48(97)

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 571/95

In the matter between:

RODERICK GERBERS **Appellant**

and

THE STATE **Respondent**

CORAM: SMALBERGER, MARAIS *et* SCHUTZ JJA

HEARD: 20 May 1997

DELIVERED: 26 May 1997

J U D G M E N T

MARAIS JA/

MARAIS JA:

Appellant was convicted in the Cape of Good Hope Provincial Division on one count of murder and two counts of attempted murder. He was sentenced to an effective term of imprisonment of 23 years. He was also convicted of being in unlawful possession of a firearm and ammunition and sentenced to a further 2 years imprisonment. An application for leave to appeal against the convictions of murder and attempted murder and the sentences imposed was refused by the trial judge (Louw AJ) but a special entry was made. Hence this appeal.

The application for the making of the special entry was based upon the following grounds:

"1. The learned judge committed irregularities during the proceedings in that the learned judge descended into the arena

1.1 after the cross-examination but prior to the re-examination of the accused, by questioning the accused in a manner that was, having regard to his judicial functions, impermissible or excessive and in some cases, a repetition of questions, bordering on cross-examination;

1.2 by further lengthy questioning of the accused for a period the following day prior to his re-examination in a manner that was, having regard to his judicial functions, impermissible or excessive;

1.3 after argument had been delivered by both the State and the defence, and whilst judgment was being awaited, despite objections from both the State and the defence, the learned judge recalled the accused and further questioned him, which in the circumstances of the case and the late stage of the proceedings, was both inappropriate and impermissible, was a repetition of earlier questioning constituting cross-examination, and employed information arising from an inspection in loco (called for by the learned judge after the accused had already completed his testimony) in a manner prejudicial to the accused.

2. The above irregularities tend to indicate that the learned judge conducted the trial in a manner that was not in accordance with justice, clouded his impartiality, precluded him from detachedly or objectively appreciating and adjudicating upon the issues, impaired the quality of his views on the issues, including those relating to

the demeanour and credibility of the witnesses and the accused, and the probabilities of the competing versions."

In the result the special entry was made by the learned trial judge in the following terms:

"1. Nadat die beskuldigde deur die Staatsadvokaat ondervra is het die voorsittende regter uitgebreide en veelvuldige vrae aan die beskuldigde gestel.
2. Gemelde ondervraging het gedeelte van een dag en 'n gedeelte van 'n daaropvolgende dag in beslag geneem.
3. Nadat die beskuldigde sy saak gesluit het, het die Hof mero motu 'n inspeksie ter plaatse gelas en onderneem en daarna is die beskuldigde deur die Hof na die getuiebank herroep.
4. Nadat die beskuldigde aldus na die getuiebank herroep is, het die voorsittende regter die beskuldigde verder ondervra welke ondervraging ook geslaan het op die waarnemings wat gemaak is tydens die inspeksie ter plaatse."

Our consideration of this appeal is therefore limited in ambit and confined to an examination of the trial judge's conduct with a view to determining whether or not it was irregular and, if so, whether there

has been a failure of justice. In sum, the complaint about the trial judge's conduct is that he wrongly descended into the arena and became a combatant on the State's behalf or gave appellant good cause to reasonably believe that he did so. The specific instances cited to support that general charge are those set out in the application for the making of the special entry. It is of course the cumulative impact of the various initiatives taken by the learned trial judge which has to be assessed.

Counsel for appellant invited us to compare the respective participation in the questioning of appellant of his own counsel (29 pages of the record inclusive of some interventions and questions by the Court), of counsel for the State (68 pages of the record inclusive of limited interventions and questions by the Court), and of the trial judge (27 pages of the record). He also drew attention to the fact that the trial

judge's prolonged questioning of appellant occurred before he had been re-examined. He relied too upon the fact that after closing arguments had been presented by both counsel for the State and counsel for appellant and the Court had reserved judgment, the trial judge reconvened the Court, recalled appellant and questioned him yet again (the questioning occupying 5 pages of the record). The trial judge's decision, taken *mero motu*, to hold an inspection *in loco* after appellant had been extensively questioned by the trial judge and had closed his case was also cited as a further example of what was submitted to be excessive intervention in the case by the trial judge.

It was contended that the trial judge's conduct exceeded the reasonable bounds of what a judicial officer may legitimately and properly do in seeking to do justice and led to the justified perception

that he was not "open-minded, impartial and fair". It was submitted that the "frequency, length, time, tone and content" of the trial judge's questioning of appellant "intimidated and disconcerted the appellant and unduly influenced the quality and nature of his replies and affected adversely his demeanour and impaired his credibility". Examples were cited of what were said to be unfairly repetitive returns by the trial judge to issues which had already been extensively canvassed and of what were said to be "conclusions" put to appellant which were disconcerting to him and resulted, for example, in him saying "Ek kan mos nie die hof se saak betwis, sien my Edelagbare". All this, so it was argued, "precluded the Court from detachedly or objectively appreciating and adjudicating upon the issues before it and impaired the quality of the Court's views on the issues including those relating to the demeanour and credibility of the

witnesses for the State and the appellant, and the probabilities of the competing versions". In summation, it was contended that the trial judge's conduct constituted an irregularity of so material and fundamental a kind that the trial was vitiated by it, thus necessitating a setting aside of the convictions and sentences irrespective of whether or not the evidence establishes that they were justified. It was argued as an alternative that if any irregularity which might be found to have been established was not of the kind just mentioned, appellant had in fact been prejudiced and that it cannot be said that if the irregularity had not occurred, he would inevitably have been convicted.

Counsel for appellant disavowed suggesting that it is irregular *per se* for a judge to question an accused while he or she testifies, or to recall an accused to the witness stand for further

questioning, or to order *mero motu* the holding of an inspection *in loco.* Nor did he contend that the doing of any of these things by a trial judge would provide *per se* any basis for a justifiable perception of bias or of a closed mind or would amount *per se* to an impermissible descent into the arena of forensic conflict between the State and an accused. What he did say was that it is a question of degree and what the cumulative impact is of the doing by the trial judge of all these things in the particular manner and at the particular time at which he did them. I agree.

The trial judge's interventions must be assessed in the light of basic principles of the administration of justice in the sphere of prosecution of crime and any relevant statutory provisions. Time-worn these basic principles may be, yet they remain as valid today as they

were when first propounded many years ago.

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done". So said **Curlewis JA** in **Rex v Hepworth** 1928 AD 265 at 277 when dealing with sec 247 of the Criminal Procedure and Evidence Act 31 of 1917 which provided that:

> "The Court may at any stage subpoena any person as a witness or examine any person in attendance though not subpoenaed as a witness, or may recall and re-examine any person already examined; and the Court shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case."

The learned judge went on to say (at 278):

> "The discretion and power under sec 247 can be exercised by a judge, whether the effect thereof be in favour of the Crown or the accused person. I see no reason to distinguish between the exercise of that power on behalf of the accused or of the Crown, provided the power is exercised for the purpose of doing justice as between the prosecution and the accused."

Sections 167 and 186 of the currently applicable Criminal Procedure Act 51 of 1977 confer identical powers and impose identical duties upon a judicial officer. What was said in **Hepworth's** case is thus no less applicable to those provisions. Sec 169 of Act 51 of 1977 specifically invests a court with the power *mero motu* to hold an inspection *in loco*.

It does not follow of course, from the mere existence of these discretionary powers, that it can never be said that a trial judge who exercises them has done so "irregularly" as that word is understood

in the jurisprudence of criminal procedure. The many cases in which a court of appeal has set aside a conviction on the ground of irregular questioning by a judicial officer bear testimony to that. Nor does it follow from the mere existence of a positive duty to exercise those powers in circumstances where it appears essential to the just decision of the case, that a trial judge's conclusion that the circumstances were indeed such, is unassailable in a higher court and that, no matter what the circumstances may have been, his carrying out of what he perceived to be his duty can never constitute an irregularity. On the other hand, it is necessary to remind oneself that there are well-known limits to the power of a court of appeal to gainsay the *bona fide* exercise by a trial court of a judicial discretion vested in it. As for the conclusion of a trial court that it is duty bound to exercise the powers under consideration,

there too I think that a court of appeal should not lightly substitute its own opinion, reached with the benefit of hindsight, for that of the trial court which had to reach its conclusion that the exercise of the particular power was essential to the just decision of the case upon the evidence which had thus far been placed before it and without the benefit of knowing what, in the result, the evidence given by persons whom it decided to call would be.

There is obviously potential tension between the need to fulfil the role of a judicial officer as described in **Hepworth's** case *(supra)* and the need to avoid conduct of the kind which led to the characterising of the judicial officer's behaviour in cases such as **S v Rall** 1982 (1) SA 828 (A) as irregular and resulting in a failure of justice. Nonetheless, it remains encumbent upon all judicial officers to constantly

bear in mind that their *bona fide* efforts to do justice may be misconstrued by one or other of the parties as undue partisanship and that difficult as it may sometimes be to find the right balance between undue judicial passivism and undue judicial intervention, they must ever strive to do so.

In the present case the problem which arose and which led to the trial judge playing a more active role than is usual was this. It was common cause that appellant had fired a number of shots in the direction of the deceased and the two other persons who were hit by some of those shots. Appellant maintained that the shots had been fired in self-defence. Initially, the State sought to prove that they were not fired in self-defence, that the deceased and those in whose direction appellant fired the shots were unarmed, and that appellant had

deliberately set out to kill the persons at whom he fired the shots. The motive, so the State alleged, was reprisal by appellant, a member of a notorious and violent gang known as the Americans, against the deceased and the others who were with him at the time of the shooting, all of whom were members of an equally notorious and violent gang known as the Hard Livings. The critical issue in the State's case, namely, whether the shots had been fired in self-defence, turned essentially on what was to be made of evidence emanating, on the one hand, from State witnesses who were members of the Hard Livings gang, and on the other, from appellant. None of these persons was an independent witness and the credibility of all of them was potentially suspect and difficult to determine. A further problem which faced the Court *a quo* was that as the trial progressed counsel for the State tended to concentrate upon

seeking to show that appellant had reacted unreasonably to the threat to his life and safety which he alleged existed, and that he had exceeded the reasonable bounds of self-defence in shooting at the deceased and the other persons in the group. The anterior question, namely, whether it was reasonably possibly true that appellant did in fact respond to any perceived or actual threat, received somewhat less attention from counsel for the State. Indeed, when argument came to be presented, counsel for the State did not contend that appellant's allegations in that regard could not reasonably possibly be true but submitted instead that on his own version appellant had exceeded the reasonable bounds of self-defence in reacting as he did. The Court *a quo* was of course not bound to see the matter in the same light nor was it precluded from exploring by appropriate questioning and the calling of witnesses itself the anterior

question of whether appellant acted in self-defence at all.

There was some reliable evidence which could potentially throw light on that question, namely, the evidence concerning the location of the gunshot wounds sustained by the deceased and the two complainants in the charges of attempted murder. If the location of all or most of them showed that the deceased and the two complainants had their backs to appellant when the shots were fired, that could cast doubt upon appellant's assertion that he felt driven to respond to a potential attack with which he was threatened by them. Neither counsel for the State nor counsel for appellant had canvassed the issue. That the trial judge decided to explore that avenue more fully is quite understandable in the circumstances.

The same applies to the trial judge's decision to call a

witness in order to ascertain whether or not appellant's version as to why so many shots were fired by him might reasonably be true. Appellant had not claimed initially that he had only pulled the trigger once. Just prior to his re-examination and in answer to questions put by the trial judge, he claimed that he had only pulled the trigger once but that the pistol operated in such a way that for as long as the trigger was held in the pulled position, shots would continue to be fired from it. Yet he disavowed saying that it was an automatic pistol which could be fired in the manner in which a machine gun is fired. In these circumstances the calling by the trial judge of the investigating officer to respond to this allegation cannot be criticised. As for the inspection *in loco*, no objection was raised at the time to the Court's suggestion that one be held. The layout of the locale was important to a proper consideration

of the competing versions of what had happened. Considerable confusion regarding the layout of the locale had arisen during the trial as a consequence of no satisfactory plan having been placed before the Court and the somewhat inept attempts by the witnesses to describe it. In the circumstances, the trial judge's decision to hold an inspection *in loco* cannot be faulted. Indeed, had it been asked for earlier by one or other of the parties and held, a good deal of the questioning by the trial judge of which appellant now complains would not have been necessary.

Deserving of closer consideration are some of the other complaints about the conduct of the trial by the learned trial judge. It is so that the questioning of appellant by the trial judge was lengthy, but appellant's answers were also often lengthy and length alone is a relatively neutral factor in an enquiry such as this. What is more

important is the manner in which such questioning took place. It goes without saying that objectively legitimate questions may be put so belligerently or intimidatingly or so repetitively or confusingly as to amount to judicial harassment and therefore an irregularity. But that does not mean that a court may not ask an accused questions which he may find it difficult to answer without doing damage to his case. Nor is a perception of partiality justified merely because a court's questions have the result that answers damaging to the accused emerge.

In this case I do not think it can be said that the manner in which the trial judge questioned appellant was unfair. It is so that the trial judge sometimes made assertions and invited comment rather than formulating an appropriate question in a neutral manner but it does not appear that appellant was cowed by that and he did indeed respond, and

respond vigorously, to the invitations to comment.

This is not a case in which the assertions made by the trial judge and put to appellant rested merely upon allegations made by other witnesses whose credibility could only properly be assessed after all the evidence had been heard. It is a case in which the assertions were a recapitulation of what was common cause or objectively indisputable, namely, the location of the gunshot wounds on the bodies of the deceased and the two complainants in the attempted murder charges. Appellant's response on one such occasion that he could not dispute "die hof se saak" was not an appropriate or justified response. Nothing which had been put to him by the trial judge entitled him to conclude that the Court was intent upon proving "its case" against him and the trial judge immediately made it clear to appellant that it was intent upon no such

thing. The true reason for appellant's discomfiture was plainly his inability to reconcile his version of what had occurred with the location of the gunshot wounds.

It is also true that the trial judge sometimes traversed repetitively aspects of the evidence which had already been explored but his object in so doing appears to have been to get clarity in his own mind as to precisely what had been said, or to provide the context for a particular question which he wished to put, rather than to entrap appellant in contradictions.

The recall by a court of an accused to the witness-box for further questioning after the conclusion of argument is no doubt something which is relatively rare and which should not lightly be resorted to. The reasons are obvious: once *lacunae* or inadequacies in

the State's case have been identified and relied upon in argument by counsel for an accused, steps taken *mero motu* by a Court at that belated stage of the proceedings to fill the *lacunae* or to remedy the inadequacies are likely to be seen as indicative of undue partiality towards the cause of the State. Even if that perception is wrong, it is one which could genuinely arise in the mind of an accused. Plainly, that is to be avoided. In the present case it might at first blush seem debatable whether it was wise of the trial judge to have recalled appellant at so late a stage and after counsel for the State had not sought to argue that appellant's evidence that he was threatened by the deceased and his compatriots was false beyond reasonable doubt, for it may have given appellant the impression that the trial judge intended to make an attempt to extract evidence from him which would show that he was not so threatened.

However, the fact of the matter is that he was recalled for the limited purpose of dealing with certain aspects of the inspection *in loco* which had taken place only after he had left the witness-box when he testified previously. The questions then put to him on his recall were concerned with the route he had taken when fleeing (as he put it) from the Hard Livings group he encountered. The precise direction of that route was only made known at the inspection *in loco* and it indicated *prima facie* that instead of it taking appellant away from them, it might have enhanced the prospect of his encountering them again, particularly one of them who according to him had a firearm. That admittedly had a bearing on the issue of whether appellant was the instigator of an attack or the potential victim of one, but the inspection *in loco* had been conducted without any objection by appellant's counsel and, observations

having been recorded which could have a material bearing on a critical issue in the case, it would have been wrong for the trial court to rely upon them to reject appellant's version without giving him an opportunity of dealing with them in the witness-box.

All things cumulatively considered, I am unpersuaded that the conduct of the trial judge amounted to an irregularity. The appeal must therefore fail and be dismissed. It is so ordered.

R M MARAIS
JUDGE OF APPEAL

SMALBERGER JA)
SCHUTZ JA) CONCUR