

trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in terms spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. ...It follows that the conduct of the trial is pre-eminently a matter of public interest. ...More importantly, public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power ...an abuse that, in many cases, would have ramifications beyond the impact upon the parties before the court ...Finally, with some limitations, a trial aims at true and accurate fact-finding. Of course, proper fact-finding is to the benefit of criminal defendants and of the parties in civil proceedings. But other, comparatively urgent, interests are also often at stake. A miscarriage of justice that imprisons an innocent accused also leaves a guilty party at large, a continuing threat to society. Also, mistakes of fact in civil litigation may inflict costs upon others than the plaintiff and defendant. Facilitation of the trial fact-finding process, therefore, is of concern to the public as well as the parties. Publicizing trial proceedings aids accurate fact-finding. Public trials come to the attention of key witnesses unknown to the parties." (- at 593 ff)

13. If it be objected that examples from American jurisprudence are of no value to South Africa, because their constitutional system is so different, such criticism is

not valid in the present instance. In the first place, the right to an open trial is not one which is enshrined in the American Constitution. It was found to be implicit, however, in other constitutional guarantees. By contrast, in South African law, the right to an open hearing, is guaranteed in section 152 of the Criminal Procedure Act. Secondly, the Richmond Newspaper's case (supra) does not state that the right to an open trial is absolute. The approach of the court clearly recognizes that there may well be circumstances justifying the hearing of portions of a trial behind closed doors. The merit of the Richmond Newspaper's case lies in the meticulous approach by the court to the whole question of hearings in open court. South African courts have in certain instances adopted a similar approach but none has gone into the question in the same detail.

A. CHASKALSON S.C.

G. BIZOS S.C.

Z. YACOOB

K.S. TIP

G.J. MARCUS

IN THE SUPREME COURT OF SOUTH AFRICA(TRANSVAAL PROVINCIAL DIVISION)CASE NO.: CC 482/85

DELMAS

1986-05-05

BEFORE:THE HONOURABLE MR JUSTICE VAN DIJKHORSTAND ASSESSORS: MR W.F. KRÜGEL (10)PROF. W.A. JOUBERTTHE STATE versus:PATRICK MABUYA BALEKA AND 21 OTHERSO R D E R

VAN DIJKHORST, J.: My attention has been directed to two pages of the Weekly Mail of 2 May 1986. On page 9 of this publication, which is a weekly newspaper, volume 2 no. 17, I find the following:

"A Judge's own notes on police activities:

Notes made by a judge while watching video footage shown by lawyers for the treason trial in Delmas throw a (20) remarkable light on police action during the September 1984 unrest. Lawyers submitted the film to support their contention that violence after a mass funeral in Evaton was the result of police action. What follows is presiding Judge J. van Dijkhorst's record of the video footage: 'A group of people are seen running to the side of the road, presumably trying to get away from their bus which has been stopped. One of the hippos veers right to cut them off. The cameraman then records (30) the following incidents. Police sjambokking through

windows/..

windows, no obvious reason, the Brigadier J. Viljoen, in charge of riot control in the Vaal during September 1984, is seen, his back facing the camera, he is waving his arms and presumably says something to the police sjambokking at the windows because they stop. He then turns and walks out of view at which stage police continue sjambokking at the windows. A person is then struck in the face by a policeman. A policeman is seen sjambokking perhaps three people in the top of the bus. They talk to him and he stops. However, when he sees (10) another policeman climbing up he suddenly starts sjambokking again. You then see a person being kicked on the ground. You then see a youth running away, jumping over a fence and being hauled back. You then see the aforesaid two policemen on top of the bus forcing a person off the top and taking a swipe at his hands with batons as he is about to drop. You then see a person in grey pants and a white shirt in the custody of a policeman. A Black policeman comes up and starts to assault him. You then see the colonel on the top of (20) the Land-Rover. His smile is questionable. You again see the person in the grey pants and white shirt being taken to where a number of people have been grouped on the side of the road, seated. On his way you see him being struck on the head by the butt of a rifle. Reaching the group he is tripped and almost immediately thereafter he is again struck by a baton. What did this poor fellow do to deserve all this attention?"

I wish to place on record:

1. That what is stated here is false. These are not my (30) notes.

2. I/..

2. I did not make any notes on this video film available to anyone, nor did anyone have access to my notes.
3. I will not comment on the correctness of the contents of these alleged notes as the matter is sub judice. It is not to be inferred from my silence on this point that the notes are correct.

I deplore the fact that by this report the public is led to believe that I acted irregularly by making my notes, which are not part of the record, available to the press and that while (10) the case is still being heard and without having given counsel an opportunity to address the Court on the correctness of my observations.

There are further matters in this publication which require comment. On page 8 there is a discussion as to the effect the Van der Walt Commission's report would have on the outcome of this case. It is stated as follows:

"One wonders if the protracted Delmas trial might have taken a different route had the findings been made available earlier." (20)

On page 9 the following appears:

"New evidence which could shake the State's case includes the following .."

and then certain aspects of the evidence are set out. There are other matters which are of not that importance that I need deal with them now.

Prima facie it appears to me that this is a matter where there is contempt of Court. A rule nisi is hereby issued calling upon the editor of the Weekly Mail and the reporter, Joanne Bekker, to show cause in this Court on Tuesday, 6 May 1986, at 09h00 why they should not be convicted of contempt of court. (30)

My/..

My registrar is directed telephonically to inform the editor of the Weekly Mail immediately of this order and the legal representatives of the accused are requested by me to do the same as far as the editor is concerned and the reporter, Joanne Bekker. I will deal with this matter tomorrow morning at 09h00.

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IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC482/85

DELMAS

1986-05-06

BEFORE:

THE HONOURABLE MR JUSTICE VAN DIJKHORST

AND ASSESSORS: MR W.F. KRÜGEL (10)

PROF. W.A. JOUBERT

THE STATE versus

PATRICK MABUYA BALEKA AND 21 OTHERS

R U L I N G

VAN DIJKHORST, J.: My ruling is that this witness will give evidence in camera. The press should be informed that they are welcome to attend henceforth on the previous conditions, that the name of the witness and his identity are not to be disclosed under any circumstances.

This witness will be known as in camera witness no. 12. (20)

- - -

HOF/..

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC 482/85

DELMAS

1986-05-07

BEFORE:

THE HONOURABLE MR JUSTICE VAN DIJKHORST

AND ASSESSORS: MR W.F. KRÜGEL (10)

PROF. W.A. JOUBERT

THE STATE versus

PATRICK MABUYA BALEKA AND 21 OTHERS

R U L I N G

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

1. For identification purposes I will hear this evidence to enable me to determine the question of admissibility at a later date.
2. Argument on the admissibility will be heard later, after the State has placed all its evidence before Court, and (20)
3. for practical purposes I will hear the evidence in the presence of my Assessors.

- - - - -

COURT/..

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA(TRANSVAALSE PROVINSIALE AFDELING)SAAKNOMMER: CC 482/85DELMAS

1986-05-15

VOOR: SY EDELE REGTER VAN DIJKHORST EN(10)ASSESSORE: MNR. W.F. KRÜGELPROF. W.A. JOUBERTDIE STAAT teen: PATRICK MABUYA BALEKA EN 21 ANDER

B E V E L

VAN DIJKHORST, R.: Dit word beveel onder artikel 153(2)(b) dat die identiteit van hierdie getuie nie bekend gemaak sal word nie, nie in die hof nie en ook nie deur middel van die pers nie. Verder sal die hof oop wees vir die publiek.

Dit hou natuurlik in, hierdie bevel, dat daar nie vrae (20) gevra sal word wat 'n aanduiding kan gee tot die identiteit van hierdie getuie nie, omdat ons nou nie in camera sit nie, maar die hof oop is vir die publiek.

- - -

IN THE SUPREME COURT OF SOUTH AFRICA(TRANSVAAL PROVINCIAL DIVISION)CASE NO. CC 482/85

DELMAS

1986-05-21

BEFORE: THE HONOURABLE MR JUSTICE VAN DIJKHORST and
ASSESSORS: MR W.F. KRÜGEL (10)
PROF. W.A. JOUBERT

THE STATE versus PATRICK MABUYA BALEKA AND 21 OTHERS

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

VAN DIJKHORST, J.: Mr Kuny, on behalf of the applicants, Anton Paul Harber and Jo-Ann Bekker, applies for leave to appeal to the Appellate Division against the convictions and in the case of Mr Harber against the sentence which I imposed in this matter of the contempt of court.

The grounds are as follows: It is stated - (20)

"1. The Learned Judge erred in holding -

1.1 that the explanations tendered in evidence by the accused and as supported by the evidence of attorney David Dison were unsatisfactory with regard to the portions of the report headed 'A Judge's own notes on police activities';

1.2 that the passages in the article referred to by the Learned Judge in his judgment and to be found at page 8 columns 1 to 2 and page 9 column 5, constitute contempt of court; (30)

1.3 that the second accused, Jo-Ann Bekker, had the

necessary/...

necessary intention as required in law with regard to the writing and publication of these passages referred to in sub-paragraph 1.2 above on pages 8 to 9 of the publication.

2. Findings of law:

2.1 The Learned Judge erred in holding -

2.1.1 that the liability of the press with regard to contempt of court is strict liability and furthermore that mens rea did not constitute an element of the offence; (10)

2.1.2 alternatively that if mens rea constitutes an element of the offence that a more stringent standard applies with regard to the press and the newspaper editor such as the first accused than with regard to any other person.

2.2 The Learned Judge should have held -

2.2.1 that with regard to the portion entitled 'A Judge's own notes on police activities' (20) the accused, being the editor and journalist respectively, had published this portion of the article erroneously but in good faith believing them to have been the judge's notes which had been recorded on the record of the proceedings then before him and that they accordingly had no mens rea as required in law to commit contempt;

2.2.2 that with regard to the passages referred to in paragraph 1.2 above, namely those (30) appearing on page 8 columns 1 to 2 and page 9 column/..

column 5

- (a) these passages had not constituted contempt;
- (b) the accused had no intention in writing and publishing such passages to bring the proceedings into contempt by commenting upon or anticipating in any respect whatsoever the ultimate findings of the Court in the trial in question.

3. The sentence:

The sentence imposed upon the first accused, Anton Paul Harber, was in all the circumstances of the case excessive and induces a sense of shock." (10)

As far as grounds 1.1 and 1.2 are concerned, which deal with the findings of fact, I hold that they are without substance. As far as ground 2.1.2 is concerned, what is stated there is factually incorrect. As far as ground 3 is concerned, that is the matter of sentence, in my view the sentence is lenient taking into account that the matter was seen objectively on the basis of strict liability, that being the test which I have applied. In my view to make a scoop out of fictitious judge's notes, is grossly contemptuous. This ground is without merit. (20)

This brings me to ground 2.1.1. In view of the conflicting decisions in the different divisions of the Supreme Court I feel that this aspect, that is the aspect of absolute liability of the press, is clearly arguable and is a matter which should be argued in the Appellate Division. On this ground leave should be granted.

As far as paragraph 1.3 is concerned I would have hesitated to grant leave to Miss Jo-Ann Bekker, had I not granted leave to Anton Paul Harber, but I deem it desirable (30)

that/...

that the whole spectrum of mens rea be placed before the Appellate Division and that this case should not be fettered by a limited leave to appeal and on that basis, therefore, I also grant leave to the second accused, Jo-Ann Bekker, to appeal to the Appellate Division.

It is clear from what I have said that I refuse leave to appeal on sentence.

In the result LEAVE TO APPEAL IS GRANTED TO THE APPELLATE DIVISION TO THE FIRST AND SECOND ACCUSED ON CONVICTION ONLY.
LEAVE TO APPEAL AGAINST SENTENCE IN RESPECT OF THE FIRST (10)
ACCUSED IS REFUSED.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO.: CC 482/85

DELMAS

1986-05-26

BEFORE:

THE HONOURABLE MR JUSTICE VAN DIJKHORST

AND ASSESSORS: MR W.F. KRÜGEL (10)

PROF. W.A. JOUBERT

THE STATE v PATRICK MABUYA BALEKA AND 21 OTHERS

R U L I N G

VAN DIJKHORST, J.: No ruling is made on the validity of the certificate. I rule that on the grounds of public policy questions as to the method by which the original of EXHIBIT 8 was obtained and the identity of the person or persons from which it was obtained are not permissible.

Mr Bizos is requested and allowed to cross- (20)
examine on any other aspect, which includes the making of the copy.

ERNEST/...

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA(TRANSVAALSE PROVINSIALE AFDELING)

DELMAS

1986-06-02

DIE STAAT

teen

PATRICK MABUYA BALEKA EN 21 ANDER

B E V E L (IN CAMERA)

VAN DIJKHORST, R.: Ek gelas dat die getuie in camera (10)
getuig.

Die vorige reëling sal geld.

IN THE SUPREME COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DELMAS

1986-09-10

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

JUDGMENT ON ADMISSIBILITY OF TAPE RECORDINGS

VAN DIJKHORST, J.: The defence objects to the admission of certain tape recordings which the state tenders as (10) proof. These audio magnetic tape recordings fall into two categories. EXHIBITS 1(1) to 1(7) purport to reflect the proceedings at the conference and national launch of the UDF on 20 August 1983. These seven tapes were found by Major H.S. Miles in the flat of Yunus Mohammed, an attorney of Durban, who is attached to the UDF, according to the major's testimony.

The defence admitted in EXHIBIT AAS 4 , amplified by EXHIBIT AAS 6 , that Yunus Mohammed was a regional secretary of the UDF from 20 August 1983 to 5 April 1985 and a member (20) of the national executive committee since the last mentioned date. From March 1985 he has also held office on the regional executive committee of the national region of the UDF. He is alleged by the state to be a co-conspirator.

The/...

The voices of some nine persons speaking on these tapes were identified by witness IC No. 12 from these tapes. A number of other speakers he could not identify.

The police had nothing to do with the recording of these tapes and their origin is unknown. Probably they result from a recording of the proceedings either officially by the organisers of the conference and public meeting or by somebody attending for his own purposes.

According to Dr Jansen, the expert who gave evidence for the state :

(10)

- (1) Four instances were found where a female voice made a short announcement which was recorded on top of the existing recording of the meeting , with the result that that portion of the meeting is wiped off the tape and the announcement is substituted. An example is to be found in the transcript V 1 at page 1, where the words "opening national launching of the UDF August, 20th 1983" are so inserted. Such insertion is called a "slate" by the experts.
- (2) There are a number of instances where the tape recorder (20) was switched off during the proceedings and later switched on again. The duration of non-recording cannot be determined. These interruptions occur, however, during singing of songs, shouting of slogans, asking for nominations or making of announcements and not during the speeches. An example is transcript V 1 page 13 where during the announcement of the names of officials of the UDF there is an interruption. In transcript V 26 page 68 there is an interruption when the chairman puts resolutions to the meeting. In my prima facie (30) opinion/...

opinion these interruptions do not seem to be material.

- (3) During the recording process there were also certain technical problems . At times the sound disappears, either because the microphone was switched off or for reasons like connection problems. There are not many of these interruptions which last more than two seconds. They result in the loss of small portions of the speech.
- (4) EXHIBIT 1(5) side 1 duplicates a portion of what appears on EXHIBIT 1(4) side 2. It is not a copy, but a simultaneous recording of the same proceedings by two (10) microphones and two tape recorders situated at different locations in the hall.
- (5) EXHIBIT 1(3) side 2 is a copy of EXHIBIT 1(7) side 1 and the first portion of side 1 of EXHIBIT 1(4) is a copy of the first portion of side 2 of EXHIBIT 1(1).

In cross-examination of Dr Jansen it was put by the defence that EXHIBITS 1(1) to 1(7) are obviously not originals.

It was put that EXHIBIT 1 was in toto a copy. Dr Jansen disputed this but stated that certain portions are copies. It was put to Dr Jansen that the fact of the discontinuity(20) of the tapes comprising EXHIBIT 1 indicates that they are copies. Dr Jansen's view was, however, that the discontinuity could indicate that there are originals because somebody making a copy would see to it that he does it properly. In an original recording there will not be continuity where the tape is turned over. Dr Jansen did not purport to give a certificate of originality in respect of EXHIBIT 1.

The faults and peculiarities in the tapes EXHIBITS 1(1) to 1(7) which have been mentioned by Dr Jansen are reflected in the transcripts of the proceedings V 1 and V 26 . (30)

It/...

It is clear from these transcripts that the faults and peculiarities abovementioned in no one way can be said to render the speeches and rest of the proceedings unintelligible. On the contrary, when viewed in the context of the whole recording, the said interruptions might well be regarded as insignificant.

The second category of tapes are recordings clandestinely made by the police. A source with microphone and radio transmitter was sent into the meeting or a secret microphone was installed beforehand. In either case the proceedings (10) were taped by a police officer outside the hall. These tapes are EXHIBIT 6, the UDF meeting at Claremont, Cape Town, 26 November 1984; EXHIBITS 7(1) and 7(2), the Krisch Rabillal Commemoration Service at Durban on 25 February 1984; EXHIBITS 12(1) and 12(2), the Huhudi Youth Organisation Meeting at Huhudi on 1 July 1984; EXHIBITS 14(1) and 14(2), the Transvaal Indian Congress Meeting at Selbourne Hall, Johannesburg on 18 July 1984 and EXHIBITS 31(1) and 31(2), the Luthuli Memorial Service at Durban on 24 July 1983.

On EXHIBIT 6, the voices of two speakers were identi-(20) fied by witness IC No. 12. He also identified the voices of two speakers on EXHIBITS 7(1) and (2). Major Benjamin who operated the tape recorder when EXHIBIT 7 was recorded testified that he recognised the voices of three speakers at this meeting, the sound from the hall reaching him directly.

On EXHIBITS 12(1) and (2) the witness I C No. 12 identified the voices of three speakers. One of them is accused no. 20. The defence admitted that accused no. 20 spoke at this meeting. Captain Sons who operated the tape (30) recorder/...

recorder when EXHIBITS 14(1) and (2) were recorded testified that while recording he recognised the voices of four of the speakers of whom two were accused no. 19 and no. 20. It is admitted by the defence that accused no. 19 and no. 20 spoke at this meeting. Warrant Officer Beneke who operated the tape recorder recognised the voice of one speaker when recording EXHIBITS 31(1) and (2). The witness I C No. 12 identified the voices of three speakers from the tape. One of them is accused no. 20. There is an admission by the defence that he spoke at this meeting. (10)

The policemen operating the recording machines testified that they did not intentionally alter the recordings.

Dr Jansen gave expert evidence on behalf of the state in respect of all the exhibits in the second category. On each tape he encountered a number of so-called technical problems. He testified that the presence of these were normal for recordings in the field with normal equipment and often old tapes. The same type of problems are encountered in EXHIBIT 1, UDF Launch and Conference, which tapes were not recorded by the police. (20)

Dr Jansen's evidence on EXHIBIT 6 was as follows. The quality of this recording is reasonable to good. The tape recorder was stopped during the proceedings, once during singing before the meeting and once at the beginning of the speech by the Reverend Chikane. This stoppage was explained by Warrant Officer Nel who has switched the recorder off while waiting for the Reverend Chikane to start speaking and was a bit late in switching it on. The tape recorder was not stopped during the speeches, according to Dr Jansen. There were certain technical problems, (30) consisting/...

consisting of short interruptions in sound as a result of a break in radio transmission, their duration being less than two seconds. This was caused by a faulty connection and does not materially affect the intelligibility of the speech as such. Dr Jansen found no indication that this tape was a reproduction or that the original tape had been altered at any stage or that it had been tampered with in any way. His view is that it is an original unaltered tape.

Dr Jansen was subjected to a very lengthy cross-examination on EXHIBIT 6, lasting more than four days. (10)

It sharply focused on the last part of the tape just before the end after the conclusion of the speech by Dr Boesak. The purpose of the cross-examination was to establish that EXHIBIT 6 is not an original. Dr Jansen was requested to listen again to the last portion of EXHIBIT 6 on stereo phones and also to the beginning of this tape. Having done this, he stated that he stood by his evidence.

In this process it was found that one channel had soft sound on it and one channel noise. He conceded that it was possible that he had not noticed this previously as he did not use additional amplifiers and as he had not listened to the end of the tape on stereo. He stated that for his purpose it had been adequate to record that due to technical problems the rest of the meeting was not properly recorded. It furthermore appeared that the place where he works is noisy. As he had not listened on stereo he did not previously pick up the difference between the two tracks at the end of the tape EXHIBIT 6. As far as the first portion of EXHIBIT 6 was concerned, he stated that he did not hear that the sound got softer there, as (20) (30)

was/...

was put by the defence. He did hear a click, which he did not regard as a switch off of the machine. To determine the cause of this click, one needs access to the actual recorder and know the circumstances under which the recording was made. He presumes that the first part of EXHIBIT 6 was recorded with the microphone of the recording machine itself, that is where the machine stood, and the rest by radio microphone, that is where the speeches were held. In his view the first portion of EXHIBIT 6 is the remnant of a previous recording which could have been made at the testing of (10) this machine. He is of the view that the machine was tested, played back and then started recording. He holds this view as there is no movement of the microphone itself to be perceived in the first part of EXHIBIT 6 and therefore the recording was probably by means of the built-in microphone of the machine itself.

The switching off of the machine at the beginning of the speech of Reverend Chikane which occurs at counter number 017 was dealt with in cross-examination.

His view is that EXHIBIT 6 could be a recording (20) on top of an existing recording, but that it is more probable that it is a stop/start situation at counter 017. He ascertained that all recorders used were official recorders. It is probable that there was a recording on top of the existing recording on EXHIBIT 6 at this stage, either because of a testing procedure or because there had been a previous recording.

It was put to Dr Jansen that the interruption at counter number 017 on EXHIBIT 6 is where the speech as recorded represents a recording over a pre-existing recording. (30)

He/...

Collection Number: AK2117

Collection Name: Delmas Treason Trial, 1985-1989

PUBLISHER:

Publisher: Historical Papers Research Archive, University of the Witwatersrand

Location: Johannesburg

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