IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE APPEAL CASE NO. 52/83

In the matter of:-

MPHILISI NICO DLAMINI

vs.

THE QUEEN

CORAM: MAISELS, J. P.

WELSH, J.A.

ISAACS, J.A.

JUDGMENT

(Delivered on 4th October, 1983)

ISAACS, J. A.

In this Appeal the Appellant had been charged with the crime of rape of one Themtie Mnisi who is described in the indictment as a fifteen year old female. I must say that apart from the statement in the indictment there is no proof in the evidence to that effect.

On the day in question she was at school looking after the child of a teacher. She was going home at 4 O'clock in the afternoon. Along the way she saw a person whom she had seen before. This was the Appellant whom she called by his name. She said she had not spoken to him before. The accused requested her to go with him to his camp. She said she refused. He then grabbed her and pulled her towards a fence. She said she struggled and screamed but she alleges and gave evidence that he had raped her. She said she had had intercourse with other people before. She said the Appellant did not finish the intercourse because some people came. Two people one of whom was her boyfriend had

come and she said she reported to the boyfriend what had happened. She also testified that she went home and told her parents what happened. Her mother took her to the Chief's runner who then took her to the Induna.

The Chief's runner gave evidence to the effect that the Appellant made a confession of rape to the Indiana. When the complainant was giving her evidence the Appellant is alleged, according to the record, to have said, "I have questions to ask this witness. Unfortunately we were caught in the act by the other boyfriend of the complainant, that is why she was giving this evidence because the other boyfriend of the complainant went to report the matter". The Appellant, in this court, denied that he did say this in the court below.

During the course of the proceedings at the trial when the Appellant was giving evidence, he was cross-examined as to an affidavit that he made in an application for bail. In this affidavit he is alleged to have said, "This girl is a former girlfriend of mine, she is not 15 years old but 18 years old, she consented to have intercourse with me". It is reported in the record that the Appellant answered, "I did say some of it but some of the things were not well taken". He did however sign the affidavit. In his evidence in the court below the Appellant denied that he had had intercourse with the complainant at that time and in this court he persisted that he did not have intercourse with her. It is perhaps unfortunate in this case that evidence which was available to the Crown was not adduced in the trial court. Neither of the boys whom the complainant alleged had come during the course of rape was called by the Crown. The Induna to whom the Appellant is alleged to have confessed was not called. The Affidavit which the Appellant made in his bail application is not before this court as part of the

record.

The court has come to the conclusion that there was probably intercourse as the Crown has alleged between the Appellant and the complainant but the court cannot say that the Crown, on the evidence, has proved beyond reasonable doubt that such intercourse was without consent. Normally in terms of the Criminal Procedure Act on a charge of rape, a verdict of intercourse with a person below the age of 16 years would be a competent verdict under a Statute but as I have said there is no evidence of the complainant's age. This court therefore cannot change the verdict to the statutory offence. We have considered the argument of the Crown Counsel, but the court thinks that under the circumstances it would be unsafe to allow the conviction to stand.
I would therefore uphold the Appeal against the conviction and sentence.

I. ISAACS

JUDGE OF THE APPEAL COURT

I agree.

I.A. MAISELS

JUDGE PRESIDENT OF THE APPEAL COURT

I agree.

R.S. WELSH

JUDGE OF THE APEAL COURT

create the impression that he is not conducting the trial in an open-minded or impartial manner. This may arise from the frequency, length, timing, form, tone or content of the questions;

(b) He should also refrain from questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him;

(c) He should also refrain from questioning a witness or an accused person in a way that may

intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility.

The question raised by Mr. Malinga is whether in the present case the learned judge transgressed these limits and, if he did, whether he did so to such extent as would justify a finding by this Court that he failed, or gave the impression of failing, to conduct the trial in an open-minded, impartial manner or rendered himself unable to form a proper and fair assessment of the demeanour of the witnesses.

I shall consider the complaints made by Mr. Malinga in the order in which they are advanced in the heads of argument. The first is based on a comment made by the judge during the course of an application made by the Crown to put a certain document in evidence. The admissibi1ity of the document was raised by the judge but attorney for the only represented accused said he had no objection. The learned judge then observed how difficult it would be to explain the legal position to the unrepresented

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accused and continued by saying:

"Well, Mr. Donkoh, if you take the risk of this going in, you know that, that I was, I think, as far as the Crown Counsel is concerned, they should not take the risk of any possible devious document, but is for you to conduct your case the way that you want to. It would, assuming that you have got a strong case hare it would be rather a shame if, that should we do the strong case, to have it go a different way on appeal because of the .... of a document of this type".

This passage has obviously become distorted in the course of transcription but as I understand it all the learned judge was saying was that he had misgivings about admissibi1ity but would nonetheless allow the document to go in evidence if the Crown pressed its application but, assuming the Crown had a strong case, it would be a shame if that case were to be upset on appeal on the ground that the document should not have gone in.

In my view, the correct manner of dealing with the matter would have been for the learned judge to have made a definite ruling on admissibi1ity and the remarks complained of would then have been unnecessary. However, the remarks were made and the question before us is whether it can properly be inferred from them, as Mr. Malinga contends it can, that the learned judge had already decided to convict the appellants, had sided with the Crown and was anxious to protect the Crown from unnecessarily providing the appellants with a potential ground of appeal. In my opinion it cannot. The learned judge was merely pointing out the obvious. He was not certain of the legal position on admissibi1ity but, in the event that the Crown were to secure convictions, thought

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it a pity if those convictions were to be set aside merely because a higher court considered that the document was inadmissible. I do not understand the judge to be saying that the prosecution would succeed nor do I understand him to be expressing any partiality towards the Crown case.

Next, complaint is made of the following: Crown counsel made the following somewhat flippant observation after certain evidence emerged implicating the third appellant on one of the counts:
"Mr. Donkoh: Fortunately for No.3, your Lordship, he was nto charged., He has had a narrow escape.

The judge: Yes".

It is submitted that the judge must be taken to have agreed with this remark and that this shows bias on his part against the third appellant. I do not agree. I prefer Crown Counsel's submission that when read in context the more likely explanation is that the learned judge was merely intimating that Crown Counsel should get on with the case.

Next, complaint is made of the large number of interventions made by the judge. An analysis set out in the heads of argument reveal that of 513 questions put to the first appellant in cross-examination Crown counsel asked 280 and the judge asked 233 - some 45%. Likewise during cross-examination of the first Crown witness the judge interjected 32 times, during cross-examination by the first appellant of another Crown witness he interjected 139 times and during cross-examination of an accomplice witness 19 times. Mr. Malinga submits that the frequency, length, timing, form and tone of the questions and interjections put by the judge does not convey open-mindedness, impartiality or fairness on his part.

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The first point which has to be made is, I think, that it would be wholly wrong to deal with this criticism on the basis of arithmetical percentages. While it is true that a judge should exercise restraint in the number of questions he asks there are a variety of circumstances which may lead a judge legitimately to ask questions. Every judge is anxious to understand the evidence being given before him and will almost inevitably ask questions to get details clear in his mind. This is even more the case where cross-examination is being conducted by an unrepresented accused. A judge is also under a duty to ensure that a witness is not undully harrassed and will properly intervene for that purpose. A judge may also wish to get clear in his mind precisely what an accused's case is and again he may decide to seek clarification while the accused is in the witness box particularly when the accused is not represented and he cannot expect any lucid argument presented in final submissions by the accused. A judge may also intervene when he considers that a line of questioning has become redundant, is unhelpful or may unwittingly damage the interests of an accused; and again this is more likely in the case of an unrepresented accused. A general calculation based simply on the number of questions asked or interjections made ignores all these factors.

Having read carefully through the record I am satisfied that a large number of the questions asked were solely for the purpose of clarification. However, it has to be recognised that on occasions it does appear that the learned judge tended to take matters into his own hands and put questions to witnesses which would have been better left to counsel. I have anxiously considered these but at the end of the day I am not in the least persuaded that it can properly be inferred therefrom that the learned judge was guilty of partiality or unfairness, as Mr. Malinga contends, or that this was the impression created. Looking at the record

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as a whole, and while accepting that the overall number of judicial interventions was too great, I am nonetheless satisfied that the interventions were prompted by the worthiest of motives and not by a hostile attitude.

Insofar as the excessive number of interventions may be said to constitute an irregularity I do not consider that it resulted in any failure of justice and accordingly I would apply the proviso set out in section 327 of the Criminal Procedure and Evidence Act and dismiss these appeals.

N.R. HANNAH

CHIEF JUSTICE

I agree.

I.A. MAISELS

JUDGE PRESIDENT

I agree.

D. COHEN

ACTING JUDGE OF APPEAL