CRI/APN/197/89

IN THE HIGH COURT OF LESOTHO

In the Application of :

MOSALA LENKA Applicant

V

R E X Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 27th day of June, 1989.

The applicant who was convicted of Culpable Homicide in a Criminal trial i.e. CRI/T/48/88 Rex vs Lenka (unreported) wherein he was charged with murder, has approached this Court by way of Notice of Motion seeking bail as follows :-

1. That the applicant be granted and admitted to bail pending Appeal to the Lesotho Court of Appeal on any conditions that the court may deem fit;

2. Granting such further and/or alternative relief as the court may deem fit.

The motion is opposed.
I have observed that in paragraph two of his petition the applicant has referred to his Notice of appeal as well as the grounds on which he relies for holding the view that both conviction and sentence should be set aside.

In paragraph one the applicant states that he is serving a sentence of eight (8) years' imprisonment. The actual sentence imposed reads as follows:-

"The accused is sentenced to eight (8) years'

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imprisonment of which two (2) are suspended for three (3) years on condition that he is not convicted of a crime committed during the period of the suspension and of which violence to a person is an element."

The applicant avers that he has good prospects of success on appeal and points out that the trial Judge descended into the arena by cross-examining him instead of putting questions which would elucidate any points whioh are obscure. He also complains that he was strongly cross-examined in his evidence in chief and told at the end of his cross-examination that his entire evidence is a lie. He swears that the record which is presently being typed will support this contention.

Much as these charges place me in an awkward position of appearing to be defending my conduct of the case - I may just point out that I do not relish that awkwardness - it is however fitting to treat this application as dispassionately as is required by law.

First it is regrettable that the record of proceedings is not yet ready and therefore it is impossible for me to refer to the actual portions where it is complained that the trial Judge descended into the arena. However my notes distinctly show that it was during the course of the applicant's evidence in chief that he introduced a fresh matter altogether which had never been either alluded to or elicited in cross-examination of the Crown witnesses.

Fearing that the applicant when pursuing this new line of giving evidence he was unwittingly damaging his interest I drew to his attention the danger of giving evidence which might turn out to be a lie and carry the stigma of being either a fabrication or an afterthought. See Phaloane vs Rex

1981(2) LL.R 246 where Maisels P. said:

> "It is generally accepted that the function of counsel is to put the defence case to the crown witnesses, not only to avoid the suspicion that the defence is fabricating, but to provide the witnesses with the opportunity of denying or confirming the case for the accused ....."

I may point out that, in a way, an intervention by the trial Judge geared at bringing this to the attention of an accused person helps absolve the accused's counsel from an accusation that he is wanting in his professional skill in that he never put his client's case to the opposing party.

If indeed accused's counsel was instructed that Trooper Monyalotsa threatened the accused with a firearm why would this have not been put to either P.W.1 Makhaola who was present throughout or to Monyalotsa himself? Why should this important and significant point of the accused's defence surface so late in the trial when it could not be tested against the testimony of witnesses who were present?

The rest of the averments by the petitioner relate to credibility of the witnesses. I need not go into that for I dealt with it in my judgment before reaching the conclusion that was specified.

It remains then to deal with the question of prospects of success on appeal under circumstances raised by the applicant.

In his invaluable book The Due Process of Law 1980 publication Lord Denning says at 58 :

> "Once upon a time there was a judge who talked too much. He asked too many questions. One after another in quick succession. Of witnesses in the box. Of counsel in their submissions. So much so that they counted up the number. His exceeded all the rest put together. Both counsel made it a ground of appeal."

See Jones vs National Coal Board (1957) 2 QB 55, where Lord Denning said :

"No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind.... He was anxious to investigate all the various criticisms that had been made ..... Hence he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases, and have done for centuries.

"Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been ..... however, a judge is not an umpire to answer the question 'How's that?' His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. ..... If a judge, ... should himself conduct the examination of witnesses, he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict' See Yuill vs Yuill (1945) 1 ALL E.R. 183.

"Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage around her eyes.....

"Such are our standards. They are set so high that we cannot hope to attain them all the time. In the pursuit of justice, our keenness may outrun our sureness, and we may trip and fall. That is what happened here. A judge of acute perception ..... actuated by the best motives, has nevertheless himself intervened so much in the conduct of the case that one of the parties - nay, each of them - has come away complaining that he was not able properly to put his case; and these complaints are, we think, justified."

"After that case," says Lord Denning "there were several appeals which came before us- - from other judges - on similar grounds. The lawyers used to get shorthand notes,

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> count up the number of questions asked by the judge and by counsel, and then ask for a new trial. But I do not remember any appeal that succeeded on that ground."

In Rex vs Hepworth 1928 AD 265 at 277 Curlewis J.A. said :

> "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."

The limits which a judge should observe in the conduct of proceedings over which he is presiding have been set out in S vs Rall 1982(1) SA 828 at 832 as follows :-

(a) He should conduct the trial in such a way that his open-mindedness, his impartiality and his fairness are manifest to all concerned.

(b) He should refrain from indulging in questioning witnesses or the accused 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.

An impression that a judge is not conducting the trial in a spirit of impartiality may arise from the frequency, length, timing, form, tone or content of the questions.

It is important to note that in Rall above Trollip A.J.A. said at 833

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"The appellant's evidence in chief occupies eight pages of the record. Cross-examination by the prosecutor covers 41 pages during which the learned Judge often intervened and questioned the 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 the appellant's re-examination (25 pages) the learned Judge sometimes intervened 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 above-mentioned 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."

- But compare and contrast with p. 831 letter C.

See Harris vs Harris (1952) times, 9 April; Judgments of the Court of Appeal, 1952, No. 148

It is important to consider the Swaziland Court of Appeal decision in Doctor Hlatshwayo & Others vs The King App. Case No. 47/84 (unreported) by Hannah C.J. concurred in by Maisels P. (for a long time a Judge and later President of the Lesotho Court of Appeal) and Cohen A.J.A.

At page 6 the learned Chief Justice said :

"Next, complaint is made of the large number of interventions made by the Judge. An analysis set out in the heads of arguments reveals 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

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the questions and interjections put by the judge do not convey open-mindedness, impartiality or fairness on his part.

"The first point which has to be made is .... 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 ..... A judge may also wish to get 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 ..... 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 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 satisfied that the interventions were prompted by the worthiest of motives and not by a hostile attitude."

None of the interventions in Rall or Hlatshwayo above come any near the handful of questions put to the accused in the case relating to the instant application in so far as it suggests that on account of some irregularity in the conduct of proceedings at trial prospects of success on appeal are good.

The sole purpose of these interventions which I don't think would cover even three quarters of a page

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of a page was to find out what his defence was. The accused stood by his innocence in the face of credible evidence to the contrary. See Rall again p. 831 letter C.

Nothing was said on his behalf regarding the presence of, let alone the threat with a gun to him by P.W.4 at the material time.

But it is this gun which when tested had gun powder despite that when last fired it had been cleaned by the accused - that the applicant wishes to be ignored and advantage taken of the other gun in regard to whose presence, even though it played no role, he wishes to be given benefit of doubt. Yet it has repeatedly been said

> "an accused's claim to the benefit of a doubt ..... must not derive from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

See R vs Mlambo 1957(4) SA. 727 AD at 738.

In dismissing the appeal the Swazi Court of Appeal had recourse to the application of section 327 of the Criminal Procedure and Evidence Act which is on all fours with our Section 329 (2) of the C.P. & E. reading :-

> "Notwithstanding that the ...Court is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedingsunless it appears to the Court of Appeal that a failure of justice has resulted therefrom."

The Court of Appeal Act No. 10 of 1978 section 8 (2) also says :-

> "Notwithstanding the fact that the Court is of the opinion that the point raised in an appeal under subsection (1) might be decided in favour of the appellant, the Court may, if it considers that no substantial miscarriage of justice has actually occurred, dismiss the appeal."

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C/F C of A (CRI) A No. 12 of 1974 Stephen Tsatsane vs Rex (unreported) by Maisels P. as he then was at pp. 12 & 13.

It is an indisputable fact that the Court of Appeal does not enjoy the advantages of a trial court which is steeped in the atmosphere of the trial proceedings. So, even though an appeal is a retrial it is impossible for an appellate court to be exposed to the same atmosphere. It is to be appreciated that in all the authorities cited in regard to judicial interventions an attempt was made to list the number of such interventions. Without benefit of the record it is impossible to make an estimate of nor even fathom the context in which such interventions were made in the instant matter. See Gilson & Cohen (1944) 29 CR. App 174 pp. 178 & 181.

In considering an appeal regard is to be had to the fact that

(a) "... if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

(b) An Appellate Court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered."

See Rex vs Dhlumayo & Another 1948(2) SA at 677 et seq.

These considerations seem to appreciably minimise prospects of success on appeal.

I have been referred to passages appearing in Rex vs Kuzwayo 1949(3) SA 761 at 764 namely

(1) "We are aware that this Court is able to apply a proper test with greater ease than the trial judge for the trial judge must in the nature of things find it somewhat difficult to look at the matter from a purely objective stand-point; he has a natural reluctance to say that his own

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> judgment is so indubitably correct that the judges of Appeal will concur therein."

See R vs Clewer (1953) 37 CR. APP. 37

I agree with the reasoning contained in (2) that

> "It seems to me that if the trial court is in the position that it can honestly say that the applicant will have a reasonable prospect of success on appeal that must indicate that there must be some doubt in the mind of the trial court, and if such doubt does exist, then there should not have been a conviction, so that the very strict application of this rule, in my opinion, renders it very difficult to conceive of cases where leave to appeal should be granted."

In like manner I find difficulty in granting application for bail pending appeal based on the view that prospects of success abound in the Superior Court because if this court is of that view then it should not have convicted in the first place. It had the opportunity of observing the demeanour of witnesses and their appearance and whole personality. This should never be overlooked.

With regard to the question of bail, regard has, at this stage to be had to the fact that presumption of innocence falls away once conviction has been secured.

It concerns the state that sentences of the court should be carried out.

With regard to the conviction itself it is important to note that the applicant has been found guilty of Culpable Homicide on the basis of the Criminal Law (Homicide Amendment) Proclamation 42/59 which defines this form of crime as murder but for the provisions of section 3 which help reduce murder to Culpable Homicide if provocation has sufficiently been shown to be involved. Accordingly a heavy sentence was called for and imposed.

Thus there cannot be any fear that by the time the applicant's matter is heard on appeal he shall have

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been made to suffer unnecessarily by completing his prison term before the appeal hearing in the event that his appeal would be upheld.

I have been referred to Rex vs Fourie 1948(3) SA. 548 at 549 where the following passage appears in Malan J's judgment :-

> "It seems to me, especially in the case of a serious crime, that a convicted person should not be admitted to bail. He has been convicted and his sentence is in force, and the fact that he has noted an appeal or had a point of law reserved does not entitle him to ask that the sentence imposed be stayed pending the decision of his appeal."

It has been urged on me that on account of discrepencies in the evidence of P.W.2 in the trial court when compared with that in the preparatory examination depositions, and also of the fact that conviction was based on his single evidence despite doubts as to his credibility double cautionary rule should have been applied. But my evaluation and assessment of his evidence left me in no doubt that he was a reliable and competent witness in terms of section 238 of our CP & E. Hence he qualified as a credible eye witness. Hence the necessity for corroboration fell away.

Questions of credibility and happenings at the scene were sufficiently dealt with in the judgment that I gave. If I entertained any doubt regarding these, then the applicant would have been granted benefit of such doubt and acquitted. Lord Denning has indicated that from 1957 to the end of his term on the Appeal Court bench no appeal was upheld founded on complaints about judicial interventions during proceedings. The Swazi Court of Appeal is aware of no reported case in which the limits to be observed by a judge in the conduct of proceedings over which he is presiding, have been considered. See R vs Cain (1936) 25 CR. App. at 204.

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Quite clearly in Rall above the interventions were beyond measure. Can the same be said of the case to which this application relates? I think not.

The application for bail pending appeal is refused.

J U D G E.

27th June, 1989.

For Applicant : Mr. Mphalane
For Respondent : Mr. Mokhobo.