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IN THE SUPREME COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: CC 482/85

DATE: 15/11/88

In the matter between:

THE STATE

and

P.M. BALEKA & 18 OTHERS

JUDGMENT

PREFACE

We preface this judgment with a few introductory remarks of a general nature. Though we use the first person plural throughout, the assessor confines his contribution to factual matters.

This has been a trying case for all concerned in it. The legal teams on both sides have to be commended for their unsparing labour to keep the legal process flowing uninterruptedly. We know of no case where such concentrated effort has been sustained for such a long period.

Having said this it is our duty to make a few observations about the procedure in our criminal courts.

We have earned the right to make them by patient prolonged suffering listening to this interminable case. It commenced on 16 October 1985. Thus far we have had 437 days in court stretched over a period of 37 months.

278 witnesses testified: 152 for the state and 126 for the defence. The record of evidence and argument consists of 459 volumes and runs to 27 194 pages. We had as exhibits 1 556 documents consisting of 14 425 pages, 42 video and audio tapes, 5 rolls of 16 mm film and numerous photographs and maps.

The fact that our quest for justice follows a route so tortuous that it seems neverending and is costly beyond endurance to both the state and accused is a sharp indictment to our procedure in the criminal courts. One should not run an ultra marathon to determine the guilt or innocence of an accused. It is not fair to the accused. It is not cost-effective to the state. It stretches our judicial resources to the limit. Whichever way the matter is regarded, justice delayed is justice denied.

We are not unmindful of the fact that the indictment of the state in the present case of necessity led to a wide field of investigation. To paint on a vast canvass may to the uninitiated appear to be impressive but it should be borne in mind that for a proper perspective of the overall picture the distance becomes so great that the detail is blurred. To this should be added the fact that the prolixity of a case is increased in multiple ratio to the number of accused. These facts, alas, the state seems unable to grasp.

There are, however, other factors as well that led to the prolixity of this case.

Our cumbersome procedure can largely be ascribed to the impotence of our judicial officers to keep their hand to the helm and firmly guide the litigious ship through tempestuous waters. This is not their fault, they are relegated to the role of passive passengers banished from the wheelhouse staring hopelessly and in bewilderment at the antics of the crew while the ship founders off course in the shallows.

This situation manifests itself in the majority of our criminal cases, where the art of cross-examination has degenerated to a treadmill of repetition and a quagmire of irrelevancies. It seems to be regarded as a sin to ask a short direct question which could lead to a direct answer. Traps are elaborately set in paths that lead nowhere. There is also a tendency, often incurable, on the part of counsel to argue their case during cross-examination, using the witness as a

sounding-board. The rationale behind this method is probably that the court is so obtuse that it needs to hear every argument twice - once during cross-examination and once at the end of the case. Should the judicial officer be bold enough to enquire where all these questions are leading (and thereby transgress the rule laid down in S v Cele 1965 1 SA 82 (A) 91F) the answer is either that the credibility or memory of the witness is being tested or, better still, that it will soon be apparent what the cross-examiner has in mind. Often one remains in the dark throughout. Meanwhile the hours drag by.

This tendency at prolixity is not limited to cross-examination. In leading evidence in chief often a lot of irrelevant matter is introduced which merely opens up further avenues for cross-examination and does not advance the case of the party leading it.

Evidence was led in extenso by the defence on matters which we thought after the cross-examination of state witnesses were common cause. Evidence was also led by the defence on matters barely relevant and immaterial in the overall picture but the real purpose of which later appeared to us to be to contradict a state witness on a collateral issue.

When the court interfered in a legitimate attempt to speed up the tedious process it was unfairly accused of impatience.

One was exasperated at times by the repetitiveness, tediousness and protractedness with which the evidence was led.

Our own Appeal Court in S v Cele (supra) 91 has little comfort for "even the most patient of judicial officers" aggravated by "incompetent or prolix cross-examination". The advice is to approach the problem with patience and discernment, even if they are "tried almost to the point of exhaustion"! At the same time it is stated that the presiding judicial officer has both a discretion and a duty to control undue or improper cross-examination. Latitude in testing by cross-examination the credibility of a witness where credibility is the issue, is however to be allowed "until the court is satisfied, either that the right to cross-examination is being misused or abused, or that the particular line of cross-examination would never be productive of anything which could assist the court in its eventual decision on credibility".

This test, laid down with laudable motives, emasculates our discretion and duty to control the proceedings in the interests of justice.

A similar dichotomy is to be found in some older English cases. In Jones v National Coal Board 1957 2 All ER 155 (CA) 158 Lord Denning on appeal referred to interventions by the trial judge as "actuated by the best of motives". He had been anxious to understand the details of the case, had intervened to protect witnesses from undue harassment, had striven to investigate all aspects and had been anxious that the

case should not be dragged on too long and had intimated clearly when he thought that a point had been sufficiently explored. In the words of Lord Denning:

> "All those are worthy motives on which judges daily intervene in the conduct of cases and have done for centuries."

Yet the court of appeal set aside the proceedings on the ground of excessive interruptions from the bench with a reference to the functions of a trial judge:

> "The judge's part in all this is to hearken to the evidence, only himself asking questions of the witness when it is necessary to clear up any point that has been overlooked or left obscure; to see that advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. ... Such are our standards. They are set so high that we cannot hope to attain them all the time."

This is the ideal judge who clairvoyantly determines immediately what line of cross-examination is irrelevant and nips it in the bud. Alas, most of us have no crystalball and are repeatedly led blindfolded into a cul-de-sac.

Cross-examination, intended as a scalpel to excise the tumour of untruth, has become a bludgeon with which justice is slowly clubbed to death. We have elevated cross-examination to the status of a holy cow and forgotten its purpose. This often bloated beast has to be culled and replaced with one much leaner and more effective.

It seems that this process has started in the United Kingdom. The present approach is that the trial judge should do his utmost to restrain unnecessarily prolonged cross-examination and the court of appeal have said that they will support him in this. Halsbury's Laws of England 4th ed vol 11 para 284 note 7; R v Kalia 1975 Crim LR 181 (CA); R v Simmonds & Others 1967 (51) Cr A.R. 316, 326. The trial judge in England is not precluded from stopping cross-examination merely because there is some tenuous legal reason for conducting it. R v Flynn 1972 Crim LR 428 (CA).

In South Africa the lethargy which has descended upon our courts as far as the duty to control the proceedings is concerned can only be terminated if the bench is given drastic powers to curtail cross-examination. An arbitrary limit to the duration of cross-examination must be determined in advance by the presiding

officer, for example 50% or 150% of the duration of the evidence in chief, which limit may only be exceeded with special leave of the court. All questions not strictly relevant must be disallowed. To enable the court to determine the relevancy of cross-examination the issues have to be defined in advance - as we will set out.

The court should in appropriate cases, for example where cross-examination bogs down or fails immediately to get to the point, or where an unrepresented accused does not effectively put his case to state witnesses, itself intervene and question in depth without fear of being accused of bias or of frustrating the line of cross-examination. We make this suggestion fully cognizant of the dangers of the court having its vision clouded by the dust of the arena. Solomon & Another NNO v De Waal 1972 1 SA 575 (A) 580; Yuill v Yuill 1945 (1) All ER 183 (CA) 188. In the latter case the English Court of Appeal did not interfere where the judge had taken over the examination of the witnesses and had asked more questions than both counsel together. Our recent Appellate Division judgment of S v Sallem 1987 4 SA 722 (A) 794F makes active judicial intervention in the process in the way suggested by us - which would in practice more often than not enure to the benefit of unrepresented accused - too risky to attempt.

A cross-examiner should be required upon request forthwith to state the relevance of his question even if it would disclose his line of approach. This can be done in the absence of the witness if necessary.

The above may seem drastic, but drastic measures are required to save our judicial process from break-down. Ours is not a lone voice. There is general discontent amongst judges and regional magistrates about the prolixity of cross-examination.

The words of Greenberg, JA in R v Steyn 1954 1 SA 324 (A) 334E-F are apposite:

> "The importance of ascertaining the truth has its limitations and there are well-known rules of law which show that zeal for the ascertainment of truth must sometimes be curbed by other considerations ... Legislative rules prescribing the time and the manner in which procedural steps must be taken in some cases bar the way to a vindication of the truth, but the avoidance of delay in the administration of justice is regarded as a justification for these rules."

To enable the court to guide the proceedings justly but firmly absolute clarity is needed of the course to be set. To this end the matters which are common cause and those which are in issue should be determined at the outset. The procedure in terms of section 115 of the Criminal Procedure Act 51 of 1977 has failed to live up to expectations, especially where the accused are legally represented. It has become the rule to state the absolute minimum instead of attempting to record areas of agreement on as wide a scale as possible.

Although we did not have the power to call a pre-trial conference we did so in this case with the co-operation of state and defence in order to shorten the proceedings. We went beyond the call of duty to urge them to reach agreement on matters which in our view were not part of the kernel of the case. Agreement was reached on a wide range of issues which if they would have had to be canvassed would have consumed many months of trial time. The written admissions comprise a thick volume. We thank counsel on both sides for their co-operation in this respect.

We firmly hold the view that the power to call a pre-trial conference, which power we usurped in this case, must be statutorily enacted. It should be applicable and limited to those cases where accused are legally represented.

A further aspect of our procedure which needs overhaul is the absolute rule that the whole state case must be presented and closed before the defence is called upon. Although as a general rule it has merit, its immutability precludes the presiding officer from ruling that a certain aspect upon which the whole case for the state hinges be determined first. Had we had the power we would have ordered in this case that the question whether the United Democratic Front propagated violent revolution be determined first. A negative answer to this question might render more than a year's evidence redundant. Why one should patiently sit through months of state and defence evidence which

may later turn out to be totally irrelevant is beyond our grasp. It is not fair to the accused. It ties down judicial officers who could be beneficially used otherwise. It is not justice. The court should be statutorily empowered in appropriate cases to rule that certain issues be decided ab initio. In civil cases the rules provide for this. See rule 33(4) of the Rules of the Supreme Court. Of course such a power would be sparingly exercised as findings on credibility in the initial stages might possibly curtail a party in the further proceedings. But the power should exist and should be used when the occasion arises.

In this case we were inundated with documents handed in by the state. Of many of those we did not see the relevance. Of those that are relevant there are many duplications. We are aware that these occur because different copies of a particular document were found in possession of different persons and at various places. Yet this duplication could have been avoided by an appropriate admission.

What we have said about the limitation of cross-examination should also apply to counsel's argument. A court should not be treated as if it hears the evidence for the first time during the concluding argument.

What we have said about the affliction of prolixity does not apply to all counsel in this case and our remarks are not intended as an attack upon the integrity of anyone. We have the highest admiration for their capacity for hard work. Our remarks are, however, necessary in the interests of justice.

Of late the view has been expressed that treason trials like this one should not be heard by the ordinary courts of the land as our procedure is not suited to this type of trial. The answer is to correct the procedure, not to exclude the courts. South African society is changing. In this process its people, their views and their institutions are being subjected to tremendous tensions. It is imperative that in these times the courts remain a bulwark to preserve the integrity of the state and protect the rights of the individual. If this is trite, we must be forgiven. To some it is not so obvious.

A few remarks on the political scene and political cases in general are apposite.

It should be remembered that ideas cannot be snuffed out by closing a prison door and that the court-room is not the forum for a political debate. We do not try men for their convictions but for their deeds. The political views so strongly held by the accused were frequently eloquently and forcefully expressed. Each in his way, they impressed upon us their perceptions, personal problems and experiences

as Black people in the developing South African situation. They told of frustrations, indignities and suffering which accompanied their political, social and economic plight.

They feel cheated and rejected in being excluded from the governmental decision-making processes that effect their very lives. We have listened to their interpretations of South African history, to their ideas of what should and should not be done, the changes required and how those should be brought about. Though we do not go along with everything that was said, it is not our function to judge them in this respect.

We hope and trust that the radical and repugnant views expressed by speakers at some meetings about which we have evidence and by the authors of some documents put before us will, when history is written, be allotted their proper niche - a passing phase in the birth-pains of the new South Africa.

In this case the state seeks to draw an inference from the contents of speeches and documents that the accused conspired with others to overthrow the state. This case is not about the freedom of speech or the right to disseminate ideas or about freedom of association. These rights are part of our common law and exist unless they are curtailed by statute and then only to the extent specified.

Some witnesses will not be referred to by their names but by numbers eg ic.12. They gave their evidence in camera. They were not secret witnesses. Members of the press were permitted to be present during their evidence and publicity was given thereto. Their identities were, however, withheld to ensure their safety.

For practical reasons we followed the somewhat unusual practice to put our questions to witnesses immediately the matter arose rather than wait till the end of their evidence which in some instances was some weeks later, as by that time the context would be lost. We also hold the view, which was applied in this case, that matters which trouble the bench should be raised as soon as possible to enable the parties to deal therewith in good time.

To avoid burdening this already too lengthy judgment with a detailed analysis of the reasons why the evidence of a particular witness is rejected or accepted we have set out these particulars in an annexure to this judgment which will be handed down. Each witness was discussed by us when he completed his evidence and notes of our prima facie views on his merits were kept. The annexure contains these views reconsidered in the light of subsequent evidence and counsel's argument. Where nothing is said about demeanour we have no adverse comments thereon.

The oral closing arguments lasted nearly six weeks. In addition we had written argument of some 3 036 pages.

We have attempted to deal in this judgment with the main arguments advanced. We cannot discuss here all the submissions made. They have, however, all been given due consideration.

In this judgment we give as far as possible the references to the documentary evidence but not to the record of oral evidence as that would not be practical. Where a document is referred to the evidence given in conjunction therewith has been taken into account.

DELMAS TREASON TRIAL 1985-1989

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