131/94

RAPPORTEERBAAR

SAAKNOMMER 491/93
EB

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(APPèLAFDELING)

In die saak tussen:

A FUHRI — APPELLANT

en

DIE STAAT — RESPONDENT

CORAM: BOTHA, HEFER, SMALBERGER, KUMLEBEN et HARMS, ARR

VERHOORDATUM: 29 AUGUSTUS 1994

LEWERINGSDATUM: 23 SEPTEMBER 1994

UITSPRAAK

HEFER AR/....

HEFER AR:

Hierdie appèl is gemik teen die appellant se skuldigbevinding in 'n landdroshof op 'n aanklag waarin beweer is dat hy artikel 85(4) van die Padverkeerswet 29 van 1989 oortree het deur 'n motorvoertuig teen minstens 143 kpu op 'n openbare pad te bestuur waar die snelheidsgrens 120kpu was. Die enigste vraag wat oorweeg moet word, is of daar toelaatbare getuienis is oor die spoed van die voertuig.

Die toestel wat gebruik is om die spoed te meet, is 'n Trevello Merk IV Kombi spoedkamera. Die hoofkomponente daarvan is twee meetinstrumente, 'n datablok en 'n kamera. Die funksie van die meetinstrumente is, eerstens, om die tyd te meet vanaf die oomblik wat die wiele van 'n voertuig in aanraking kom met 'n stel sensorkabels op die padoppervlakte totdat dit 'n tweede stel kabels 'n bepaalde afstand vanaf die eerste stel tref en, tweedens, om die tyd en afstand elektronies te verwerk tot 'n spoed uitgedruk in kilometers per uur wat dan in die vorm van twee afsonderlike lesings (een vir

elke instrument) op die datablok verskyn. Die kamera is so gemonteer dat dit die lesings op die datablok sowel as die voertuig waarvan die spoed gemeet is, deur aparte sluiters gelyktydig op dieselfde negatief fotografeer. Dit is toegerus met 'n apparaat waardeur die datum, tyd en plek (laasgenoemde in kodevorm), telkens wanneer die sluiters in werking gestel word, ook na die datablok gevoer word. Wanneer die lesings verskyn, word beide sluiters in werking gestel en 'n foto geneem wat later ontwikkel kan word. Daarop verskyn dan 'n voertuig, 'n datum en tyd, 'n plekkode, en twee spoedlesings.

Om akkuraat te funksioneer, is dit natuurlik noodsaaklik dat die toestel op die regte manier deur 'n opgeleide operateur opgestel word. Dit behels oa die vashegting aan die padoppervlakte van die twee stelle sensorkabels op die korrekte afstand van mekaar, en die verbinding daarvan met 'n battery en die res van die apparaat. Nadat dit gedoen is, laai die operateur 'n film in die kamera, voer hy die datum, tyd en plekkode in en neem hy sekere toetslesings ten einde te verseker dat alles behoorlik geskied het. Daarna funksioneer die apparaat outomaties: telkens wanneer die wiele van 'n

voertuig die eerste stel kabels tref, word dit geaktiveer en word die spoed gemeet en die lesings gefotografeer totdat die film vol is, waarna die operateur dit vervang. Uiteindelik word die apparaat verwyder en die vol filmrolle weggeneem vir veilige bewaring en latere ontwikkeling.

By die verhoor in die onderhawige geval het een van die ontwerpers van die toestel die werking daarvan volledig aan die hof verduidelik en het die verkeersbeamptes wat dit die dag van die beweerde oortreding langs die N12-deurpad opgestel het, beskryf hoe hulle dit volgens voorskrif gedoen en later weer verwyder het en hoe die vol filmrolle gemerk en in veilige bewaring gehou is. Een van die foto's op een van die rolle is later ontwikkel. Daarop verskyn 'n voertuig wat volgens 'n erkenning by die verhoor aan die appellant behoort en twee spoedlesings van 143 en 145 kpu onderskeidelik (benewens 'n datum, tyd, en plekkode wat in ooreenstemming is met die Staat se bewerings oor die datum, tyd en plek van die beweerde oortreding).

Namens die appellant is beswaar gemaak teen die inhandiging van die foto maar die landdros bevind dat dit toelaatbare getuienis oor die spoed van

die voertuig was. Die basis van die beswaar - en die betoog namens die appellant in hierdie hof - was dat dit ontoelaatbare getuienis bevat omdat daar geen getuie was wat kon bevestig dat dit 'n korrekte beeld was van wat op die betrokke oomblik voor die kamera was nie. Appellant se advokaat het aangevoer dat, wanneer 'n foto as reële getuienis in 'n strafsaak aangebied word, dit geïdentifiseer moet word as 'n ware voorstelling van die voorwerp, situasie of persone wat daarop verskyn deur 'n lewende persoon wat, weens persoonlike fisiese waarneming, kennis van die inhoud dra.

Aanvanklik moet daarop gewys word dat die vermoë van die apparaat om die spoed te meet en te boekstaaf en die betroubaarheid daarvan in alle opsigte bo verdenking is. In die lig van erkennings by die verhoor en 'n aanduiding deur appellant se advokaat aan hierdie hof dat hy die korrekte opstel en funksionering daarvan nie betwyfel nie, is dit nie nodig om die tegniese getuienis wat voor die verhoorhof geplaas is, te bespreek nie en kan volstaan word met die opmerking dat dit buite twyfel aanvaar kan word dat die apparaat om ongeveer 8 uur die oggend van die beweerde oortreding

behoorlik opgestel en in werking gestel is langs die N12 waar dit behoorlik en akkuraat gefunksioneer het tot ongeveer 3 uur die middag toe dit van die toneel verwyder is. Dat die foto wat in gedrang is die betrokke dag daar geneem is, is ook nie in geskil nie. Indien dit as toelaatbare getuienis beskou word, is die oortreding bewys en moet die appèl van die hand gewys word.

Die algemene beginsel ten opsigte van die toelaatbaarheid van "models, maps, diagrams, photographs" as getuienis word in Wigmore on Evidence (Chadbourn Revision) *in para 790 ev bespreek. In para 790* (op 218) word aanvanklik opgemerk:

> "We are to remember, then, that a document purporting to be a map or diagram is, for evidential purposes, simply nothing, except so far as it has a human being's credit to support it. ...It can of itself tell us no more as to the existence of the thing portrayed upon it than can a tree or an ox. We must somehow put a testimonial human being behind it (as it were) before it can be treated as having any testimonial standing in court. ...whenever such a document is offered as proving a thing to be as therein represented, then it is offered testimonially, and it must be associated with a testifier."

Die ratio van hierdie benadering word op 218-219 soos volg beskryf:

> " ...the mere picture or map itself cannot be received except as a non-

> verbal expression of the testimony of some witness competent to speak to the facts represented. ...by universal judicial concession, a map, model, or diagram, takes an evidential place simply as a non-verbal mode of expressing a witness' testimony...Upon like principles a photograph may be admissible as the testimony of a qualified witness who instead of verbalizing his knowledge of what the picture portrays, adopts it as a substitute for description with words."

Daarna gaan die skrywer egter soos volg voort:

> "This theory, which has been aptly dubbed the 'pictorial testimony theory of photographs', was advanced in prior editions of this work as the only theoretical basis which could justify the receipt of photographs in evidence. With later advancements in the art of photography, however, and with increasing awareness of the manifold evidentiary uses of the products of the art, it has become clear that an additional theory of admissibility of photographs is entitled to recognition. Thus, even though no human is capable of swearing that he personally perceived what a photograph purports to portray (so that it is not possible to satisfy the requirements of the 'pictorial testimony' rationale) there may nevertheless be good warrant for receiving the photograph in evidence. Given an adequate foundation assuring the accuracy of the process producing it, the photograph should then be received as a so-called silent witness or as a witness which 'speaks for itself.' "

Verskeie skrywers en uitsprake van die howe in die VSA en elders word op 220-224 as gesag aangehaal. In People v Bowley 96 ALR2d 1178 (Cal. App.) het Peters R bv op 1182-1183 opgemerk: -

"Until now, this court has not been called upon to state the theory upon which photographs are admitted into evidence... In doing so we recognize that photographs are useful for different purposes. When admitted merely to aid a witness in explaining his testimony they are, as Wigmore states, nothing more than the illustrated testimony of that witness. But they may also be used as probative evidence of what they depict. Used in this manner they take on the status of independent *'silent'* witnesses. *(See* McKelvey, Evidence *[5th ed. 1944] par 379, p.* 668.)

An example of a photograph which is probative in itself is found in People v Doggett, 83 Cal. App. 2d 405, 188 P.2d 792, in which convictions of violating Penal Code section 288a were affirmed. The only evidence of the crime was a photograph showing the defendants committing an act of sexual perversion. This photograph was introduced into evidence although there was no testimony by any eyewitness that it accurately depicted what it purported to show. There was, however, other evidence of when, in point of time, the picture was taken, the place where it was taken and that the defendants were the persons shown in the picture. Furthermore, there was testimony by a photographic expert that the picture was not a composite and had not been faked but was a true representation of a 'pure' negative. Upon this foundation, it was held that the photograph was admissible in evidence. (Cf. People v Mehaffey, 32 Cal. 2d 535, 554-555, 197 P.2d 12; People v Mitman, 122 Cal. App. 2d 490, 495, 265 P.2d 105; People v Batsford, 91 Cal. App. 2d 607, 205 P.2d 731.)

Since no eyewitness laid the foundation for the picture's admission into evidence in the Doggett case, the picture necessarily was allowed to be a silent witness; to 'speak for itself.' It was not illustrating the testimony of a witness. This seems to be a sound rule. Similarly, X-ray photographs are admitted into evidence although there is no one who can testify from direct observation inside the body that they accurately

represent what they purport to show... There is no reason why a photograph or film, like an X-ray, may not, in a proper case, be probative in itself. To hold otherwise would illogically limit the use of a device whose memory is without question more accurate and reliable than that of a human witness. It would exclude from evidence the chance picture of a crowd which on close examination shows the commission of a crime that was not seen by the photographer at the time. It would exclude from evidence pictures taken with a telescopic lens. It would exclude from evidence pictures taken by a camera set to go off when a building's door is opened at night... We hold, therefore, that a photograph may, in a proper case, be admitted into evidence not merely as illustrated testimony of a human witness but as probative evidence in itself of what it shows."

Hierdie standpunt word tans algemeen gehuldig in die VSA en sommige Statebondslande (vgl die sake aangehaal in die 1994 bylae tot Wigmore 187-188; Corpus Juris Secundum Vol 32 par 709 op 989-990; American Jurisprudence 2d Vol 29 par 783 en die voorbeelde in die 1994 bylae daartoe op 365-366, 369-370; Owners of Motorship Sapporo Maru v Owners of Steam Tanker Statue of Liberty [1968] 2 All ER 195 (PDA); R v Maqsud Ali, R v Ashiq Hussain [1965] 2 All ER 464 op 469 (CCA); Castle v Cross [1985] 1 All ER 87 op 91 (QBD); J C Smith: The Admissibility of Statements by Computer; [1981] Crim LR op 390; Archbold: Pleading, Evidence and Practice in Criminal

Cases (1993 uitg) Vol 1 1638-1639; R v Caughlin 18 BCLR 2d 186; R v George Sitek [1987] 26 A Crim R 421 op 424-425; Elliott Goldstein: Videotape and Photographic Evidence Update 1989 SALJ 718).

In R v Maqsud Ali. R v Ashiq Hussain supra waarin die toelaatbaarheid van 'n bandopname ter sprake was, is op 469 C-E bv opgemerk:

> "For many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The prints as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording, conversations. We can see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence."

In die gerapporteerde beslissings van die Suid-Afrikaanse howe het die toelaatbaarheid van foto's en dergelike reproduksies as reële getuienis van die

inhoud daarvan tot dusver nie veel aandag geniet nie. In S v Mthimkulu 1975(4) SA 759 (A) het Corbett AR (soos hy toe was) op 763 G ad fin egter gewag gemaak van die feit dat

> "[whenever] the facta probanda include concepts such as weight, speed, time, length (or distance), or a combination of two or more of these concepts, proof thereof must normally be presented in terms of the measures in current use at the time"

en dat

> "[apart] from cases where human estimate is acceptable, proof of these matters of weight, speed, etc., in terms of their recognised measures, necessarily entails evidence of a measurement thereof by means of a *mechanical or scientific instrument and, in some instances, in addition* a process of computation."

Nadat voorts daarop gewys is dat sulke getuienis teoreties altyd getuienis insluit "as to the trustworthiness of the method or process followed in order to make the measurement and as to the accuracy of any instrument used in that process" is die volgende opmerkings uit Wigmore, 3de uitg. Vol III pp.189-190 met goedkeuring op 764 A-C aangehaal:

> "Our impression is not received by the unaided senses, but depends for its verity upon the correctness of the intermediate instrument or process. It would seem plain, however, that the situation is the same as if our senses had been abnormally enlarged in scope or capacity, and that we may here also claim to have knowledge, in the ordinary sense, provided only that the instrument or process is known to be a trustworthy one. That trustworthiness may be based upon general experience as to the class of instrument in question, together with a knowledge of the mechanism of the particular instrument as one constructed according to the trustworthy type.
> What is needed, then, in order to justify testimony based on such instruments is: Preliminary professional testimony (1) to the trustworthiness of the process or instrument in general (when not otherwise settled by judicial notice); (2) to the correctness of the particular instrument, such testimony being usually available from one and the same qualified person. Any process or instrument, furnishing abnormal aid to the senses, may thus be employed as a source of testimonial knowledge."

Aldus het hierdie hof in beginsel reeds die inligting versamel, en selfs verwerk, deur betroubare meet- en ander wetenskaplike instrumente as toelaatbare getuienis aanvaar ten spyte daarvan dat die juistheid van die inligting as sodanig nie vatbaar is vir menslike verifikasie nie. Die ratio vir die toelating daarvan is eenvoudig die bewese of bekende betroubaarheid van die betrokke instrument en die wyse waarop dit aangewend is. Op 764 E-G het

Corbett AR bv op die volgende gewys:

> "Expert evidence as to the trustworthiness of the process may be obviated by die doctrine of judicial notice. This is referred to by <u>Wigmore</u> in the passage quoted above. In further elaboration of the point the learned author remarks (at p. 190):
>
> > 'It may be premised that though, on the principle above noted, any such process or instrument must be preliminarily found to be a trustworthy one, yet, if the appropriate science or art has advanced to a certain degree of general recognition, this trustworthiness may be judicially noticed as too notorious to need evidence.'
>
> Thus, to take again the example of the X-ray, while the court may in some cases require expert testimony to interpret an X-ray photograph tendered in evidence, it does not ordinarily need to have the process of X-ray photography proved or explained to it. Judicial notice is similarly taken of other scientific instruments or processes, such as tape-recording, telephony and ordinary photography. When it comes to the reliability or correctness of the particular instrument used there is again a measure of flexiblility. In certain instances the courts do not demand proof of such reliability either because of the high degree of likelihood that the machine is accurate or because it has been tested."

Op grond van die voorafgaande kan sekere opmerkings in <u>S v Ramgobin and Others</u> 1986(4) SA 117 (N) waarin die toelaatbaarheid van klank- en video-opnames in geskil was, nie ondersteun word nie. In die uitspraak het Milne RP (soos hy toe was) naamlik aanvanklik (op 126 F)

aangedui dat "evidence aliunde establishing the accuracy of the recording" 'n vereiste vir toelaatbaarheid is, en op 135 I-J verduidelik dat

> "when I talk of the need for proof of accuracy, I mean that there must be a witness to the event purportedly recorded on the tape, who testifies that it accurately portrays that event. It need not be the person who made the recording, but may be anyone who witnessed the event."

(Vgl ook die opmerkings op 159 I - 160 B, 162 F, 165 I, 166 D en 166 I-J.) In S v Baleka and Others (3) 1986(4) SA 1005 (T) het Van Dijkhorst R tereg van hierdie sienswyse verskil. Volgens hom (op 1024 I - 1025 B)

> "[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 further fail to appreciate why that proof of reliability and accuracy can only be furnished by viva voce evidence of a witness who saw and heard the events recorded. Surely, circumstancial evidence (waarmee klaarblyklik getuienis oor die betroubaarheid van die apparaat en die operateur daarvan bedoel is) might, in a given case, lead to the same conclusion."

In die onderhawige geval bestaan daar, soos reeds aangedui, geen bedenkings oor die vermoë en betroubaarheid van die toestel wat gebruik is om die spoed van appellant se voertuig te meet en te boekstaaf nie en ook nie

oor die manier waarop dit aangewend is of die egtheid van die foto nie. In die lig hiervan doen die afwesigheid van menslike verifikasie van die inhoud van laasgenoemde nie afbreuk aan die toelaatbaarheid daarvan nie.

In 'n alternatiewe argument het appellant se advokaat aangevoer dat die toestel wat gebruik is as 'n "rekenaar" beskou moet word volgens die omskrywing van so 'n apparaat in die Wet op Rekenaargetuienis 57 van 1983, en die foto as 'n "rekenaardrukstuk" wat nie toelaatbare getuienis in 'n strafsaak is nie omdat die bedoelde wet slegs voorsiening maak vir die toelaatbaarheid van sulke drukstukke in siviele sake. Die betoog is klaarblyklik ongegrond. Die toelaatbaarheid van getuienis in enige saak word beoordeel aan die hand van die gemene reg en toepaslike statutêre bepalings met as uitgangspunt die grondbeginsel dat alle relevante getuienis toelaatbaar is behalwe in soverre dit gemeenregtelik of statutêr uitgesluit word. Of die foto soos die een in die onderhawige geval per definisie 'n rekenaardrukstuk in 'n siviele saak sou wees, kom nie daarop aan nie omdat dit, indien relevant, in strafsake nóg deur wetsduiding nóg op enige gemeenregtelike grond uitgesluit

is. Die relevansie van die foto in die onderhawige geval spreek vanself.

Die appèl word afgewys.

J J F HEFER
APPèLREGTER

BOTHA, AR	)	
SMALBERGER, AR	)	)STEM SAAM
KUMLEBEN, AR	)	
HARMS, AR	)	