MCH 91-3-1-16
SAC 113 31/4

R. v. Madlebe & Ors.

1). Applying for discharge of accused. Argument in fact covers all the accused.

2). By agreement - arguing on specific aspect viz. the notes. Their weakness and admissability. Effect in brown case of deficiencies in notes. There are other aspects - would argue at this stage, complex questions of law + detailed references to record. Latter not complete. Hold over argument on these aspects, if necessary.

3). Deal with the approach of Court at this stage. Court has a discretion - but not a complete one. Must be exercised judicially - the test is whether on all the evidence led a reasonable man might or could convict.

R. v. Mall. 1960 (2) 340. (342 G et seq.) - to Bar.

The main consideration is the nature of the evidence. But if in doubt - as to whether to exercise discretion or not - in other words, on the evidence it is difficult to decide whether or not to grant the application, should have consideration for other factors related to this trial. What has been called, the balance of convenience" a phrase frequently used in the Supreme Court when the Judges are called upon to exercise a judicial discretion.

Will demonstrate, we are confident, that on the evidence Court will not hesitate to discharge

but should the Court be in 2 minds - clearly should uphold the application. Grounds:

a). Large number of accused - trial more than a year - several months in jail. An act of justice to release them, rather than keep them coming to Court for further possible weeks on end - to deal with evidence of most tenuous ~~[illegible]~~ nature.

b). The principal accused - against whom most of the evidence was directed, are no longer on trial. (Werbeloff)

4). Starting off point is reference to the charge sheet.

Common purpose : 3rd May - 30th March. invited persons referred to to break the pass laws. Manner - set out a) & b).

Particulars asked for : provided - annexures "B" to "BB". Speeches alleged to have been made.

b). No evidence other than possession of documents. Nothing to show printing, distribution etc. Most appear - from Jhbg. - could have been posted to accd. Fall away.

5). Left with what has been the major issue all along - the speeches alleged to have been made. It is our contention that the evidence given by the detectives, with the exception of Mr. White, as to what they heard at the meetings, is either:

a). inadmissable or

b). ~~if such~~ subject to such deficiencies as to render it worthless in a Court of law.

A) Admissibility:

Can be regarded from 2 aspects. Either - notes for witness to refresh memory. Or - a direct recording of what was said: admissible in the way a photograph or tape recorder would be.

If a) - then not evidence: merely a means of refreshing memory. (Seems artificial to class under this head - all witnesses agreed: were entirely dependant on the notes.)

Here the exact words or language used are all important. Not as though witnesses have general recollection - refer to notes for details. The notes are not only guide as to what was said. If they are patently unreliable then they cannot be used for purposes of refreshing memory. Evidence should properly be rejected - excluded. But if altered at a stage when witness could not possibly have recalled the exact words - becomes not merely unreliable or weak - rendered unfit for refreshing memory.

If b). - submit, more appropriate - same considerations apply. Will be admissable subject, mutatis mutandis, to the rules governing the admissibility of tape recordings

of speeches.

R. v. Behrman 1957 (1) SA at 439

Issue - admissibility - not value.

5 Rules - first : not tampered with - only relevant conversations.

First, Courts guard jealously against abuse.

Here both these safeguards offended against.

Opportunity for tampering:

a). after meeting

b). at home that evening

c). Before transcripts were typed. Next day.

d). After case started.

On their own admission - were tampered with.

Alterations made at all 4 stages.

Go further: evidence establishes that both re Nhlapo & Sibuta - whole pages were substituted.

Nhlapo: Mr. Haddad's X examin. showed convincingly that entirely re-written notes of one afternoon's speeches.

(i) Neatly written - more neatly even than in neatness test in Court.

(ii). No abbreviations - expect at meeting. Not even PAC.

(iii). No erasures at all.

(iv). "Witness" crossed out "White" next word. Clearly - copying from something.

(v). Not signed - except last page.

Sibuta:

Some pages neat and unsigned. No or only slight alterations.

Others: gross alterations, signed & dated.

[View that whole passages were inserted is strengthened by the fact that although these speeches were made over a period of 10 months - only 1 person was arrested. If the original notes were regarded as being at all reliable by the Police - inconceivable that they would have allowed the law to be broken week in and week out without charging any of the offenders.

Either original notes regarded as worthless or else did not contain passages of incitement now found.].

B: Assuming they are admissible - problem remains whether sufficient weight could be attached to them to say: reasonable man could convict on them. Clearly no.

Apart from above - alterations:

(i) Taken in longhand

(ii) Translated while copied, from Xhosa to English.

(iii). By unlearned men, whose Xhosa is not of the best and whose English is poor. Mhlapo is not even Xhosa-speaking: home language is Sesuto.

(iv). On their own admission -

Mhlapo could have taken down a quarter of what he heard.

Sibuta - less than half.

From comparing the times - speeches, reading notes in Court - less than 1/6.

Letsela less than 1/4.

(vi.) When tested under conditions most favourable, both fared extremely badly. What they took down was:

a) Gibberish
b) In parts quite inaccurate.
c) Hopelessly incomplete.

Each ~~[illegible]~~ recorded a sentence expressing the exact opposite of what was actually read.

(vii). They themselves regarded the purpose of their taking notes to be not the provision of evidence for a Court, but merely to give their superiors an idea of what had been said. i.e. were rough notes. Not approached with the spirit of strictness and accuracy demanded in a Court of Law.

(viii). What was taken down was not continuous sections, but occasional sentences. Gaps.

(ix). The final result - even after being polished up - was largely ~~[illegible]~~ nonsense. Incoherent, and meaningless for the most part.

My learned friend (for State) has acted with characteristic fairness in making concessions ~~for purposes of argument~~ - fairly; wisely too.

Similarly, when it became apparent that the State's case was not making much progress, he wisely called the best of his remaining evidence, and discarded certain witnesses.

I:

One of the results is that the typist who copied the notes was not called - accordingly we have no control for checking the notes against. Another: other witnesses to each meeting. not called - inference: not strengthen.

Evidence of speeches constitutes the incitement - ~~goes to the~~ makes up the very body of the charge. In addition, is vital to the establishment of common purpose. Without having acceptable proof of the contents of the speeches we are in the dark to some extent as to the precise nature and object of the common purpose, ~~as well~~ and completely in the dark as to who associated themselves with it - embraced it.

No record: even now

Have not dealt as yet with Mr. White's evidence. Will say this: purport to be merely extracts of a long speech - the smaller portion. If one compares with Nhlapo's notes - which should contain everything - especially the English which was easier to write down - ~~would think~~ great gaps discrepancies ~~they were different speeches~~. Most of what White wrote down simply does not appear in Sabata's; Nhlapo's version, and where there is some correspondence in subject matter, there is conflict in content. At most - can be used against Molokoti only - would mean convicting on basis of portion of speech only.

Other speakers: how can they be associated if we don't know what they said? Could have

repudiated ; or at least dissociated themselves

for necessity of having the full context -

see R. v. Nkutlo 1950(1) SA.

R. v. Sesidi & Ors 1953(4) at 639

JUBASE.

p. 123. Ltd. IX.
Can't do shorthand.
No special training

p. 140 - Entirely reliant on notes.
Position uncomfortable.

p. 145 - Alter if anything looks wrong before handing over to superior.

p. 147 - Possible I left out whole sentences.

p. 148 - "Polished up notes?" - checked - gave to superior.

Test: Check copies.

A. By Accd

1. - Altered notes when with typist.
20 - Admits making mistakes in writing down.
40 - Altered notes at a later stage because I saw mistakes and knew the speaker had
41 not said them.
42 - By P.P.: notes by another Detective of meeting on May 3rd.
46 et seq. Test by Accd. 10.
Shows lack of knowledge of English.
56-7. Mistake re identity - admitted.

Haddad

88 et seq.: inserted words after transcript typed.
92 - Some pages not signed as per regular procedure. Other suggestions (e.g. spelling) that notes entirely re-written

99 -

M. SEKAME: Entirely discredited: thus completely worthless as far as Court is concerned. In any event, only 1 speech - in 1959. Nothing re incitement to break pass laws.

J. N HLAPO:

Haddad: A 155: Instructed to take down all - not only what was politically important.

156: didn't take down prayer - might have been. Anything could have been said (et seq.).

159: Easier to write in English than Xhosa.

161: Meeting 3-6 p.m. Took 20 mins to read.

163: I sign my notes always. Detectives (whites) sometimes do.

164: Neatness test in Court. Apparently meeting notes are tidier. (Each: "X").

165: No abbreviations.

166: Hlapo's signature on last page only. No erasures.

166-7: Names of speaker - sometimes from accompanying detective.

168: At times - get name from speaker - miss part of next speech.

171: Words, phrases in parts. not in notes.

Speaks Sesuto.

p. 173 : Dec. to notes - one speaker was against having ref. books.

p. 176 : Opportunity for alteration when Sgt. Smit gave notes. June. et seq. : words altered - all before typing.

~~p. 180.~~ p. 180. "witness" crossed out - replaced by "Whites".

p. 185 : Entirely dependent on notes.

Xed. Sechs.

p. 186 : Notes to give superiors idea of what was said.

p. 187 : Didn't think would be used in Court.

p. 188 : I wasn't aware of any offence being committed. Applies to all the meetings.

p. 188 : Would change notes at times at close of meeting, or at home. Make notes readable.

p. 190 : I wouldn't say - left out half. Can't give estimate.

p. 191 : Found Xhosa much easier than English. Used interpreter.

p. 196 - Test : Exh. "Y".
Witness : 1 min. - 60 words.

197. Can't complain re speed of dictation - some speakers faster than average.

198 : Not be surprised if at meeting took down a quarter.
Notes handed in neater than test.

p. 201 : Don't have to get notes down word for word.

p. 202 : Wrote down opposite of what was dictated.

Test - Wed. 18. Edeh. "cc".
Speed confirmed by PP. (248).

252: "The ups and downs have none to see to." - Understandable, sense! cf. 2591.

254: Tells Court - can rely on notes taken on dictation.

290: Does record applause - do what I feel like.

328: Withess admits - unable to make out theme of meeting - what speakers were talking about.

P. 418: "Brown's intention to call typist at later stage.
Court gives assurance - will be called.

427-8: P.P. says he will call Cokie - (present at meeting - took own notes).

536 - Saverman says: procedure at office wrong. —