S v RALL [1982] 1 All SA 258 (A)

All South African Law Reports 1982 (1) SA 828 (A)

Division: Appellate Division

Case No: not recorded

Judgment Date: 26 November 1981

Before: Muller JA, Trollip AJA and Van Heerden AJA

Cases referred to:

Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd 1976 (2) SA 565 (AD) - Referred to
Hamman v Moolman 1968 (4) SA 340 (AD) - Applied
Jones v National Coal Board [1957] 2 All ER 155 (CA) - Referred to
R v A 1952 (3) SA 212 (AD) - Applied
R v Hepworth 1928 AD 265 - Referred to
R v Roopsingh 1956 (4) SA 509 (AD) - Referred to
Rex v Ngcobo 1925 AD 561 - Referred to
Rondalia Versekeringskorporasie van SA Bpk v Lira 1971 (2) SA 586 (AD) - Referred to
S v Meyer 1972 (3) SA 480 (AD) - Referred to
S v Mushimba en Andere 1977 (2) SA 829 (AD) - Referred to
S v Sigwahla 1967 (4) SA 566 (AD) - Referred to
S v Wood 1976 (1) SA 703 (AD) - Referred to
Solomon and Another NNO v De Waal 1972 (1) SA 575 (AD) - Referred to
Yuill v Yuill 1945 PD 15 (PD) - Considered

View Parallel Citation

TROLLIP, A.J.A: The appellant, a White man, was tried by a Judge and assessors (two retired magistrates) in the Durban and Coast Local Division on a charge of murder. He was defended by junior counsel. The allegation was that he shot and wounded one Ngcobo, a Black man, on the night of 29 February 1980 in the Eagle Hill Road in the residential area of Yellowwood Park, Durban. The victim subsequently died of his wounds on 3 March 1980. Appellant maintained that he had acted in self-defence, the deceased having attacked him with what he thought at the time was a spear-like object but which subsequently turned out to be a folded umbrella. The trial Court rejected that defence. The appellant was found guilty of murder with extenuating circumstances. He was sentenced to 10 years' imprisonment. With the leave of the Judge *a quo* he has appealed to this Court against his conviction and sentence.
In applying for leave to appeal his counsel (he did not appear before us on the appeal) relied *inter alia* on an irregularity allegedly committed by the learned Judge during the proceedings. The allegation was that while the appellant was testifying in his defence the learned Judge questioned him in a manner that was, having regard to his judicial functions, impermissible or excessive. *Apropos* hereof, the learned Judge, in granting leave to appeal, said:

> ". . . . it is not for me to say anything on that aspect of the matter beyond this. In this case, as in others, I consider that I am not a referee in a game, who is here merely to blow a whistle. I am here to discover, in so far as I can, the truth of the matter. That not infrequently involves questioning one or another, and sometimes a number, of the witnesses, they may be the accused or defence witnesses. It depends on whether the evidence is evidence that, in the Court's view, calls for much more detailed probing than it has received, or which calls for particular aspects to be investigated that occur to the Court as

> important, and may not necessarily occur to counsel as being important. They may sometimes turn out, in the Court's view, not to be important in the long run, but in

---------- ***[1982] 1 All SA 258 (A) at 259***

> the meantime they must be investigated in case they are. The Appellate Division must decide whether the reasonable limits of judicial questioning, whatever such may be, have been exceeded in this case."

Before us appellant's counsel relied heavily on the alleged irregularity. Indeed, it constituted the springboard for their argument

---------- ***[1982] 1 All SA 258 (A) at 831***

View Parallel Citation that the credibility findings by the Court *a quo* appertaining to certain of the State's witnesses and the appellant should be disregarded, and that we should ourselves assess their respective credibility. So this issue has regrettably to be considered by us, and it should be dealt with immediately.

First, some general observations.

According to the well-known *dictum* of CURLEWIS, J.A., in *R.* v. *Hepworth* 1928 A.D. 265 at p. 277, which the learned Judge *a quo* obviously had in mind in his remarks quoted above:

> "A criminal trial is not a game . . . .and a Judge's position . . . . 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."

Inter alia a Judge is therefore entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the accused, as seem to him desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case. (*Wigmore* on *Evidence*, 3rd ed. vol. 3, paragraph 784, p. 151/2.) And for that purpose, according to the learned author (*ibid* p. 159), he may put the questions in a leading form-

> "simply because the reason for the prohibition of leading questions has no application to the relation between judge and witness."

There the learned author differentiates that relation from the one between counsel and a witness he calls. Counsel is prohibited from putting leading questions to his own witness because of the risk that the witness may perhaps think that such questions are an invitation, suggestion, or even instruction to him to answer them, not unbiasedly or truthfully, but in a way that favours the party calling him. (Cf. *Wigmore* paragraph 769; *R.* v. *Ngcobo* 1925 A.D. 561 at p .564; *R.* v. *A.* 1952 (3) S.A. 212 (A) at p. 222 C - D.) Ordinarily that would not apply to leading questions put by the Judge. Nevertheless, the putting of leading questions by a Judge should, I think, be subject the limitations about to be mentioned.

Much depends, of course, upon the particular circumstances of the trial itself as to whether, when, to what extent, and in what form or manner such questioning should be indulged in by the Judge. Thus, if the accused is not represented by counsel, the Judge should and ordinarily would assist him to put his defence adequately, if necessary by the Judge himself questioning prosecution witnesses as well as the accused and his witnesses. The need to do that is naturally

---------- ***[1982] 1 All SA 258 (A) at 260***

far less where the prosecution and defence are both represented by counsel. While it is difficult and undesirable to attempt to define precisely the limits within which such judicial questioning should be confined, it is possible, I think, to indicate some broad, well-known limitations, relevant here, that should generally be observed (see example, *S.* v. *Sigwahla* 1967 (4) S.A. 566 (A) at p. 568 F - H).

(1) According to the abovequoted *dictum* of CURLEWIS, J.A., the Judge must ensure that "justice is done". It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should

---------- ***[1982] 1 All SA 258 (A) at 832***

View Parallel Citation therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused (see, for example, *S.* v. *Wood*

1964 (3) S.A. 103 (O) at p. 105 G; *Rondalia Versekeringskorporasie van S.A. Bpk.* v. *Lira* 1971 (2) S.A. 586 (A) at p. 589 G; *Solomon and Another*, *NN.O.* v. *De Waal* 1972 (1) S.A. 575 (A) at p. 580 H). The Judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression (cf *Greenfield Manufacturers* (*Temba*) (*Pty.*) *Ltd.* v *Royton Electrical Engineering* (*Pty.*) *Ltd.* 1976 (2) S.A. 565 (A) at p. 570 E - F; *Jones* v. *National Coal Board* (1957) 2 All E.R. 155 (CA) at p. 159 F).

(2) A Judge should also refrain from indulging in 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 by the litigants. As Lord GREENE, M.R., observed in *Yuill* v. *Yuill* (1945) 1 All E.R. 183 (C.A.) at p. 189 B, if he does indulge in such questioning-

> "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation."

(See, too, the *Jones* case, *supra*, at p. 159 C - E.) Or, as expressed by WESSELS, J.A., in *Hamman* v *Moolman* 1968 (4) S.A. 340 (A) at p. 344 E, the Judge may thereby deny himself-

> "the full advantage usually enjoyed by the trial Judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts."

The quality of his views on the issues in the case, including those relating to the demeanour or credibility of the witnesses or the accused or the relevant probabilities, may in consequence be seriously impaired (see, for example, *R.* v. *Roopsingh* 1956 (4) S.A. 509 (A) at p .514-5). And, if he is sitting with assessors, that may well adversely influence their deliberations and opinions on those issues.

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(3) A Judge should also refrain from questioning a witness or the accused 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. As Lord GREENE, M.R., further observed in *Yuill*'*s* case, *supra*, at p 189B-C:

> "It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the Judge to what it is when he is being questioned by counsel, particularly when the Judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue."

It therefore follows that the right or duty of a Judge to examine the witnesses or accused in a criminal case is not nearly as extensive as the learned Judge seems to predicate in the abovequoted extract from his judgment in granting leave to appeal.

Now any serious transgression of the limitations just mentioned will generally constitute an irregularity in the proceedings. Whether or not this Court will then intervene to grant appopriate relief at the instance

---------- ***[1982] 1 All SA 258 (A) at 833***

of the accused depends upon whether or not the irregularity has resulted in a failure of justice (see the proviso to section 322 (1) of the Criminal Procedure Act No. 51 of 1977). That in turn depends upon whether or not the irregularity prejudiced the accused, or possibly whether or not this Court's intervention is required in the interests of public policy (cf. *S.* v. *Mushimba and Others* 1977 (2) S.A. 829 (A) at p. 844H). Of course, if the offending questioning of witnesses or the accused by the Judge sustains the inference that in fact he was not open-minded, impartial, or fair during the trial, this Court will intervene and grant appropriate relief (cf., for example, *S.* v. *Meyer* 1972 (3) S.A. 480 (A)).

I turn now to the present case.

The application for leave to appeal confined the criticism of the learned Judge's conduct at the trial to his alleged impermissible or excessive questioning of the appellant. Before us the criticism was somewhat broadened in scope. It was submitted that from the very commencement of the trial the learned Judge "descended into the arena" against the appellant by manifesting disbelief or at least scepticism of the validity of his defence of self-defence. The finding by the Court *a quo* that two important State witnesses were credible should therefore also be

disregarded, so it was urged. But it suffices to say that the passages in the record relied on, read in due context, do not bear out the submission. (The abovementioned credibility finding will, however, be considered on its merits presently.) I therefore pass on to counsel's main argument on this part of the case relating to the judicial questioning of the appellant.
The appellant's evidence in chief occupies eight pages of the record. Cross-examination by the prosecutor covers 41 pages

---------- ***[1982] 1 All SA 258 (A) at 262***
during which the learned Judge often intervened and questioned appellant. I estimate those interventions to be in all about 18 pages. Thereafter, and before the re-examination of appellant by his counsel, the learned Judge proceeded to question him continuously for 34 pages in which he traversed in detail virtually the whole of his version again. During appellant's re-examination (25 pages) the learned Judge sometimes intervened again with his own questions. True, many of the questions were legitimately put to the appellant by the learned Judge for elucidation or supplementation of appellant's version. But in the main, especially during the continuous questioning covered by the abovementioned 34 pages, the interrogation was tantamount to sheer cross-examination of the appellant in which leading questions were put to discredit him as a witness. Many of them also conveyed judicial disbelief or scepticism of his evidence on certain material aspects of his alleged self-defence. It may well be, as appellant's counsel maintained before us, that the learned Judge was trying to discredit the appellant and establish through such sustained cross-examination in the above mentioned 34 pages that the aggressor was the appellant and not the deceased and that the appellant was aware from the outset that the deceased had only an umbrella in his possession.
Indeed, the Court *a quo* (the learned Judge and assessors) did ultimately reject the appellant's version as being untrue. The learned

---------- ***[1982] 1 All SA 258 (A) at 834***
Judge in the judgment said that he was "a most unimpressive and unsatisfactory witness", he frequently "rambled off the point", was constantly and deliberately evasive, and was untruthful on certain issues. It was found that he knew "perfectly well" that the "implement" used by the deceased was "an ordinary, plain and simple umbrella", and that he did not believe that it was "a spear, a knife, or the like" as he maintained in his evidence.
I shall not overburden this judgment with extracts from the record to illustrate the nature of the learned Judge's questioning of the appellant. They would be too numerous and lengthy. It suffices for me to say merely that, in my view, he far exceeded or clearly infringed the limitations mentioned above. That does not, however, mean that it can be inferred therefrom that in fact he was prejudiced against appellant and prejudged the case against him. I do not think that he did. But the offending questioning obviously created that impression in the minds of appellant and his counsel at the trial, for that complaint featured in the application for leave to appeal made from the Bar soon after he was sentenced. And, having read the offending questioning many times, I think that it does create such an impression. Moreover, the learned Judge thereby did undoubtedly descend into the arena of the conflict between the parties. That that clouded his vision and that of the assessors is evidenced by the fact that they paid no regard to certain important, decisive probabilities in the case, as will presently emerge. Lastly, the sustained cross-examination of the appellant by the learned Judge probably also contributed appreciably to his poor showing as a witness.

---------- ***[1982] 1 All SA 258 (A) at 263***

I think therefore that the offending questioning did constitute an irregularity in the proceedings which prejudiced the appellant. This Court is consequently entitled to intervene and grant relief. The best way to remedy the prejudice and ensure that justice will also be seen by the appellant to have been done is for us to disregard the adverse finding by the Court *a quo* concerning appellant's credibility and to determine afresh his guilt or innocence according to the recorded evidence. That accords too with the request made to us by counsel for the appellant.
My conclusion therefore is that the State did not prove that the fatal wound was inflicted by the last shot or in the circumstances set out in the above reasoning of the Court *a quo.* It could therefore have been caused by any of the four shots in accordance with the alternative theory.
To sum up: even though appellant was not an entirely satisfactory witness, his version of the shooting the deceased might reasonably be true. That is, that without provocation the deceased suddenly, unexpectedly and violently attacked him and continued attacking him with what he believed was a spear-like object; that he therefore believed that his life or body was in serious and imminent danger; and that in self-defence he fired the four shots. That in those circumstances he reasonably held those beliefs or a reasonable man in his position

[1982] 1 All SA 258 (A) at 835

View Parallel Citation would have held them (cf. BURCHELL and HUNT *S.A. Criminal Law and Procedure*, vol. 1, pp 279-280) was correctly not disputed by the State. Did he exceed the legitimate bounds of self-defence by firing *four* shots? Certainly on his version he was justified in firing the first shot. Incidentally, that might well have been the fatal shot. But be that as it may, that shot did not cause the deceased to desist. The attack continued. Hence appellant then fired the next three shots in quick succession in his general direction, not to kill him, but rather to stop the attack. Objectively viewed, I think that in those circumstances a reasonable man in appellant's situation, with the revolver as the only means to hand for his defence, would have done the same.

The consequent conclusion is that the State failed to negate appellant's defence of self-defence and therefore did not prove that he was guilty of any offence. The appeal must therefore succeed and the conviction and sentence must be set aside. It was common cause that in that event the further orders made by the Court *a quo* in relation to the revolver must also be annulled.

[1982] 1 All SA 258 (A) at 263_1

The following orders are made: the appeal succeeds, the conviction and sentence are set aside, the orders by the Court *a quo* forfeiting the appellant's firearm and bullets to the State and declaring appellant unfit to possess any firearm are also set aside.

MULLER JA and VAN HEERDEN AJA concurred.

Appearances

B Law, SC and JS Janson - Advocate/s for the Appellant/s
RA Suhr - Advocate/s for the State
De Villiers and Strauss, Durban; Symington and De Kok, Bloemfontein - Attorney/s for the Appellant/s

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Footnotes

Parallel Citation	Page 830 of 1982 (1) SA 828 (A)
Parallel Citation	Page 831 of 1982 (1) SA 828 (A)
Parallel Citation	Page 832 of 1982 (1) SA 828 (A)
Parallel Citation	Page 833 of 1982 (1) SA 828 (A)
Parallel Citation	Page 834 of 1982 (1) SA 828 (A)
Parallel Citation	Page 835 of 1982 (1) SA 828 (A)