

IN THE HIGH COURT OF SOUTH AFRICA

[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO SS 67/2005

DATE 20-04-2006

In the matter of:
THE STATE
versus

1. SELWYN WINSTON DE VRIES
2. VIRGIL LENNITH DE VRIES
3. JULIAN MICHAEL VAN HEERDEN
4. VERNON NOEL VICTOR
5. ALEX ANNA
6. GARY WILLIAMS
7. LLEWELLYN SMITH
8. FRANCIS JAMES NGARINOMA
9. EDWARD MOAGI
10. DARRYL PITT
11. ACHMAT MATHER

JUDGMENT

BOZALEK,J:

I am now called upon to make a ruling at the culmination of the third trial-within-a-trial in this trial relating to the admissibility of cellphone records procured from cellphone service provider companies by way of subpoenas authorised in terms of section 205 of the Criminal Procedure Act 51 of 1977.

Although I would have liked more time to prepare these reasons, that must give way to the imperative of pressing on with this trial which has already been running for a long period, during which not insubstantial periods of time have been lost.

The eleven accused in this matter are standing trial on some two dozen charges which revolve principally around three armed robberies of cigarette delivery vehicles, two of which took place in the Western Cape in June and August 2003 and one outside Port Elizabeth in October of that year. The trial commenced in August 2005 and has now been running for approximately 53 days. The State has still to complete its case. Evidence led so far reveals that in each instance the hijacking was the work of robbers using several vehicles and keeping close communication with each other, using cellphones.

Prior to the inception of the trial, the State approached the Cape Town magistrate and sought, by way of subpoena in terms of section 205, access to records of cellphone activity over the period of the robberies in relation to 17 cellphone numbers. A lengthy trial-within-a-trial ensued after defence counsel challenged the admissibility of such evidence. On 30 January 2006 I ruled that the evidence derived from the two section 205 subpoenas (Exhibits RRR2 and RRR3) and relating to four cellphone numbers, was inadmissible.

Within the same trial-within-a-trial the admissibility of evidence obtained pursuant to certain warrants of arrest, pursuant to which several of the accused had been arrested, was also considered and ruled upon. In the event no reasons were furnished for these rulings and these will be handed down on the conclusion of this trial.

What was central to the ruling on the admissibility of the cellphone documentation, however, was evidence that the magistrate in question had failed to properly apply his mind to the merits of the application for the subpoenas and had been disproportionately influenced by the fact that the application had been brought in the name and under the signature of an official in the office of the Director of Public Prosecutions for whom the magistrate had a high professional regard. That trial-within-a-trial took up a considerable amount of court time, although much of it involved evidence relating to the arrest of the accused and simultaneous search and seizure operations conducted at their residences.

The second trial-within-a-trial concerned records relating to the usage of certain cellphone records, before, during and after the third robbery outside Port Elizabeth in October 2003, which records were similarly obtained from the service provider companies through section 205 subpoenas authorised by the Port Elizabeth magistrate.

That documentation was declared inadmissible when the evidence brought to light that the magistrate had failed even to appreciate the test which he was required to apply in considering the application for a subpoena.

The State thereafter sought to introduce in evidence records of cellphone usage relating to 10 cellphone numbers and three cellphone or handset specified IMEI numbers for the period commencing 1 June 2003 until respectively September and November 2003, during which period the two robberies in the Western Cape were effected.

This documentation was procured by the State pursuant to two section 205 subpoenas authorised by the Cape Town magistrate in February and March 2006. The applications for the subpoenas were made by the Deputy Director of Public Prosecutions after and consequent upon the ruling made by this Court on 30 January 2006. The cellphone and IMEI numbers are set out in the two subpoenas which form part of the Bundle of documents (Exhibit EEEE). The balance of the Bundle, some 100 pages of documentation, comprises sworn statements by the investigating officer, Inspector A J Jonker ("Jonker") made in support of the two applications in terms of section 205, and a host of other supporting documentation, including the statements of witnesses who have testified at the trial, data down-loaded from cellphones and suspect profiles.

An analysis of the cellphone numbers and IMEI handset numbers set out in the subpoenas reveals the following features. Firstly, all the cellphone numbers are so-called "non-contract numbers", i.e. they relate to "pay-as-you-go" SIM cards or their equivalent and the documentation in question will not reveal directly who was operating such cellphone numbers.

Secondly, it is undisputed that evidence, either before this Court or placed before the Cape Town magistrate, indicates that the ten cellphone numbers may be linked to the following accused - numbers 1, 2, 3, 4 and 5, this in the case of the subpoena directed to Vodacom. All these accused persons have been implicated in one or more of the robberies in the Western Cape by at least one State witness who has already testified, the section 204 accomplice witness Mr Vernon Aspeling. The remaining cellphone number on the subpoena addressed to Vodacom is that of Aspeling himself, who clearly has no objection to the production of his cellphone records.

As far as the second subpoena is concerned, that addressed to MTN, the three cellphone numbers relate to accused number 8, a former accused who has now disappeared, one Jimmy Maseko, and a ghost number also referred to as a "koketela" card which, according to Aspeling's evidence, was repeatedly used to contact him immediately before, during and after the two robberies in the Western Cape in which he participated. Apparently this

type of SIM card relates to a cellphone number which can be used without cost.

The three IMEI numbers referred to in the second subpoena relate to handsets which were seized from the residences of one or more of the accused at the time of their arrest. The linkages between the cellphone numbers listed in the subpoenas and the accused, as well as the linkages between the IMEI numbers and one or more of the accused were, although not admitted by the accused, not seriously disputed by them in the trial-within-a-trial. In it the State led the evidence of the investigating officer Jonker and the magistrate who considered the applications and authorised the subpoenas, Mr S Maku. Instead the accuseds' objections to the admissibility of the documentation were founded upon procedural grounds relating to the application for the authorisation of the section 205 subpoenas, which grounds I will set out in more detail hereunder.

During the trial-within-a-trial and notwithstanding the fact that the documentation relating to the cellphone usage did not relate to every accused, I allowed the respective counsel for all the accused to cross-examine witnesses and direct argument to the Court since, should the documentation be held admissible, it may well have potentially far-reaching effects on all the accused. None of the accused testified in a trial-within-a-trial, nor were any witnesses led on their behalf. None of the accused to whom the various cellphone numbers and IMEI numbers were linked admitted using the relevant cellphone numbers or handsets.

A final feature of the documentation sought in terms of the two subpoenas which is of some significance is that all of the cellphone numbers had been listed in the earlier 205 applications authorised by the Cape Town magistrate and which had led to the State obtaining records relating to the usage of such cellphone numbers over the relevant period.

The anomalous situation which existed in February 2006 was then that the State had in its possession much of the detailed data relating to the usage of the cellphone numbers. Because of the ruling of inadmissibility, the prosecution appeared to have formed the view that they would have to re-apply for fresh subpoenas under section 205 to obtain the same data and the limited amount of additional data which they sought in relation to the three IMEI numbers.

The evidence of Jonker and magistrate Maku reveals that on this occasion a more formal procedure was followed by the State. Apart from the substantial body of documentation placed before the magistrate, Jonker attested to a sworn affidavit on 12 February 2006 in which he gave some background to the application, emphasising the importance of the cellphone data being sought, and gave some background to the matter. He referred therein to certain attached sworn statements by witnesses who had already testified in the case, namely Messrs Speed, Cottle, Mentoer, Aspeling and a Ms Harding. He also referred to attached affidavits of Ms van Heerden and a Ms Zeelie, who had not testified in the trial.

Although these affidavits referred to various cellphone numbers, the role of cellphones in the robberies and linked certain cellphone numbers to certain of the accused, the amount of detail contained in the statements and the supporting documentation, together with the fact that the numbers listed on the applications for the two subpoenas are not coupled with the names of any of accused, would have left any person considering the applications with a difficult task in evaluating their merits.

In mid-February, Jonker called upon the magistrate, unaccompanied by any prosecutor, and placed the applications before him. Mr Maku's response was to tell Jonker that he could leave the documentation with him to read and consider in his own time and he would contact Jonker in due course. Mr Maku bore some knowledge of his colleague, Mr Venter, having testified in this trial during late 2005 concerning his authorisation of the earlier section 205 subpoenas. Although no reasons were furnished for the ruling of admissibility in relation to those subpoenas, it appears that Mr Venter's experience had brought about changes in the manner in which applications for such subpoenas were considered within the Cape Town Magistrates' Court.

Senior management had met and new guidelines were, in the first place, announced. In the first place, whereas previously such applications had been processed without any record being retained in the Magistrates' Court, the new arrangements required a file to be opened for each such application and a copy thereof to be retained. Secondly, and more importantly, the Chief Magistrate advised his magistrates that they would have to be more careful with section 205 applications and ensure that such applications were in proper form and, in relation to subpoenas relating to cellphone records, check that there was indeed a link between the numbers in respect of which cellphone data was sought from the service provider companies, and the information contained in the statements supporting the applications. The new procedures which I have just described was that according to Mr Maku's unchallenged evidence.

Some days after receiving the applications, Mr Maku called Jonker to state that he could not make sense of certain statements therein. In response to this, Jonker furnished him with a further sworn affidavit from himself in which he clarified which cellphone numbers appearing on the subpoenas were linked to which accused or other person allegedly involved in the robberies. That statement is dated 24 February 2006.

In essence it appears that the magistrate had been unable to follow how the State linked the relevant cellphone numbers to the accused or other persons involved. Thus on 24 February 2006, not only did Mr Jonker furnish Mr Maku with a further statement, but he also sat with him and took him through the existing documentation in an attempt to clarify the linkages.

In that self-same encounter Mr Maku advised Mr Jonker that he was not prepared to grant the subpoena directed at Vodacom in respect of two of the nine numbers listed and these numbers were deleted from the subpoena. He authorised and signed the subpoena in respect of the remaining seven numbers. Mr Maku, however, still had queries relating to the second subpoena, that addressed to MTN, which difficulties he raised with Mr Jonker. As a result, Jonker filed further documentation and a further explanatory sworn affidavit from himself. This affidavit was dated 6 March and related to two of the three cellphone numbers listed in the second application for a subpoena. Mr Maku was notable to state definitely whether he had met with Mr Jonker on a third occasion, the first being when Jonker had merely placed the applications before him. It appears quite likely that this was the case.

In the intervening period there were a number of phone calls between Maku and Jonker where they sought to communicate with each other, this process being somewhat hampered and delayed by the fact that Jonker had either taken leave or had been out of town. By 9 March, however, Mr Maku was satisfied that a case had been made out in the application for the second subpoena and he authorised and signed it.

Before this Court, Mr Maku also testified that he had been aware that the trial of the accused was part-heard and ongoing and that certain of the witnesses whose statements were before him, most notably Vernon

Aspeling, the accomplice witness, had already testified in court. He had not asked for typed transcripts of their evidence. When asked whether he had considered giving an audience to the accused's legal representatives in the applications, Mr Maku's reply was that his interpretation of section 205 was that the parties directly involved at that stage were the witnesses, namely the service providers, and the Director of Public Prosecutions' representative and not the accused/suspects.

A variety of arguments were made before me by the accuseds' counsel as to why the cellphone records should not be admitted in evidence. There was little, if any, attack upon the substantive case made out in Exhibit EEEE before the magistrate linking various numbers and handset numbers to accused suspects or witnesses.

Instead, the arguments were largely of a procedural nature, the general thrust being that admission of the evidence would violate the accuseds' right to a fair trial, more specifically, their right to a speedy trial. Reliance was also placed on the accuseds' right of privacy, the contention being that it extended to the records of cellphone usage compiled by service provider companies.

As far as the application itself was concerned, it was argued that the magistrate had not acted independently in that he had leant over backwards to assist the State and the police. It was contended further that the applications had contained certain misrepresentations and that the best evidence had not been placed before the magistrate. It was further contended that the applications should not have been heard without the accused being represented thereat and, furthermore, that it was defective by reason of the absence of a prosecutor or representative of the Director of Public Prosecutions. Further cause for complaint was the late discovery by the State of some of the documents comprising Exhibit EEE and financial and other prejudice caused to the accused by the series of trials-within-trials.

It was argued that cumulatively these defects were such as to render the admission of the evidence a breach of the accuseds' right to a fair trial or detrimental to the administration of justice.

A starting point in the consideration of the various grounds of objection raised by the defence is to note that the provisions of section 205 of Act 51 of 1977 have received the judicial *imprimatur* of the Constitutional Court.

In Nel v Le Roux N.O. & Others 1996(1) SACR 572 (CC) it was held that these provisions were "as narrowly tailored as possible to meet the legitimate state interest of investigating and prosecuting crime" (at 503G-H).

In concluding that there was no substance to the various constitutional challenges mounted against the section, the Court had regard to the context of section 205 proceedings as a whole. It noted that the subpoenas were obtained at the request of an Attorney-General or an authorised public prosecutor and it can only be issued at the instance of an independent judicial officer.

In the light of this authority, it seems to me that defence counsels' occasional references to section 36 of the Constitution as a means of evaluating section 205 process which is the subject of this ruling, is inappropriate. Rather, the correct lens to be used is section 35(3) of the Constitution which provides for the exclusion of any evidence obtained in a manner violating any right in the Bill of Rights if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

The first question which arises is whether the State was entitled in the circumstances of this matter to use the section 205 procedure. Two possible objections to its use arise. In the first place, there is the consideration that section 205 applications are generally used as part of the pre-trial investigation procedure and not during the course of the trial itself. The second unusual feature of the present applications was that they were in effect a repeat application/s since there was a considerable degree of

overlap between the applications launched pre-trial and those launched before the Cape Town magistrate in February 2006.

As regards the first point, there is nothing in the provisions of section 205 which stipulate or even suggest that its use is limited to the pre-trial period. One can readily envisage a situation where, in the midst of trial, information comes to light which may have an important bearing on the outcome of the matter and which can only or best be obtained through the use of the section 205 procedure. I can see no bar, therefore, to the use of section 205 by the State in a situation where a trial has already commenced. A criminal trial has a dynamic of its own and it would be inappropriate to seek to freeze the potential evidentiary material at any given point prior to the Court rendering its verdict.

The second and related question is whether the State is entitled to bring a fresh section 205 application where there has been a ruling by a court that the same information obtained through an earlier similar process was inadmissible. Again there is nothing in the terms of section 205 which appears to preclude a repeat application. A ruling that evidence is inadmissible is an interlocutory ruling and therefore one which a court is capable of varying in appropriate circumstances. (See in this regard S v Tiiho 1992(1) SACR 639 (NM) and S v Mkwana 1966(1) SA 736 (A) at 743)

In the latter matter dealing with a confession which had initially been held to be admissible; Williamson, JA stated as follows:

"If other factors touching upon the question of admissibility appear later in the trial he can, and should, reconsider any earlier decision as he rightly did in the present case". There is no reason in principle, furthermore, why such an approach does not apply to evidence initially held to be inadmissible and in relation to evidentiary material other than confessions and admissions. (See also in this regard R v Melozani 1952(3) SA 693 (A) at 644E-F; and S v Ramgobin & Others 1986(4) SA 117)

Particularly pertinent too are the remarks of Ackermann, J (as he then was) in Sv Lepele & Others (2) 1986(2) SA 346 where the State applied during the course of a criminal trial for a direction in terms of section 153(2) of Act 51 of 1977 that the evidence of certain State witness be heard *in camera* and his identity not be revealed. A prior application in general terms in respect of all black State witnesses, including the present witness, had been dismissed earlier. The application was opposed it being contended *in limine* that as the previous application had been dismissed by the Court, the matter was *res judicata* and could not be raised again. Ackermann, J held that as the previous order did not dispose of any of the issues in the trial or any portion thereof, it was a purely interlocutory order which could be corrected, altered or set aside and accordingly that the State was free to proceed with the application.

The learned Judge conducted a full review of the authorities and, referring to the line of cases which dealt largely with confessions which had initially been ruled admissible, stated as follows at page 350C-D:

"There is, in my view, no warrant for restricting the ambit of these judgments to a reconsideration of evidence admitted and not to evidence rejected. Both situations relate to the question of admissibility. I can in principle see no reason why the rejection of evidence should be not treated on the same footing. The interlocutory nature of an order excluding evidence appears to me an *a fortiori* case".

Ackermann, J also dealt with the argument advanced on behalf of the defence that the State, having been initially unsuccessful, should not be permitted to renew its application since this could lead to a never-ending succession of applications of this nature. It was also argued that this could lead to abuse with the initial application being used to "test" a particular judge's approach to such an application and the subsequent application being used to supplement the defects of the initial application in the light of the knowledge so gained, the State having been made aware of "where the

shoe pinches".

Similar arguments were raised by defence counsel in the present matter.

Of this argument, Ackermann, J stated:

"The point raised by Mr Farlam is, I think, a valid one but is met, in my view, by the fact that the court has an inherent jurisdiction to limit the extent to which it will allow its own orders to be varied. In Bell v Bell (*supra*) the court stated at 894 that:

'Courts will not likely (lightly(?)) vary their own orders even though they may be of a merely interlocutory nature and cases in which such orders will be altered in the absence of fresh facts cannot be numerous. At the same time the present matters offers an instance of a class of case in which relief may under certain circumstances well be granted". I am in respectful agreement with the approach adopted by Ackermann, J in S v Lepele. Furthermore, I regard the circumstances of the present matter as appropriate to allow the State making a fresh application or applications for subpoenas in terms of section 205.

In the first place, the central reason for the inadmissibility ruling in relation to the information obtained from the first subpoena arose from the manner in which the applications were determined by the magistrate.

Although I have not furnished by reasons for that ruling, it was argued by counsel at the time, correctly so, that the magistrate had failed to apply his mind to the merits of the two applications and had merely rubber-stamped them. This approach on the part of the magistrate cannot fairly be laid at the door of the prosecution. To disallow the State from bringing a fresh application would be to penalise the prosecution for the omissions of the magistrate.

A further argument advanced by the defence was that should repeat applications in effect be condoned by this Court, the effect would be to violate the accuseds' right to a speedy trial. As I understood this argument its thrust was that the initial trial-within-a-trial, which indeed lasted weeks, should, in the light of the magistrate's approach, have been abandoned by the State which could possibly then have re-applied for subpoenas in fresh applications.

Having chosen not to do so, the accused had been saddled with the consequences of the initial lengthy trial-within-a-trial followed by the third trial-within-a-trial, with which we are presently concerned. Not only have these sub-trials considerably lengthened the duration of the trial as a whole, they have imposed concomitant financial pressures on the accused, most notably, the example of accused number 1 was cited as someone who could no longer afford to pay his counsel or his legal representatives and was making do with their services on something other than a normal fee-paying basis.

This argument, however, does not withstand scrutiny. Inevitably some criminal trials last for a long period of time and the present matter is one such case. However, in the present instance this is a consequence of many factors, including the number of accused and counsel involved, the broad range of the charges which encompass three robberies over a period of months in different parts of the country. By way of illustration, the main State witness Aspelung testified in chief for one court week, four days, and was cross-examined for a further two court weeks.

Furthermore, the first trial-within-a-trial, although lengthy, was by no means concerned solely with the admissibility of evidence obtained pursuant to the section 205 subpoenas. Much of it was taken up with detailed defence from numerous witnesses concerning the validity of warrants of arrest in respect of the accused and their execution, including the consequent searches of and seizures from the accuseds' places of residence.

A related factor to be taken into account is that the accused have exercised their undoubted right to dispute the admissibility of evidence derived pursuant to the section 205 subpoenas, as well as the validity of the arrest warrants, thus necessitating the leading of considerable evidence by the

State in regard to these issues. Whilst the accused are of course fully entitled to adopt such a stance, it hardly behoves them in these circumstances to attribute the lengthy duration of the trial solely to the State.

The argument that the State should have abandoned its reliance upon the initial section 205 subpoenas rests upon the assumption that the State should have foreseen that one of its last witnesses, the magistrate in question, would candidly testify that he had approved the subpoenas only is such a criticism based upon hindsight, but it also assumes that the State was aware that the magistrate would so testify under cross-examination. There is insufficient information for me to make such an assumption.

I turn now to the various criticisms of the process of applying for the section 205 subpoenas. Mr Mihalik for accused number 1 contended that various misrepresentations had been made in the applications. He referred in particular to paragraph 4 of Jonker's founding affidavit which states that certain cellphone data had already been obtained but was ruled inadmissible by this Court in January 2006 when it found that the magistrate had not exercised his discretion when considering the applications in terms of section 205.

Mr Mihalik pointed out that no reasons had been furnished for the ruling and therefore that the investigating officer was misleading the magistrate in making this statement.

To my mind there is no substance to this criticism. The magistrate's failure to exercise a discretion was clearly the Achilles heel of the State's case in the first trial-within-a-trial in relation to the section 205 subpoenas and the investigating officer was merely anticipating, albeit somewhat presumptuously, the Court's reasons for the ruling. Nor is there any evidence to suggest that the investigating officer was thereby attempting to mislead the magistrate.

I can, furthermore, see no prejudice to the accused in a magistrate being told directly that it is necessary for him to exercise his or her discretion when considering such an application.

The only other misrepresentation on which Mr Mihalik relied is the first line of paragraph 4 of Jonker's affidavit dated 24 February 2006 which reads as follows:

"Selfoonnommers is vanaf 'n bron ontvang wat beweer dat hy gehoor het dat die verdagtes betrokke was by die pleging van die misdrywe." This appears to be a reference to one Alfred Mentoer who testified on a limited ambit within the first trial-within-a-trial. Mr Mihalik argued that his evidence before this Court as to the accuseds' involvement in the robberies was at odds with his sworn statement which was before the magistrate and also at odds with the evidence of at least one other State witness, Cottle, who testified that he had first received information from Mentoer as an informer. Mentoer's evidence throughout, however, was that various accused were involved in the robberies and that they generally used certain cellphone numbers which he had furnished.

Whether his evidence was always consistent as to the basis upon which he arrived at the conclusion that these accused were involved in the robberies may very well be the subject of debate and criticism. That, however, in my view, is a matter which will no doubt be fully argued at the appropriate stage of this trial and did not justify being a central issue for the magistrate, I do not see that Jonker's failure to point out possible discrepancies in the evidence of Mentoer compromised the applications for the subpoenas. The applications were, moreover, in no way based solely upon Mentoer's sworn statement since there was a wealth of other documentation and evidence linking the accused to various cellphone numbers and IMEI numbers.

I accept that in applications such as these the State is under an obligation not to mislead the magistrate as to material facts or aspects of the matter, but nor is it under a duty to present to the magistrate such arguments that the accuseds' legal representatives might raise were they party to the application.

In the same vein it was contended on behalf of the accused that the statements of persons who had already testified in the trial should not have been put in front of the magistrate. Instead a transcript of their evidence before the High Court should have been placed before the magistrate or, alternatively, a summary of their evidence. The logistics of doing so would have entailed the State obtaining thousands of pages of the transcript of this trial. This would have taken a considerable amount of time, not to mention the expense. As I have mentioned, Aspeling alone testified for three court weeks. Even a summary of his evidence, much of it irrelevant for the magistrate's purposes, would have entailed many hours of labour. The end result of such an exercise would have been that the magistrate would have been faced with documentation entailing hundreds, if not thousands, of pages rather than the already bulky bundle of one hundred pages which he eventually had to deal with.

Implicit in this argument seems to be the suggestion that the magistrate would then have to make credibility findings regarding these witnesses, a task which even this Court is presently not equipped to do in the absence of hearing all the evidence and arguments. In short, to require the State to follow the procedures suggested by the defence would certainly, in the circumstances of this matter, render the procedure in section 205 unworkable.

For good measure, defence counsel also submitted that the accuseds' legal representatives should have been given advance notification and opportunity to contest the applications. Similarly, if this suggestion were to be followed, the magistrate, in dealing with these applications, who, I estimate, must have spent between a half and a full working day on them, would have been faced with a fully-fledged opposed application entailing voluminous documentation which could easily have taken up weeks of his time. Once again, such a process, one neither provided for nor envisaged by the legislation, in my view, would have rendered the section 205 evidence-gathering procedure completely impractical and unworkable.

Section 205 permits the State to use the compulsion of a possible prison sentence to obtain information from any person who is likely to give material or relevant information as to any alleged defence. Once the State has obtained such evidence it can tender it in a trial against an accused through an appropriate witness or witnesses. The accused then has the opportunity to contest the admissibility of that defence on any possible ground. The section 205 process does not render the evidence admissible and therefore there is no warrant, in my view, even in the context of an ongoing trial, to require as of right the participation of the accused at a time when the section 205 subpoenas are sought.

A further objection to the process was the prominent role played by the investigating officer and, by contrast, the limited role played by the Deputy Director of Public Prosecutions (the applicant) or his delegee in the applications for the subpoenas. Mr Mihalik argued that the close involvement of the investigating officer in his dealings with magistrate Maku were undesirable, particularly seen from the point of view of the accused's perceptions. In this regard he relied on the case of S v Roberts 1999(4) SA 915 as offering guidance as to how the police should interact with magistrates.

I accept that as a general rule too close a relationship between the police and the magistrate in the course of his or her exercising a judicial or *quasi judicial* function is undesirable to the extent that it may reasonably convey that the magistrate is not acting independently. Some distinction must, however, be drawn between a magistrate acting as a presiding officer and a magistrate exercising, as in this case, a limited judicial or *quasi judicial* function relating to the authorisation to issue a subpoena.

Roberts' case is not directly on point, concerned as it is with communications between the magistrate presiding and the prosecutor and defence counsel during the course of a trial. It does appear that a practice has developed whereby section 205 applications are placed before

magistrates by the investigating officer and that the prosecutor's role is limited to that of being the applicant, but not moving the application before the magistrate him or herself.

It would seem to me that it is desirable that the applicant or his or her delegee plays a greater role in such proceedings, if only to ensure that ethical constraints are observed and to alleviate any impression that authorisations for such subpoenas are there merely for the asking. That said, there can be no objection to the presence of or involvement in the procedure of the investigating officer who oft times is the person who has the greatest working knowledge of the case. In the present matter there has been no evidence that the investigating officer acted irregularly, improperly or unethically in his dealings with the magistrate and his central role in the proceedings is, in my view, certainly not in itself improper.

A related criticism of the process was that magistrate Maku had been too accommodating with the investigating officer and thereby the State's interests in dealing with the applications. It was submitted further that the magistrate had in fact "trained" the investigating officer by advising him what further information he should place before him in order to secure authorisation of the subpoenas.

These submissions are not substantiated by the evidence. It was put by defence counsel to both Jonker and to magistrate Maku on several occasions that the latter had advised Jonker as to what further documentation or statements he must procure and place before him in order to make out a proper case for the authorisation of the subpoenas. Both witnesses denied this suggestion and, in my view, convincingly so. Magistrate Maku was at pains to clarify that what he had done was in essence to seek clarification from Jonker as to the links between the cellphone and handset numbers and the information contained in the bundle placed before him which purportedly linked those numbers to the accused and other persons allegedly involved in the robberies. Maku stated that he had not specified what further statements or documentation should be placed before him, but that in response to the difficulties which he raised with him, Jonker furnished further clarificatory sworn affidavits from himself and other supporting documentation.

Even on this scenario it was argued that magistrate Maku had been too accommodating with the State and it was suggested that he should simply have read the application in its initial form and refused or allowed it on its merits. I cannot agree that such an approach on the part of the magistrate was the only proper one.

By analogy, counsel appear unopposed and ex parte motions before the High court on a regular basis. Where the presiding judge has a difficulty or a query relating to the merits of the application which may well be cured by argument or even supplementary evidence, he or she will in most cases raise such difficulty or query with counsel, thereby affording them an opportunity to attempt to remedy the defect or clarify some issue. If the presiding judge were in such circumstances to adopt an approach of not disclosing his or her difficulties and merely dismiss or allow the application, the administration of justice in that forum would, in my view, be rendered unnecessarily cumbersome and complicated.

To my mind, the analogy which I have sketched above and which I put to counsel in argument can also be applied to applications where section 205 subpoenas are concerned. This approach enjoys some measure of judicial approval, as Mr Mihalik himself fairly conceded, see Haysom v Additional Magistrate, Cape Town & Another 1979(3) SA 155 at 158G-H where Van Winsen, J stated as follows:

"Should he consider the information placed before him by the prosecutor to be inadequate for the exercise of such a judgment he will be entitled to require the submission of further evidence".

Furthermore, I was favourably impressed with the manner in which Mr Maku dealt with the applications. He clearly heeded the new guidelines which emphasised that magistrates had to carefully consider such applications.

This is illustrated by the fact that he did not even attempt to deal with the applications at the time they were placed before him by Jonker. He clearly realised the need to take time to consider the applications at a time when he was less busy. When, understandably, he had difficulty in making the necessary linkages he advised Jonker and directly or by implication sought clarification.

Even when further documentation was forthcoming in relation to the subpoenas sought against Vodacom, he applied his mind to the application and struck out two phone numbers, not being satisfied that a case had been made out in respect thereof.

He then took time to consider the second application and further documentation which was furnished, clarifying its basis before granting the application and authorising the subpoenas. Mr Maku made a most favourable impression on me as someone who properly and fully appreciated his function as an independent official required to exercise a judicial discretion as to the merits of the applications before him. The only minor respect in which his evidence can be faulted, in my view, was his description of his function as administrative whereas in truth it was judicial or *quasi* judicial. This is a case, however, of attaching the wrong label to his function and his evidence clearly demonstrated a proper appreciation of his role and function.

I might add that the approach which Mr Maku followed in considering the applications differed, as day does from night, from the manner in which the first set of applications was considered at the pre-trial stage and this new critical approach can only be welcomed.

As regards the late production of documents, it is so that Exhibit EEEE, part of which had not previously been disclosed to defence counsel, was only made available to them approximately a week before the third trial-within-a-trial commenced. It is regrettable that these documents were not disclosed at an earlier stage but I cannot see any material prejudice to the accused, none of whom sought time to deal with the new material. A similar complaint cannot be entertained in relation to the cellphone documentation since much of it was obtained pre-trial and made available to defence counsel.

A further point raised was that the State had misused the provisions of section 205 which are intended only for recalcitrant witnesses.

Case law does show that section 205 has in the past been used against recalcitrant witnesses, particularly in cases of a political nature. The terms of the section do not, however, limit its use to such circumstances and, in my view, it constitutes a tool which the prosecutor or investigating authorities can use in a range of appropriate circumstances. There was evidence before Court that the major cellphone service provider companies will, not surprisingly, not furnish cellphone records and documentation relating to their subscribers without a "court order". An ordinary subpoena or subpoena *duces tecum* does not carry the sanction of a Court directly, whereas a section 205 subpoena is authorised by a magistrate after the exercise by such an official of a judicial discretion. In these circumstances I do not regard it as inappropriate of the State to have used the provisions of section 205.

Certainly it did not, in my view, constitute an abuse of the section's provisions.

Defence counsel also repeatedly referred in argument to the invasion of the accused's right to privacy should the cellphone documentation be admitted in evidence. This stance sits somewhat uneasily with the fact that none of the accused have testified in the trial-within-a-trial or admitted through their legal representatives that any of the cellphone numbers listed in the subpoenas are numbers which they have ever used, nor are there any admissions in regard to the handset numbers. In these circumstances; a claim of, or reliance on, an infringement of the accused's right to privacy is, at the very least, weakened.

What must also be taken into account in considering the extent of any invasion of the accused's right to privacy, apart from the judicially sanctioned constitutionality of section 205 of Act 51 of 1977, is the extent of any invasion of privacy and the importance of the evidence forthcoming as a result of such an invasion of privacy. Judging by similar records placed before a court, the cellphone records sought to be introduced will reveal the time, duration and date of all calls made to and from the cellphone number in question. They indicate which numbers were called using that cellphone number or which numbers called the cellphone number in question.

Furthermore, the records reveal whether the call was a text message or a live call. The content of the message is not recorded. Finally, the records also indicate, importantly so in this matter, near which geographical base station the phone number initiating the calls was situated at the time of the call. When, therefore, the State's main witness and accomplice, Aspeling, testified that at the time of the robberies he was contacted by various accused and other persons involved in the robberies at or near various locations in the Western Cape, cellphone records relating to these numbers may very well offer independent corroboration, not only of the making of such calls, but the whereabouts of the activating SIM card.

By and large Aspeling's evidence implicating many of the accused was strenuously disputed. The evidence sought to be admitted is therefore potentially, at least, highly material to the issues in dispute in the case. In determining the admissibility of the cellphone usage records sought to be introduced, this Court must ultimately determine whether its reception would render the trial unfair or otherwise be detrimental to the administration of justice.

Having considered the various objections and criticisms of the process raised by the accused's legal representatives, I have come to the conclusion that neither singly nor cumulatively are they such as to compromise or violate the accused's rights to a fair trial or their right to privacy. Needless to say, the mere fact that such evidence may be prejudicial to the accused does not in itself mean that their rights to a fair trial are violated. Nor do I consider that the reception of such evidence will be detrimental to the administration of justice. Both the State and the broader community which it represents has an interest in seeing that evidence which is material to a criminal prosecution, if lawfully and fairly obtained, is placed before a court for consideration and not excluded on the basis of overly technical or unfounded objections.

In the circumstances I make the following order:

The evidence obtained by the State pursuant to the subpoenas authorised in respect of Vodacom on 24 February 2006 and MTN on 9 March 2006 (pages 1-4 of Annexure "EEE") is admissible.