background. Its loudness varies with the activity of the automatic gain control. It was put to Dr Jansen that this was either background singing or a consequence of a bad erasure. This is the evidence which Dr Jansen gave under cross-examination.

In re-examination Dr Jansen reiterated that the tapes in the second category have not been tampered with and that there are no indications that intentional alterations were made on the original tapes.

At this stage I must make two further observations (10) in connection with the evidence of Dr Jansen. The first is that he did his tests on mono machines as the tapes had been recorded on mono machines and the second is that his evidence-in-chief is to be found to a large extent in the exhibits which he handed in which are EXHIBITS ABD 1 to ABD 6.6.

As appears from my judgment his evidence was also supported by certain photographs.

As appears from what I have said the defence case as put in cross-examination is as follows. EXHIBIT 1 is a (20) copy. EXHIBITS 6 and 7 might be copies and might be edited, but the defence is uncertain about that. EXHIBIT 12 might be a copy, but the defence is uncertain about it. EXHIBIT 14 has places where edits could be hidden. EXHIBIT 31 has a number of insert erasures. At one spot there are three efforts at erasure and at one spot there is an off/on switch.

It should further be mentioned that the defence made a series of admissions in EXHIBIT AAS 10 relating to the whereabouts and handling of the tapes. These can be summarised (30)

as/...

as follows. The tapes in the second category were not tampered with or altered in any way, since leaving the possession of the original operator of the recording machine until they were produced in court. EXHIBITS 1(1) to (7) were not tampered with or altered in any manner since their attachment.

The evidence of Mr Atkinson the expert for the defence on the tape recordings was presented in an unusual way. He handed in a report EXHIBIT ABD 8.3 which deals extensively with his experience, expertise, brief and equipment used by him. It contains under the heading Preliminary Findings statements like the following.

"Paragraph 2.1 :

A number of technical explanations given in the ABD series are found to be not in accordance with what was on the tape recording and these were taken up with the State's technical expert."

Only one example is given.

"Paragraph 3 :

A number of obvious and audible interruptions were present in the recordings. Many had not been correctly identified and typical cases only were raised with the State's technical expert. Great care should be exercised at these points, because the interruption may conceal an otherwise unacceptable edit."

No examples are given.

"Paragraph 8.1 :

The majority of the recordings investigated commence in the 'leader tape' and many end in the 'leader tape'."

The exhibit numbers of the tapes where this feature is to

be found are not given.

In viva voce evidence-in-chief these bald statements were not substantiated and I was surprised to hear the witness merely stating that he confirmed what defence counsel had put to Dr Jansen in cross-examination, adding that there had been a loss in the transfer of the technical information. That cross-examination had stretched over some eight days.

No doubt this procedure was adopted by counsel to save time which in a case like this, which has lasted for many months is a laudable motive. This procedure is, however, (10) not to be countenanced.

The opinion of an expert is only of assistance to the court where it is properly motivated and given with sufficient detail to enable the Court to evaluate it. Where an expert for one party has placed before the court detailed evidence, as Dr Jansen has done in respect of each tape recording in reports ABD 4, ABD 5 and ABD 6, consisting of some 44 pages on which he was cross-examined for days, it is adequate for the other party's expert to fall back on mere generalisation and merely confirm what was put by counsel in cross-examination. (20) In that way the expert does not put his evidence across in his own words viva voce, but hides behind the words of counsel. The phraseology of counsel may be more elegant, but is not necessary exactly what the witness had in mind. It may be a shade different, but the witness may not have noticed that or may be diffident about correcting counsel. Furthermore, the manner in which this evidence is adduced compels the court to wade through lengthy cross-examination to ascertain precisely what the point is which the defence intended to make, instead of having it precisely put by the defence expert in his (30)

evidence-in-chief.

The evidence of Mr Atkinson is, generally speaking, that erasures after the fact (that is recordings over existing recordings) interruptions, drop-outs (that is where sound fades) clanks, bangs, level changes and changes in the nature of applause, could all be signs of or places to hide signs of editing of tape recordings and that all these features occur in the tapes before court. Furthermore where recordings commence and end on leader tape it is not possible to ascertain whether they are originals or copies and it is common cause that a copy can mask tampering of all sorts.

In his evidence Mr Atkinson made certain general observations.

(1) Magnetic recordings may be copied and altered and materially altered in such a way that even experts cannot detect the alteration or detect the evidence of the copy ing.

(2) It is not possible to determine from an examination of a tape recording alone whether it is an original or not.

(3) It may be possible to prove that a tape recording is definitely a copy if definite signs of the copy process can be found.

(4) If no obvious signs of a copy are found, that does not mean that the recording is not a copy. It simply means that no signs were found.

(5) Editing and tampering can be carried out in such a way that evidence may be found, but it can also be carried out in such a way that evidence may not be found.

(6) There may exist on a recording examples of subtle tampering as well as obvious stops and starts and erasures.

(7) It/...

(7) It is not enough to consider only the obvious interruptions. If anything, more attention must be given to the less obvious signs.

(8) A great deal of time is required to investigate a tape recording fully for possible signs of tampering and the task is practically impossible without a great deal of background information and access to equipment allegedly used to make the recording. Even in those cases where the original equipment can be obtained, it may still prove impossible to come to the conclusion due to (10) the difficulty of controlling any variables present at the time the recording was alleged to have been made.

Mr Atkinson concluded :

"(1) It is entirely possible that the recordings are copies even though obvious signs may not have been detected.

(2) The majority of the recordings have been altered since the recording was prepared. Note further that the fact that a recording

(20)

(3) Tampering may well have been carried out, but simply not be apparent on limited investigation which is all that these recordings have received."

Mr Atkinson therefore concluded that it was not possible for him to form an opinion as to originality or lack of tampering.

It will be noted that I have not expressed any views on the relative expertise of Dr Jansen and Mr Atkinson or the criticism voiced during cross-examination by counsel (30)

on the evidence of Dr Jansen. Neither have I evaluated their evidence. I have merely set it out rather fully to illustrate the type of problems encountered with the tapes before court.

On my approach which I set out hereunder, the weight of the evidence of these experts is a matter for the court consisting of judge and assessors to decide upon at the end of the case. This observation also applies to the question whether interruptions and peculiarities in the tape recordings are material and whether the tapes are originals or trustworthy copies or not.

What struck me as curious in these proceedings was that the defence would employ a costly expert to examine the tape laboriously for signs of possible tampering, without ascertaining from some if not all of the speakers on the tape-recorded meetings, which included some of the accused, whether their speeches have been altered and in which respects. Had this been done, the experts would have been able to concentrate their efforts on those spots and a lot of time and effort would have been saved. Are we to assume from the absence of any allegation to that effect in cross-examination that it is not the defence case that there is in fact a false version of the meetings before Court? It would seem so. In that case, we have the incongruous situation that the law of evidence which should be designed to facilitate court proceedings in quest of the truth is in fact utilised to stultify those proceedings by preventing the use of relevant evidence.

On 3 June 1986 I gave a judgment on the admissibility of twelve video tape recordings. Two days later the

learned/...

learned judge-president of the Natal Provincial Division ruled on the admissibility of certain audio and video tape recordings in S v RAMGOBIN AND OTHERS, as yet unreported. Our conclusions differ.

The defence argued that the latter judgment should be followed, whereas the state rested its case on my judgment on the videos. MILNE, J.P. held in respect of the admissibility of tape recordings that he was bound by the decision in R v SINGH AND ANOTHER 1975(1) SA 330 N, where it was held at 333 G that where the issue of a possible fabrication (10) is raised, it has to be established that the tape recordings produced are the originals. If it is likely that they are not the originals and therefore not the primary and best evidence the court will reject them. Accordingly, if there exists a reasonable possibility of interference with the tape recordings, then they are not admissible in evidence.

The learned judge-president supported that conclusion and held that before the tapes would be admissible the State had to prove beyond reasonable doubt :

(1) that the recordings before court related to meetings (20) and conversations alleged in the indictment;

(2) by way of testimony of a witness who saw and heard the events allegedly recorded, that the recording accurately reflects those events; and

(3) that the tapes are the original recordings and have not been interfered with in any way, whether by mistake or otherwise, since the original recordings were made.

This stringent test for admissibility is laid down by the learned judge-president because tape recordings "can be altered (and materially altered) in such a way that even (30)

experts cannot detect the alteration". For this reason tape recordings are said to be dangerous from an evidential point of view unless certain precautions are taken. These are reflected in the tests set out above.

I respectfully differ. The above approach is equally applicable to viva voce evidence. It would be absurd to refuse to hear a witness because he might turn out to be a liar. Of course, a witness can be cross-examined. On the other hand, the evidence of a tape recording can be gainsaid by calling the speakers themselves or members of the audience to cast doubt on its authenticity and veracity. An accused does not stand helplessly tied to the stake of a tape recording.

The approach advocated above leads to the unacceptable situation that a court refuses to consider relevant evidence because it might be fabricated, where the correctness of that evidence is not even placed in issue in cross-examination, but only its admissibility. At no stage in our case was it put to any witness that the tapes are not a true reflection of what happened at the meetings. Cross-examination established that the witnesses do not remember the contents of the speeches, which was clear from the start. It was not put in cross-examination that the tapes had been tampered with. It was not disputed in cross-examination that the tapes relate to the meetings mentioned. And yet, I am asked on the basis of the test laid down by the learned judge-president to exclude this evidence from consideration by my assessors and myself when all the evidence is weighed at the end of the case. In my view this would lead to a miscarriage of justice in this case.

I have dealt in my judgment on the admissibility of the video tapes with S v SINGH (supra). I will not repeat what I have said there.

I have considerable difficulty with the requirement that the state has to prove admissibility of tape recordings beyond reasonable doubt. In R v MAQSUD ALI 1965(1) AllER the Court of Criminal Appeal did not lay down such a test. The matter was left open in R v STEVENSON 1971 (1) AllER by KILNER BROWN, J. at 680 D. The learned judge did, however, express strong views on the procedure which was (10) followed by MILNE, J.P. and myself. He said at page 679 G :

"One further general proposition which must not be overlooked, is that although it is for the judge to rule on admissibility, it is for the jury to decide on the truth or falsity of any piece of evidence ."

And at 608 :

"... as a general rule it seems to me to be highly undesirable and indeed wrong for such an investigation" (that is of a technical nature on admissibility) "to take place before the judge. If it is regarded as a general practice (20) it would lead to the ludicrous situation that in every case where an accused person said that the prosecution evidence is fabricated, the judge would be called on to usurp the function of the jury."

In R v ROBSON 1972(2) AllER 699 in the Central Criminal Court SHAW, J. held at 701 E that in considering admissibility

".. the judge is required to do no more than to satisfy himself that a prima facie case of originality has been made out by evidence which defines and describes the provenance and history of the recordings up to the (30)

moment of production in court. If that evidence appears to remain intact after cross-examination, it is not incumbent on him to hear and weigh other evidence which might controvert the prima facie case. To embark on such an enquiry seems to me to trespass on the ultimate function of the jury. It is true that in determining whether an alleged confession is admissible or not, the judge has the duty of deciding a contentious issue and he has to apply the same criteria as a jury would have to do, but this is an anomolous case deriving (10) from its own special history and from considerations peculiar to confessions."

As I stated in my judgment on the videos I hold the view that the documentary best evidence rule should not be extended to tape recordings. Should I be wrong and should that rule be applied, however, I would respectfully agree that no more than prima facie evidence of originality be required at the stage where admissibility is to be decided.

I agree that it must be shown that the recordings relate to matters which are in issue before the court. (20) This is another way of saying that they must be relevant. I respectfully disagree that relevancy must be proved beyond reasonable doubt. All that is needed in this respect at this stage of the proceedings is that it be shown that prima facie the material tendered as evidence has some probative force. A link has to be forged between the tape and the meeting to which it is said to relate. That link can, of course, be evident from the contents of the tape recording itself.

I further respectfully disagree with the view that before the tape recording is admissible, a witness has to testify (30)

that he saw and heard the events allegedly recorded and that the recording accurately reflects those events. This approach relegates the evidence of tape and video recordings to a role which is merely corroborative and then only to a limited extent. Obviously the state will have to convince the court of the reliability and accuracy of the tape recordings. I fail to see, however, why that has to be done before the final argument at the end of the case. I further fail to appreciate why that proof of reliability and accuracy can only be furnished by viva voce evidence of a witness (10) who saw and heard the events recorded. Surely, circumstantial evidence might, in a given case, lead to the same conclusion. I do not support the view of the learned judge-president that at the stage where admissibility is to be decided upon it has to be proved beyond reasonable doubt that the tapes are originals. As I pointed out in my judgment on the video tapes that requirement flows from the equation of tapes with documents and the application of the best evidence rule to the former. I could find no ground or authority in our law for this approach. (20)

I can see no objection to the use of a copy provided the court is satisfied that it accurately reflects what was recorded.

The proposition of the learned judge-president that it has to be proved that the tapes have not been interfered with in any way, whether by mistake or otherwise, since the original recording was made, is in my respectful opinion too widely stated. An example will illustrate this.

In the case of EXHIBIT 7(2) Major Benjamin, when replaying the tape inadvertently pressed the recording button. (30)

This resulted in a deletion of a short portion of the existing recording. On the strength of the proposition set out above, this interference will cause the whole tape to be inadmissible, without any room for the court to determine whether this interference materially affects the recording as a whole. To me this looks like throwing out the child with the bath water.

In my view a much sounder approach would be to deal with each interference, stoppage, interruption and fading of sound on its merits, determine whether it is material and (10) whether it amounts to tampering and thereafter ask the question whether the state has proved that the whole tape or a particular portion of it on which the state relies is reliable and accurate. This question has to be answered by judge and assessors at the end of the case. I will not at this stage usurp that function.

Even if a tape through faulty recording or otherwise is partly unintelligible, it may be that in a given case the court may be satisfied that the balance of the recording is reliable. No hard and fast rule should be laid down. (20)

In R v W 1975 (3) SA 841 T at 843 A it was stated that a photograph or film does not have to measure up to some theoretical and possibly unattainable standard of perfection as a record, before it can be admitted as evidence. The same can, in my view, be said of tape recordings.

The above remarks are made after having "had the privilege, or burden, of listening to extensive expert evidence on tape recordings," and their fallibility.

The learned judge-president referred to American Law Reports, second series (1958) volume 58 page 1027, third series (1974) page (30)

606 and volume 60 paragraph 11 and 12, fourth series (1985) page 817, where reference is made to rules prescribed for testing the admissibility of recordings. They are :

(1) a showing that the recording device was capable of taking testimony;

(2) a showing that the operator of the device was competent;

(3) establishment of the authenticity of the recording;

(4) a showing that changes, additions or deletions have not been made;

(5) a showing of the manner of the preservation of the recording;

(6) identification of the speakers; and

(7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

I would hesitate to transplant this American species of the law of evidence into South African soil. In my judgment on the admissibility of video recordings I referred to the particular requirements of their jury system. In my view, apart from identification which may be a way of proving relevance, the rest of the above rules should not be pre-requisites to admissibility. I express no opinion on rule 7 which is not applicable to this case.

It follows from what I have said above that I deal with tape recordings as I would deal with any other type of real evidence tendered where its admissibility is disputed. The test is whether it is relevant. It will be relevant if it has probative value. It will only have probative value if it is linked to the issues to be decided. That link will often have to be supplied by evidence of identification of voices on the tape, where the identity of a speaker is

in issue. This proof of relevancy need only be prima facie proof. Consequently no trial-within-a-trial should be held on the question of admissibility as the defence will, apart from contesting this evidence by cross-examination, not be entitled to lead any evidence on this issue at this stage. The defence can canvass the matter fully when it presents its case.

In the instant case I expressed some reservations on the calling of Mr Atkinson by the defence out of turn at this stage. I allowed this procedure as it was also followed (10) in S v RAMGOBIN (supra) and to enable the defence to present its case on admissibility fully.

In the light of my remarks set out above, the caling of Mr Atkinson at this stage of the procedure was incorrect. His evidence will, of course, be considered with all the other evidence at the end of the case.

The above approach does not mean that sight is lost of the dangers inherent in tape recordings. All these dangers have to be duly weighed when the question is considered at the end of the case whether the state has proved that the (20) tape recordings are reliable. That decision will be reached on all the evidence then available which includes that of the accused, should they give evidence. Only then will the court know which portions of the tape recordings are disputed, whereas at present the defence is merely indulging in shadow boxing.

During the proceedings before me several features were indicated which theoretically might indicate that a tape had been tampered with. The defence expert was not prepared to state this as a fact. It was merely put forward in an (30)

attempt/...

attempt to cast doubt on the tapes during the hearing on admissibility, but it was never put that the tapes were not materially faithful recordings of what happened at the meetings. In fact on behalf of accused no. 19 and no. 20 who attended and spoke at some of the meetings it was not disputed in cross-examination that the tapes correctly record what they said. What the defence in effect attempts to do is to nullify material evidence without disputing its correctness. I do not think that the law of evidence is intended to create such a travesty of justice. (10)

On the approach which I adopt the real issue, namely whetherthe tapes are a true record of the meetings concerned, will be dealt with without a prolix theoretical debate on possibilities which have no basis in reality.

The tape recordings before court are clearly relevant. The matters raised in cross-examintion of Dr Jansen and the evidence of the defence expert Mr Atkinson will be considered at the end of the case. The objection against the admission of the tape recordings EXHIBITS 1(1) to (7), 6, 7(1) and (2), 12(1) and (2), 14(1) and (2) and 311(1) and (2) is rejected.

- - - - - - - - - - -

Lubbe Recordings/Pretoria/MCL Case No. CC 482/1985

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DELMAS

1986-09-18

THE STATE

versus

P.M. BALEKA AND 21 OTHERS

JUDGMENT ON APPLICATION FOR RECALL OF WITNESS IC NO. 8

K465.57 VAN DIJKHORST, J. The defence applied for the recall of (10) the witness I C no. 8. The facts are these:

His evidence-in-chief in this court lasted two days, 4 and 5 February. On the latter day, only part of the day was utilised. He was cross-examined on 6, 7, 10, 11, 12 and 13 February. On 6 February only part of the day was utilised. After he had completed his evidence in this court, the trial of S v MASHELA and 9 others started in Pretoria before VAN DER WALT, J. Those accused stood trial on a charge of murdering Caeser Motjeane, one of the deceased in the indictment in this case before us. I C no. 8 was called by the state (20) as a witness. The accused were represented by counsel instructed by one of the attorneys for the accused in this trial. I uplifted the embargo on the record of the evidence of I C no. 8 at the request of counsel in Mashela's case to enable him to use it in cross-examination there. That

he /....

he did. The evidence-in-chief was given on 19 and 20 February 1986 and he was cross-examined there on 24,25 and 26 February 1986.

Now it is alleged that there are certain material discrepancies between the evidence of I C no. 8 in that case and in this case. That is the basis for the application for his recall.

Why this application is brought only now when the state has called its last witness, nearly seven months after he gave his evidence in the Mashela case, is not explained. (10) This application is brought under Section 167 of the Criminal Procedure Act no. 51 of 1977. This is not a new section. Its predecessors were Section 210 of Act 56 of 1955 and Section 247 of Act 31 of 1917. Before that the principle that a court had a discretion to call or recall a witness where it was in the interests of justice to do so, was recognised in our courts. See R v GABRIEL 29 1908 NLR 570 and R v CONRAD COHEN AND 4 OTHERS 20 SC 664.

In terms of Section 167 the court has a duty to call or recall a witness if his evidence appears to the court (20) essential to the just decision of the case. The court may in any event, without holding the view that the evidence of such witness is essential, take that step. R v OMAR 1935 AD 230 and R v HEPWORTH 1928 AD 265 In the latter case CURLEWIS, J.A. found it

> "somewhat difficult to distinguish the first portion of this section from the second portion, to say when discretion ceases and when the duty begins, because a judge is not likely to exercise his discretion under the first portion of the section unless he thinks (30)

that it is essential to the just decision of the case." In R v MAJOSI AND OTHERS 1956 (1) SA 167 at 172 MILNE, J. did not have that difficulty and stated that the distinction lay between essentiality and desirability of the evidence for the purpose of arriving at a just decision. WYNNE, J. held in R v IMPEY AND ANOTHER 1960 (4) SA 556 at 562 A that the wide powers under Section 210 must be sparingly and cautiously exercised and should not be used to built up a case for the prosecution or to rebut a defence, such as that of an alibi. (10)

A witness may not be called for the purpose of testing the credibility of another witness on any point entirely irrelevant to the issue. R v IMPEY AND ANOTHER supra 562 B; SINGH v R 1941 (NPD) 11; R v HENDRICKS 1952 (1) SA 138 C; R v SAKEYU 1957 (3) SA 198 (FC) 200 A.

In the conduct of the trial which includes the decision whether to apply Section 167 or not, the judge must see to it that justice is done. R v HEPWORTH supra 277 That is the test which I will apply.

Counsel for the defence referred me to the conflicting (20) decisions of S v KONDILE 1974 (3) SA 774 (Transkei) at 775 D and S v M 1976 (4) SA 8 (T) at 10 H. He submitted, however, that his application fell squarely within the dictum of R v MAKHUDU 1953 (4) SA 143 (T) at 144 D.

As I am bound by the two Transvaal decisions, I need not express an opinion on the Transkei judgment. The two Transvaal decisions, both consisting of benches of two judges, differ, however. In R v MAKHUDU supra BLACKWELL, J. said the following at 144 D :

"This question of recalling a crown witness for cross- (30)

examination came before my brother STEYN and myself on 31 July in the case of MONOSI v REGINA 1953 (1) PH H131 in which much the same circumstances existed and I expressed the opinion then, and I reiterate it today, that magistrates should not deny a request that a crown witness be recalled for further cross-examination unless they think that such request is unreasonable or obstructive. The whole problem before our courts is to arrive at the truth. You cannot, you should not convict an accused person upon testimony led by the crown until you have probed that testimony to the fullest legitimate degree. It sometimes happens that a point which should be explored immediately in cross-examination is not explored. In the earlier case I have mentioned that it was because of a change of legal advisers, but whatever the reason may be, my own feeling is that courts should lean over backwards, if I may use the phrase, in assisting the defence to bring out any points which they are anxious to explore. No prejudice is suffered by the crown, no harm is done to anybody and all that results is that the accused is given a fairer trial than he might otherwise receive."

This passage should be read against the background of the facts of that case, which were that the magistrate first refused the recall of the witness who had inadvertently not been cross-examined on a certain aspect and thereafter relied heavily on that aspect to convict.

In S v M supra the court did not refer to R v MAKHUDU, The court did, however, refer to S v KONDILE supra and differed as follows at 10 G :

With/...