinary procedures which are followed. Nothing takes places openly where persons are given an opportunity to state their (20) positions and consequences follow from that. So, when that does take place and that inquiry becomes a subject matter of an objection, public policy would require that that inquire is fully open, lest it should be thought that events are being concealed and if a misfortune occurs, that at a private inquiry of that sort there develops a conflict between the member of the court who conducted the inquiry and the member of the court who was inquired into, that conflict becomes the result of the way in which the inquiry was conducted and the circumstances in which it was (30)

conducted/...

conducted and the ensuing dispute if there is one and if it be relevant to the matters, flows directly from that and I would suggest to Your Lordship that the position cannot be that one view only of what took place in that private inquiry be heard and if there are conflicting views and they have a bearing on the outcome of the trial, it may be that sort of an occurrence which is wellknown to our law where something quite unexpected takes place and which as a result of that having occurred, the proceedings are stopped and I suggested to Your Lordship when I addressed you in argument two days that the inevitable result of this has been that the case has to stop, because Your Lordship cannot be both the witness and the judge in relation to an incident where there is disagreement among members of the court and because there is no procedure whereby members of the court can put themselves on trial and be examined in cross-examination, nor is there anybody who could determine what the outcome might be.

COURT ADJOURNS. COURT RESUMES.

MR CHASKALSON : My Lord, I think I must formally tender the evidence to Your Lordship that is necessary for Your Lordship for a ruling. I have an affidavit referring to the report from Professor Joubert which is annexed. I must tell Your Lordship that the report deals with matter which I consider not necessarily relevant to the application I am now making, that it contains evidence which is relevant to that application and it also contains evidence relevant to a request which will be put to Your Lordship later for the accused to give consideration to certain matters.

COURT : What do you mean? The report itself?

MR CHASKALSON/...

MR CHASKALSON : No, the brief affidavit. It says :

"We wish to consult with our attorneys and counsel in regard to various matters raised in the affidavit which will be relevant to the recusal application."

COURT : Put it down in front of you, Mr Chaskalson, When I have heard Mr De Villiers I will decide whether I take it or not. That is the best.

MR CHASKALSON : I think it must be formally tendered and I should tell Your Lordship what is in that affidavit. The affidavit, if I may say, from the accused, there can (10) be no objection to my reading to Your Lordship.

COURT : If there is no objection from Mr De Villiers to that affidavit I will take the affidavit without the annexure.

MR DE VILLIERS : My Lord, I have not had an opportunity of seeing the affidavit. It has been handed to me this second. So, unfortunately I cannot comment on the contents of the affidavit and I would like to see it.

MR CHASKALSON : It is one page.

MR DE VILLIERS : I have not had an opportunity of even (20) looking at it.

MR CHASKALSON : Perhaps My Learned Friend would like to look at it. It will take him two minutes to read.

COURT ADJOURNS. COURT RESUMES.

MNR. DE VILLIERS : Dankie vir die geleentheid dat ons daarna kon kyk. Ons maak beswaar dat My Geleerde Vriend uit enige dokument voorlees wat in ons submissie ontoelaatbaar is.

HOF : Ja, maar wat sê u is nou ontoelaatbaar? Die eeds-verklaring of die verslag of albei?

MNR. DE VILLIERS : Nee, albei, want die eedsverklaring (30)

verwys/...

verwys na die verslag en lyf dit by wyse van verwysing in in die verklaring.

MR CHASKALSON : As I say, I thought - I think it is necessary for me formally to tender the evidence.

COURT : Very well, place it in front of you and argue.

MR CHASKALSON : Would Your Lordship like to see the form of the affidavit without the report?

COURT : I think I had better look at that.

MR CHASKALSON : I have the original. I must tell Your Lordship that I am taking it off what has been deposed to (10) ... (Court intervenes)

COURT : Keep the original there and the annexure to it and just give me a copy of the affidavit.

MR CHASKALSON : The other submission which I should make to Your Lordship is that evidence of jurors is admissible for the purpose of showing an irregularity committed during the proceedings. There we would rely on the case of R v SILBER 1940 (AD) 187. I will read the headnote :

> "After the conviction of an accused it was shown that one of the juryman at the trial had unknown to the (20) presiding judge being unable to understand the language in which the complainant had given her evidence, held that there had been a miscarriage of justice and that an application for special leave to appeal should be granted and the conviction set aside."

The case of RABAHERILAL v THE KING EMPEROR was followed and in CRASMA's case in relation to RABAHERILAL CENTLIVRES, J. at page 482 said this :

> "In RABAHERILAL v THE KING EMPEROR Lord Atkin who was a member of the Court of Appeal had eleven years (30)

earlier /...

earlier expressed his view as to the exclusionary rule referred to in his reasons for judgment in the privy council, to the well established grounds that for the purpose of setting aside the verdict, evidence by jurors is not admissible to prove what discussions took place in the jurybox or in the juryroom. Counsel for the appellant referred the Court to a further passage in Lord Atkin's reasons where he says :

'It would be remarkable indeed of what may be a scandal and perversion of justice may be prevented during a trial, but after it has taken effect the Courts are powerless to interfere. Finality is a good thing, but justice is a better.'"

His Lordship went on to say that the dictum must not be wrenched from its context, because it shows that the learned Lord was referring to a case where a juror who for some reason is unfit to function as such, should not be allowed to be sworn. That dictum was presumably not intended to qualify the well established ground referred to earlier in the reasons of the learned judge. In other words, that the well established reasons that you cannot contradict a verdict of a juryman to which the juror has been party. But it appears both from the dictum of Lord Atkin and from the passage of Hume that there are circumstances in which it would not only be proper, but in which the jurors would be under a duty to speak and to provide information during the course of the trial. And those circumstances are where there appears - may I say that they include at least the situation in which an irregularity has been committed.

We are here in a situation in which there is an

allegation/...

allegation that an irregularity has been committed, both in relation to the power to make an order and the circumstances in which the order was made. It was not a verdict in the sense that it does not affect the guilt or innocence of the accused, but it was a ruling given during the course of the trial and it was a ruling to which Professor Joubert was not a party.

Your Lordship asked me a question earlier. Your Lordship asked me whether I seek to contradict something which Your Lordship has said. I think the answer to that is not whether I personally accept or do not accept what Your Lordship has said. The answer to that I think is that the accused whom we represent have had put before them two different versions in regard to the facts relevant to the application which we are now bringing and it was their good right to rely upon that version of the facts which they think support their case and it is our duty to put that version to Your Lordship. If the situation is such that it is not possible for Your Lordship to deal with the situation which has arisen, then the remedy and the only remedy I suggest is for Your Lordship to say so and to quash the trial because it has become impossible for Your Lordship to deal with the situation which has arisen during the course of the trial.

The submission to Your Lordship is that the evidence tendered is relevant to an issue which Your Lordship has to decide, that it ought properly to be put on record so that Your Lordship can have regard to it and can see what has been said and take it into account in deciding how you ought properly to react and that it ought properly to be

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before the Court for that purpose and I think I have made it clear to Your Lordship that the report contains information, it was received in this form this morning, which responds to Your Lordship's statement and I consider some but not necessarily all of that response to be relevant to this application.

I do not think I dealt with the last issue of public policy. I want to make it clear that I do accept that there are requirements of public policy which bear upon discussions in the juryroom or between assessors and judge. (10)

The question as to the admissibility of such discussions must always depend upon the nature of the discussion, the subject matter to which it relates and the purpose for which it is tendered. There will be some instances in which I would acknowledge that such evidence would be inadmissible. There would be other instances in which I submit and do submit to Your Lordship that it is admissible. One such instance is the instance described in the passage from Hume cited with approval in CRASMA's case. (20)

Another such instance would we suggest, the discussions which are relevant to an alleged irregularity. Let me give Your Lordship an example of the type of discussion which I think would clearly be admissible. Let us assume that the judge and two assessors, the judge calls into the room a prospective witness and says "We would like you to make the following investigations, because we intend later to call you to give evidence under the power which we have to do so." I have read Your Lordship already a judgment in which it was held that if a magistrate did that, it (30)

was/...

was a MOODIE type irregularity which would vitiate the whole proceedings. If a magistrate does it and it vitiates the proceedings, the same must apply to a judge who does it. It would vitiate the proceedings. In such a situation if one of the members of the court, let me say two of the members of the court, subsequently informed counsel for the accused that this has happened, it would be the duty of counsel for the accused to stand up and to say "I have been advised that this happened in Your Lordship's chambers this morning and I ask Your Lordship to quash the proceedings because they are not in accordance with justice" and to refer Your Lordship to the case which I referred Your Lordship to earlier and to the powers which you have and why it is irregular and if in such a situation the judge were to say "This did not happen" and this is a hypothetical situation but we need to put it to test what has happened in this case and the assessors were to say "It did", I would suggest that evidence of what the assessors said would be receivable in evidence and it may be that the consequence of that disagreement between members of the Court as to what did and did not happen, would itself require the judge to discharge the court, because the reason for the discharge would not then be the irregularity, but the subsequent disagreement between members of the court as to what did and did not happen and it would be that which would make it impossible to continue the trial and really, that is what has happened here. The question at the moment is not, and I say so with the greatest respect to Your Lordship, whether Your Lordship's report is correct or Professor Joubert's report is correct. That is not what we are arguing to

Your/...

Your Lordship. The question is that there are facts and if there is a disagreement as to what happened, that in itself creates a situation where the point cannot be decided unless Your Lordship were to hold that even on one version of the facts or the version most favourable to the accused, there was no irregularity.

But one thing I suggest would not be the correct thing to do would be to say that evidence cannot be led because what would then happen is that the accused and the public would perceive the situation to be one in which a particular version of relevant evidence cannot be brought into account and where the judge has become a judge really in a matter in which he has an interest. It is not the type of interest which a judge might have where a recusal application is brought. It is a different type of interest. It is an interest in regard to how he conducted the particular inquiry which was not conducted in open court but which was relevant to the trial.

Your Lordship said or suggested to me that it may be contempt of court to contradict a statement made by a judge as to what happened. I think Your Lordship will see that in the SULIMAN case a statement by the judge who presided as to what happened, was in fact contradicted. The circumstances are different. I accept that immediately because there the Appellate Division said that the judge prepared his report some time after the events and his memory may have failed him, but in fact the Appellate Division acted on facts contrary to what the judge had said in his report and they said this was probably due to a lapse in memory.

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But I do suggest to Your Lordship that the accused are and must in circumstances like this be entitled to have regard to what is communicated to them from a person of standing and a very distinguished lawyer from a very respective name. Why as an accused person must they say "I cannot rely on what he tells me"? And how can they ever be in the position where they feel that they are not entitled top ut before Your Lordship evidence from such a person in regard to an event which they say has nullified the trial and which they say is material to the issue and which indeed if it were to be accepted must, I suggest, be material to the issue. (10)

I ask Your Lordship to think very carefully as to whether it is actually possible to make a ruling on a matter which is of fundamental importance to our case on the irregularity in view of a difference which has arisen between Your Lordship and Professor Joubert and I suggest it cannot possibly be contempt to ask Your Lordfship to bring that under consideration to deal with it in the way Your Lordship would deal with the matter in any case. (20)

Those are our submissions to Your Lordship in relation to this issue.

MNR. DE VILLIERS : U Edele, namens die Staat vra ons dat die saak afstaan tot môre om ons die geleentheid te gee om behoorlik op die punt voor te berei. U Edele sal besef dat benewens die argument wat ons op voorbereid was wat ten opsigte van toelaatbaarheid van die gedeeltes van die verklaring wat reeds voor u is, is hierdie eintlik 'n nuwe verwikkeling en het U Edele ook van die Bank aan My Geleerde Vriend sekere vrae gestel in verband met die toelaatbaarheid (30)

van/...

van 'n verklaring wat strydig is met 'n verklaring van die Hof. Dit is 'n nuwe aspek wat ons glad nie die geleentheid gegee is of gehad het om te oorweeg nie en ons sou graag ernstige aandag daaraan wou gee en U Edele behulpsaam wees om sover as wat dit moontlik is gesag in die verband voor te lê.

MR CHASKALSON : I do not mind. I also have had to argue, Your Lordship required me to argue and I attempted to do so to the best of my ability at very short notice. I can understand that My Learned Friend, though he took the (10) objection, may wish more time to consider. That is obviously a matter of great importance and one on which Your Lordship should be fully assisted by counsel.

COURT : No doubt you can also unearth some further authorities on the subject.

MR CHASKALSON : I do not think that anything like this has ever happened before.

COURT ADJOURNS UNTIL 2 APRIL 1987.