APP. CASE NO.47/84

In the matter of:

DOCTOR HLATSHWAYO AND OTHERS Appellants

vs

THE KING Respondent

CORAM: MAISELS, J.P.

COHEN, A. J. A.

HANNAH, C.J.

FOR THE APPELLANTS: MR. L. MALINGA

FOR THE RESPONDENT: MR. A. DONKOH

JUDGMENT

(15/05/87)

Hannah, C.J.

On 2nd October, 1984 the first appellant was convicted on three counts of robbery and two of housebreaking. The second and third appellants were convicted on one count of robbery and one of housebreaking. All three now appeal against these various convictions on the ground that the learned trial judge's conduct of the trial was such as to give rise to a gross irregularity resulting in a failure of justice. Additionally, the second and third appellants appeal against their conviction on the housebreaking count on the ground that there was insufficient evidence to warrant a conviction.

The evidence against the first appellant on the various charges which he faced and the evidence against the second and third appellants on the robbery count upon which they were convicted was overwhelming and it comes as no surprise to me to find that they have not sought to appeal on the merits. The evidence on the

housebreaking count against which appeal has been lodged on the merits was as follows. On the night of 13th November 1983 the premises of the Swaziland Meat Corporation at Matsapha were broken into and a quantity of goods were stolen. According to the evidence of Fikile Mhlanga, the first appellant's girlfriend, over that weekend the first, second and third appellants came to her house at night in a van bringing with them an assortment of goods. These goods were left in her house and the first two appellants then departed leaving the third appellant at the house. The goods were subsequently recovered from the house by the police and when shown to witnesses called from the Meat Corporation were identified as part of the stolen goods. The defence of the two appellants was that of an alibi but that defence was rejected and the learned judge, relying on the evidence of Fikile, convicted them. Fikile was rightly regarded by the learned judge as an

accomplice in that she allowed her house to be used for storing stolen goods but he nonetheless found her to be: "an obviously truthful witness who was subjected to lengthy cross-examination from which she emerged without any appreciable damage to her credibility".

He acknowledged that there were some slight inconcistencies in her evidence which he took account of but observed that these were to be expected in view of the wide-ranging evidence she gave on the various counts and the lapse of time. Mr. Malinga has seized upon some of these inconsistencies as a basis for his submission that the learned judge erred in relying upon her evidence on count three. I have considered these and in my view they are perfectly explicable on the basis referred to by the learned judge. The alibi advanced by the appellants was found to be false and in my view that finding coupled with Fikile's evidence was sufficient to warrant a

conviction.

I therefore turn to the major ground of appeal which concerns the alleged misconduct of the trial by the learned judge. Mr. Malinga contends that it can readily be inferred from various observations made by the learned judge, from questions put by him and from the large number of interventions made from the bench that the judge failed to display the impartiality, open-mindedness and fairness which is to be expected from all judicial tribunals; that he descended into the arena and prejudged the issues before the appellants had an opportunity of putting their own case.

The limits which a judge should observe in the conduct of proceedings over which he is presiding have not, so far as I am aware, been considered in any reported case in Swaziland though the question has been considered in a number of cases in England and South Africa some of which are set out in the appellants' heads of argument. See, for example, Yuill v Yuill 1945 (2) ALL E.R. 183; R v Gilson and Cohen 29 Cr. App, R 181; Hamman v Moolman 1968 (4) S.A. 340; R v Roopsingh 1956 (4) S.A. 509 and State v Rall 1982 (1) S.A. 828. What emerges from these and other decisions is that although it is possible to lay down general guidelines which a judge should follow it must at the same time be realised that it is difficult and, indeed, undesirable to attempt any rigid definition of the limits of judicial intervention. Much depends on the circumstances prevailing in a particular case and the final view of an appellate court will be heavily influenced by the flavour of the case to be extracted from the record when read as a whole.

In State v Rall (supra) Trollip A.J.A.(as he then was) defined the limits in broadterms as follows:

(a) He should refrain from asking questions of witnesses or the accused in such a way as to

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

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 here 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 admissibility 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 admissibility but, in the event that the Crown were to secure convictions, thought

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.

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

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