13.10. Once the trial judge had taken the step of placing the 'facts' on record it was absolutely incumbent upon him to admit evidence in contradiction thereof. The procedure is analagous to that adopted when an inspection in loco takes place. In this regard it has been stated:

> 'It is important, when an inspection in loco is made, that the record should disclose the nature of the observations of the court. That may be done by means of a statement framed by the court and intimated to the parties who should be given an opportunity of agreeing with it or challenging it and, if they wish, of leading evidence to correct it. Another method, which is sometimes convenient, is for the court to obtain the necessary statement from a witness, who is called, or recalled after the inspection has been made. In such a case, the parties should be allowed to examine the witness in the usual way'.
>
> Kruger v Ludick 1947(3) SA 23 (A) at 31

13.11. The same procedure ought to have been adopted with regard to evidence intended to contradict the trial judge's version of events.

> 'It is clear ... that a presiding officer's personal observations must be conveyed to the parties, who then have the opportunity of agreeing with or challenging such observations. Such a challenge does not in any way impugn the presiding officer's integrity or render his position intolerable'.

Newell v Cronje 1985(4) SA 686 (E) at 697E

13.12. The attitude of the trial judge was that to contradict a judge would put the credibility of the court itself at issue. The circumstances of the present case illustrate how dangerous a supposition this is. It is based upon the premise that judges are always correct. No doubt this is usually true but it cannot be elevated into an inflexible principle. To do so would expose litigants to arbitrary or capricious conduct on the part of judicial officers, and deprive them of the right even to challenge corrupt behaviour.

> 'It is no answer to say that such a case is not likely to arise. It might arise. Nor is it any answer to say that ministers should be trusted not to act oppressively. So should kings. But kings have oppressed notwithstanding'.

Dedlow v Minister of Defence and Provost Marshall 1915 TPD 543 at 561

13.13. It is submitted that the procedure which the trial judge suggested would have been approriate is profoundly inimical to the administration of justice. During the course of argument he stated:

> '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'.
>
> Annexure 'A': Vol 4 p 295 lines 10 - 19

Implicit in this suggestion is that the accused would have to accept such facts, and would not be entitled to rely on anything that Professor Joubert said that was in conflict therewith. Also, that such issues should be resolved privately between counsel and the judge in the absence of the accused.

13.14. The principle of open justice has constantly been affirmed by our courts. In R v Maharaj 1960(4) SA 256 (N), Broome JP stated at 258B - C:

> 'It is a principle of justice as administered in this country that trials must take place in open court and that judicial officers must decide them solely upon evidence heard in open court in the presence of the accused. If that principle is violated, then, quite apart from the question as to whether the accused is manifestly guilty, the proceedings are bad because it might be supposed that justice was being administered in a secret manner instead of in open court. It is elementary

> that a judicial officer should have no communication whatever with either party in a case before him except in the presence of the other, and no communication with any witness except in the presence of both parties'.
>
> Cited with approval in S v Moodie 1961(4) SA 752 (A) at 756H - 757B
>
> S v Rousseau 1979(3) SA 895 (T) at 898F - G
>
> S v Ngcobo 1979(3) SA 1358 (N) at 1359H

In similar vein, Lord Diplock in Harman v Home Office 1983 AC 280 at 303 he says that the reason for the rule is to keep the judges themselves up to the mark - to discipline the judiciary - and at 303d stated:

> 'Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards agains improbity. It keeps the judge himself, while trying, under trial'.

13.15. Although the context of these cases differs from the present, the principle remains the same. From the point of view of the accused, it would have been quite unthinkable for the matter to have been resolved by private discussion in the judge's chambers. Equally, it was wrong for the judge to take the crucial decision that he did on the basis of deliberations conducted privately without notice to the accused and without hearing them.

13.16. The trial court relied upon the case of R v Krasner 1950(2) SA 475 (A) as authority for excluding paragraph 6 of Professor Joubert's second report and the whole of his third report. Krasner's case is not, however, directly in point since it was concerned with the deliberations of a jury.

13.16.1. An assessor is not in the same position as a juror. An assessor who takes the oath forms part of court.
Section 145(4) of the Criminal Procedure Act 51 of 1977

13.16.2. Juries 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 need not have any special qualifications.

13.16.3. Assessors are chosen by the judge by reason of their experience in the administration of justice or skill in any matter which may be considered at the trial.

Section 145(1)(b) of the Criminal Procedure Act 51 of 1977.

13.16.4. Juries had no contact with the outside world at all. They could only separate with the leave of the judge. Assessors, however, are free to come and go as they please between sittings of the court.

13.17. If the analogy with the jury is applicable to a case such as the present, the scope of the rule against the admissibility of jurors' statements must be understood. It is not an absolute rule, although this was the standpoint adopted by the trial judge.

Annexure 'A': Vol 5 p 362 lines 19 - 28

13.18. The rule, which derives from English law is that evidence of a juror is inadmissible to impeach a verdict to which the juror has been party. The rule appears principally to be derived from the dictum of Lord Mansfield CJ given more than 200 years ago in Vaise v Delaval [1785] 99 ER 944 and referred to in Krasner's case 481, 484 and 485. The rule was reiterated in a number of other

English decisions referred to in Krasner's case. The modern line of authority begins with Ellis v Deheer [1922] 2 KB 113, referred to in Krasner's case at 482 and 484. The most recent English case which considers the authorities in detail is Nanan v The State [1986] 3 ALL ER 248 (PC).

13.19. In Ellis v Deheer [1922] 2 KB 113 Atkin LJ articulated the rule at 121 as follows:

> The court does not admit evidence of a juryman as to what took place in the jury room, 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 effect to be'.

After citing this authority, the court in Nanan v The State [1986] 3 ALL ER 248 (PC) at 253 stated:

> 'The same principle applies to discussions between jurymen in the jury box itself. If a juryman disagrees with the verdict pronounced by the foreman of the jury on his behalf, he should express his dissent forthwith: if he does not do so there is a presumption that he assented to it. It follows that, where a verdict has been given in the sight and hearing of an entire jury without any expression of dissent by any member of the jury, the court will not thereafter receive evidence from a member of the jury that he did not in fact agree with the verdict, or that his apparent agreement with the verdict resulted from a misapprehension on his part'.

13.20. The rationale for this rule is twofold: 'the first is the need to ensure that decsions of juries are final; the second is the need to protect jurymen from inducement or pressure either to reveal what has passed in the jury room, or to alter their view'.

Nanan v The State [1986] 3 ALL ER 248 (PC) at 253h

Ellis v Deheer [1922] 2 KB 113 at 121

Boston v W S Bagshaw and Sons [1967] 2 ALL ER 87 at 88

13.21. The rule in these cases is concerned solely with evidence intended to impeach a verdict. Even that rule is subject to exceptions.

13.21.1. Evidence may be given that the verdict was not pronounced in the sight and hearing of one or more members of the jury, who did not in fact agree with that verdict, or may not have done so.

R v Wooler 171 ER 589

Ellis v Deheer [1922] KB 113

Nanan v The State [1986] 3 ALL ER 248 at 254a - b

13.21.2. Evidence may be given that a juryman was not competent to understand the proceedings resulting in a clear miscarriage of justice.
Ras Behari Lal v The King Emperor
[1933] ALL ER 723

In that case, Lord Atkin stated:

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

Ras Behari Lal v The King Emperor has been cited with approval by the Appellate Division.
R v Krasner 1950(2) SA 475 (A) at 482 - 483
S v Moodie 1961(4) SA 752 (A) at 758D - E

13.21.3. And in R v Krasner (supra) at 483 the Appellate Division cites with approval a passage from Hume's Commentaries in which it is said:

> 'To withstand and control any attempt, by any one 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 inclosed till the Court meet, and then dissolve their sederunt and state the reason to the Judge (though it should invalidate the whole proceedings) than to acquiesce in a downright usurpation and injustice'.

13.21.4. The list of exceptions to the rule is not closed.

Nanan v The State [1986] 3 ALL ER 248 (PC) at 254e - f

13.21.5. The Appellate Division has in fact had regard to an affidavit by an assessor, other than for the purpose of impeaching a verdict.

R v Matsego 1956(3) SA 411 (A) at 417E

The court referred to Krasner's case (at 418F) but in a different context. It is clear, however, that the court was aware of the case and did not regard the principle enunciated therein as applying to a situation where an affidavit from an assessor was used for purposes other than the impeachment of a verdict.

13.21.6. The rule against the admissibility of a juror's testimony in order to impeach the verdict has no application to the present case. The facts deposed to in Professor Joubert's affidavits were collateral to the issues in the trial. In relation to his dismissal, Professor Joubert was the subject of an investigation and not the trier of an issue. The rule relating to the impeachment of verdicts by juror testimony cannot be extended to exclude evidence such as that tendered in the present case, which is materially relevant for other purposes.

14. THE IMPLICATIONS OF THE RULINGS CONCERNING THE ADMISSIBILITY OF PROFESSOR JOUBERT'S REPORTS

14.1. Professor Joubert's third report, and paragraph 6 of his second report, both came to the attention of the accused. The trial judge refused to look at the third report notwithstanding the fact that he knew it to contain matter which the accused proposed to rely upon in support of the recusal application.

Annexure 'A': Vol 4 p 302 line 20 - 303 line 7

14.2. For the reasons already stated, it is submitted that Professor Joubert's third report as well as paragraph 6 of his second report is admissible. It is submitted that an accused person, having read Professor Joubert's various reports together with the statement made by the trial judge, could reasonably believe that he would not receive a fair trial. It is, 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

> Lord Hewart in R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256 at 259

The way the trial judge dealt with the recusal of Professor Joubert, and later with the reports by him that were tendered in evidence, and generally his reponse to the applications for quashing and recusal, as well as the contents of Professor Joubert's reports, particularly his third report which the judge refused to read, could reasonably have led the accused to doubt the objectivity of the judge, and the fairness of their trial.

14.3. On the evidence and facts which were admitted, it appears beyond dispute that -

14.3.1. There were differences of opinion between Professor Joubert and the presiding judge of a political nature which were often 'sharp';

14.3.2. There were differences of opinion between the judge and Professor Joubert in regard to the evaluation of the evidence. The judge perceived Professor Joubert as identifying himself with the defence case. Professor Joubert perceived his presence as an essential countervailing influence to the balance and orientation of the judge towards issues of great importance.

14.3.3. There is a material conflict between the judge and Professor Joubert in regard to the events leading up to the discharge of Professor Joubert, and serious allegations concerning the judge's attitude to the case and his attitude to the accused were made by Professor Joubert in this third report, which was seen by the accused.

14.3.4. The effect of the judge's ruling concerning the admissibility of Professor Joubert's various reports and the status of the statement made by him was to make that statement definitive and not susceptible to contradiction. That made it impossible for the accused to proceed with the recusal application;

14.3.5. By ruling the third report to be inadmissible, and refusing to read it, the trial judge precluded himself from having regard to Professor Joubert's answers, and precluded himself from having regard to what had been brought to the attention of the accused in that report.

14.4. Since the trial judge considered the first report as having placed the continuation of the trial in jeopardy, had he read and considered the third report he may (and we submit should) have recused himself and stopped the proceedings.

14.5. Since the rulings bear directly upon the fairness of the trial, and the propriety of the trial

judge continuing to hear the case, the ireegularities fall into the first category of irregularities mentioned in S v Moodie (supra), and have per se, resulted in a failure of justice.

15. CONCLUSION

15.1. It is submitted, therefore, that there is a reasonable prospect that special entries 1 and 2 will be upheld, and if upheld, that the convictions and sentences will be set aside.

15.2. It is further submitted that for the purposes of determining the two questions, namely

(a) Did the judge commit irregularities as set out in special entries 1 and 2; and if so

(b) Do such irregularities constitute per se a failure of justice.

It is not necessary for a full reord to be prepared, and that all information reasonably required for the purpose of such decisions is contained in Annexure 'A'.

15.3. The Petitioners accordingly ask that compliance with the provisions of Appeal Rule of Court 5 be excused, and that a direction be made in accordance with prayers 1 and 2 of the petition. Further, that the Court dealing with special entries 1 and 2 give such directions as may be necessary for the further prosecution of the appeal, in the event of its ruling against the Petitioners on either of the issues referred to in sub-paragraph (a) and (b) of paragraph 15.2 above.

15.4. Should this relief be refused, the Court will be asked to give directions in regard to the further prosecution of the appeal, and to fix a time within which a petition for leave to appeal on grounds not granted by the trial judge, should be lodged.

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K S TIP
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COUNSEL FOR THE PETITIONERS

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION) **CASE NO: 54/89**

In the matter between:

GCINUMUZI PETRUS MALINDI	First Petitioner
TSIETSI DAVID MPHUTHI	Second Petitioner
NAPHTALI MBUTI NKOPANE	Third Petitioner
TEBELLO EPHRAIM RAMAKGULA	Fourth Petitioner
SEKWATI JOHN MAKOENA	Fifth Petitioner
SERAME JACOB HLANYANE	Sixth Petitioner
THOMAS MADIKWE MANTHATA	Seventh Petitioner
HLABENG SAM MATLOLE	Eighth Petitioner
POPO SIMON MOLEFE	Ninth Petitioner
MOSIUOA GERARD PATRICK LEKOTA	Tenth Petitioner
MOSES MABOKELA CHIKANE	Eleventh Petitioner

and

THE STATE	Respondent

In re: The State v Patrick Mabuya Baleka and Others
(TPD CASE NO. 482/85)

LIST OF AUTHORITIES IN PETITIONER'S MAIN HEADS OF ARGUMENT

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