CG CASE NUMBER: 441/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SITHEMBELE KHALA Appellant

and

THE STATE Respondent

CORAM: JOUBERT, F H GROSSKOPF et
VAN DEN HEEVER JJA

HEARD ON: 26 AUGUST 1994

DELIVERED ON: 27 SEPTEMBER 1994

J U D G M E N T

VAN DEN HEEVER

JA

On 1 March 1990 in broad daylight Mr D Meadows was robbed at gunpoint by a group of black men of his blue-grey Volkswagen Caravelle Kombi, in Dornfontein.

Three-quarters of an hour later an armed gang arrived at Standard Bank in Germiston in this Caravelle. They threatened the bank employees with handguns and assault rifles, shouted instructions, took almost R200 000 in cash as well as a wristwatch belonging to a Mr Sher, and made off.

On 28 March there was a repeat performance at the Nedbank Branch at the coner of Fox and Simmonds streets in Johannesburg. This time the booty taken was R 102 051,90 from the bank, R200 from Mrs Moyce, Rl 879 in a brown school suitcase from Mrs Gray, and a watch from the Nedbank security guard. The robbers arrived in the Caravelle which however now had new number-plates. They had been carefully chosen since they reflected the lawful number belonging to a vehicle which in appearance matched this one,

stolen from Meadows. The robbers wore gloves, pulled down balaclavas as they entered the bank, and knew exactly whom and what to look for where. Estimates of the time it took them to do what they had come for, ranged from two-and-a-half to five minutes, after which they rejoined the waiting driver who drove off as they climbed into the vehicle.

Police patrolling in the area, alerted by radio, hastened towards the bank. As fate would have it, the oncoming Caravelle passed them on the route they had taken. Sergeant Ludick noticed that one of those in the Caravelle had a firearm in his hand. The police car turned around and a wild chase followed, until the Caravelle was held up by a truck ahead of it which had stopped at a red robot at the intersection of Marshall and Nugget streets. Sergeant Pero had already fired a shot at the vehicle. His fire was returned by an occupant of the Caravelle. When it came to a halt, men piled out and fled on foot northwards up Nugget street. Further shots were exchanged. A man subsequently identified as Geoff, as well as the driver, who was bringing up the rear, were shot, fell, and

were arrested, but the others got away. According to police witnesses, Geoff was carrying a bag and the driver a brown school suitcase both full of stolen money.

The Caravelle suggested that the same gang may have been responsible for all three robberies. The driver stood trial alone in the Witwatersrand Local Division on a variety of counts arising out of these events. The other man arrested after having been wounded, Geoff, had subsequently succeeded in escaping. The driver was convicted on only two of the eight charges laid, namely counts 3 and 5. Count 3 related to the Nedbank robbery. Count 5 was a charge of attempted murder, of Sergeant Pero: as Geoff fled, he had aimed at and attempted to shoot his pursuer, but fortunately for the latter Geoffs fire-arm had refused. The driver was sentenced to 14 years' imprisonment for the robbery and five in respect of attempted murder, the sentences to run concurrently. The trial court however granted leave to appeal, and I refer to the driver henceforth as the appellant.

The record makes it clear that what motivated the grant of leave to appeal against both the convictions and sentences imposed, was the fact that the trial judge had refused an application brought during the course of the lengthy trial, that he recuse himself. He considered it arguable that he may have gone too far in his questioning of appellant; "and then the whole of the case has to be looked at in any case, I think, possibly".

Appellant is the general secretary of the trade union which calls itself the Media Workers Association. He is clearly no unsophisticated illiterate. He pleaded not guilty to all the charges, raising alibis in respect of the robbery of Mr Meadows and of the bank in Germiston. These accounted for a good deal of the long trial. He admitted inevitably - that he had driven the Caravelle from which the gang emerged to rob Nedbank and in which the robbers afterwards fled, on the date on which he was arrested. Conviction was equally inevitable unless the defence he raised, that he had done so under compulsion, could

reasonably possibly be true.

Appellant's story of how he came to be involved with the gang on that eventful day, may be summarized as follows:

1. He had parked his BMW car in the basement of the Johannesburg Sun and was in the process of removing the tape-deck from the dashboard, intending to lock it in the boot, when he was accosted by an armed man whom he later heard called 'Geoff and who demanded the ignition key. He handed it over but had another with an immobilizer on the key-ring in the pocket of his windbreaker. Others joined Geoff. Not only did no one think to search the appellant for a possible weapon, but an argument followed about what to do with him: whether to lock him in the boot of his BMW, or take him along with them. They "ultimately", he said, decided to use him as their driver. He was herded into the Caravelle, and ordered to drive it. Geoff was deputised to guard him. and was the one who thereafter gave him directions.

2. Following Geoffs instructions, he was directed along a route which

circled Nedbank, which he had to follow "four or three times" until one of the gang said "Clear". He dropped off all except Geoff, and stopped on the corner of Main and Simmonds streets. Traffic banked up behind him. In the rear-view mirror he saw a traffic officer coming up on his motorcycle from behind; who, as he passed the Caravelle, ordered him "Ry aan, ry aan". Geoff, who was moving up and down inside the vehicle, ordered him to turn into Main street and stop. They remained there for about five minutes. Then the gang members emerged from the bank, running, some of them removing their balaclava masks as they came. They climbed in at the open sliding door of the Caravelle, and he was ordered to return to where his BMW was parked. 3. The route he followed was a direct one. He denied the police version of a tortuous chase. He saw an oncoming car with headlights on. It made a U-turn after it had passed the Caravelle and followed the latter. He thought it might be the police. He was ordered to turn into Nuggett street, did so, and deliberately moved left and slowed down, wanting the

police to catch up with the Caravelle. At the robot there was a vehicle stationary at the robot, behind which he stopped. People had already started shooting at the police from the Caravelle and police were returning fire. Some of the passengers in the Caravelle were leaving even before it had come to a halt. He too got out and ran, in the same direction as the robbers. He received two gunshot wounds. He thought one had been caused by Geoff. The other, from the police, hit him in the knee and he fell. He denied carrying anything as he ran.

He and Geoff were taken to the same hospital.

This defence had been summarized by counsel in elaboration of appellant's "not guilty" plea on the counts arising from these events. Evidence of prosecution witnesses incompatible with appellant's conduct having been that of a man acting under compulsion, was mainly that of the police who saw appellant running off carrying part of the booty; and of Mr Dyke. He was in the banking hall waiting for a client when the robbers came in. He was ordered to lie down facing Main street, and did

so. Through the glass wall there, he saw the Caravelle draw up. The only person he saw in this vehicle was the driver, who climbed between the two front seats, opened the sliding door on the side, and climbed back into the driver's seat. When the robbers came out rounding the corner into Main street, they climbed into the Caravelle which drove off without waiting for that door to be closed. Mr Dyke jumped up and made a note of the registration number of the vehicle, and later gave this to the police. Pressed in cross-examination, he conceded that there might possibly have been someone other than the driver in the Caravelle. The concession was valueless to appellant, because of the rider added, that such a person would have had to be bending down below the level of the window, or, if moving around in the Caravelle, doing so on his stomach.

Appellant was the first witness for the defence, and did not fare well under cross-examination, which stressed improbabilities in his tale.

There obviously was no direct evidence to contradict his story of being abducted from the basement of the Johannesburg Sun. He

admitted that that was a busy place. The improbability that a professional gang able to plan as well as these did, would choose to abduct him from such place with no firm idea of what they proposed doing with him, was pointed out to him by cross-examination. He used many words without really saying anything, despite attempts by the court to establish what he was driving at. He at length came up with various theories, each of which led to more unanswered questions. The suggestion that the gang perhaps intended using his BMW as a get-away car after the robbery, may have made sense had the BMW been removed to some remote and safe spot. Otherwise, it involved entering the building basement where there were security guards on each floor and an attendant at the boom where emerging motorists pay for their parking. The risk of being disturbed in any attempt to transfer their booty to and drive off in the BMW would have been considerable. The suggestion that they may have wanted the robbery to look like an operation of the PAC since appellant is a prominent member of that organization, trips on

his evidence that there was an argument as to whether he should be locked in the boot; and would leave him, after the robbery, either as a potential witness capable of identifying them, or a corpse; which would defeat the object of that exercise. His evidence that such an argument had occurred also makes it clear that the abductors were not short of a driver. That raised the further question, why a gang as well-organized as this one should be prepared to use a recalcitrant and/or frightened stranger to drive a vehicle to which he was quite likely unaccustomed, on a potentially dangerous trip, without their having the slightest idea of the quality of his driving skills or the strength of his nerves.

As regards Mr Dyke's evidence relating to what happend at the Caravelle while the robbers were busy inside the bank, appellant did not under cross-examination suggest that this witness was lying. He conceded that Mr Dyke was possibly correct, that appellant had opened the sliding door. Asked where Geoff was when he himself did so, appellant replied:

> "Geoff was inside the vehicle but I cannot say specifically where he was seated in the vehicle, whether it was in the front or wherever it could have been. I cannot locate him."

It was also put to him that the advent of the traffic officer created an opportunity for him to escape from Geoff, which he denied: he obeyed the traffic officer's injunction to move on because he was concerned that Geoff might do the officer as well as appellant himself harm. (That again would raise interesting questions, such as whether he could have thought for a moment that Geoff would risk shooting either of these in public and in those circumstances, in the process lumbering himself with a corpse in the driver's seat of the Caravelle in which his colleagues expected at any moment to leave the scene.)

Appellant could give no acceptable explanation why, when the Caravelle was brought to a halt by the vehicle held up by the robot at the intersection, he fled in the same direction as the robbers. The best he

could offer, was that he was confused, and saw everyone running in that direction and accordingly followed suit. This, in the face of his claim that he had deliberately moved in behind the stationary vehicle and halted abruptly, to catch his abductors by surprise and create an opportunity for himself, forewarned, to escape them. Pressed on details of his conduct and that of the other erstwhile occupants of the Caravelle at that stage, his evidence was evasive and riddled with phrases such as "I think", and "if I remember it well". He however ultimately conceded that Geoff left the Caravelle before he himself did so and that he was the last out. Appellant's original inference that it was Geoff who inflicted a wound on appellant, grew into a firm belief during the course of appellant's testimony. Under cross-examination he admitted that the same attorney had visited both him and Geoff in hospital on the day they had both been arrested.

After he had been cross-examined at length and re-examined, the Bench asked him questions. During the course of this, the defence asked the trial judge to recuse himself. The application was refused. I return to it later. Thereafter appellant returned to the witness box, and called two defence witnesses. The first of these attempted to explain why the fact that the same attorney had visited appellant as well as Geoff in hospital, should not lead to the inference that appellant was voluntarily associated with this robber. The evidence on this issue involves a concatenation of coincidences as well as an excess of caution on the part of the relevant witness. He was Mr Hlatswayo, the assistant general secretary of the Media Workers Association in Johannesburg. He and appellant were supposed to have attended a meeting with potential donors that morning. Appellant had not arrived, although inquiry revealed that he had left home earlier. A person who had witnessed the shooting in

Nuggett street came to Hlatswayo in his office and reported that he had seen someone there who looked like appellant. Hlatswayo went along, saw appellant lying bleeding, surmised that he might be taken to the Hillbrow Hospital, went there and discovered that appellant was in ward 29. Police came out of the ward as he arrived at its door, in the company of a man they referred to as "prokureur". Hlatswayo then asked this attorney, who had been to see the other injured man, who was his client, to act on behalf of appellant also, quite fortuitously and - it was implied - not because their interests ran parallel. Cross-examination created insurmountable hurdles for Hlatswayo in trying to retain any semblance of credibility or undermine the inference that this prompt visit by the attorney to both wounded men suggested a pre-existing link between appellant and Geoff.

The police evidence, which was not damaged by cross-

examination, that both Geoff and appellant had been carrying loot as they left, would have been sufficient in itself to put paid to appellant's defence. Appellant's counsel sought to nullify this by calling Mr van Wyk, a journalist whose report of the incident in Nuggett street had appeared in a newspaper. According to that,

> "(het) konstabel Scholtz ... die bestuurder langs die bussie in die been en rug geskiet. ... Sersant Ludick en konstabel Pero het op die vlugtende rowers geskiet en een wat met 'n handtas probeer weghardloop het, in die bolyf getref.

According to this report, therefore, it was not appellant who had taken charge of the brown suitcase. Since Van Wyk probably spoke to the police at the scene, it was suggested, they then spoke true and were now fabricating this damning piece of evidence against appellant. Quite apart from other considerations, however, Mr van Wyk told the court that he had no independent recollection of the incident, usually spoke to whoever

could give him information on such occasion, and put together his own version by patching together bits and pieces obtained from various sources. Accepting that Van Wyk did speak to i.a. the police at the scene, there is as little assurance that he heard them aright or relied on what they had said, as one can be assured that his copy escaped the attention of a sub-editor unscathed. The court a quo accepted the evidence of the three police witnesses and there is no reason to differ from its assessment as to their reliability.

It is unnecessary to analyse further aspects of appellant's tale, grossly improbable from beginning to end, and the conflicts between his evidence and that proferred by the state. The court a quo was correct in classifying appellant's story as "bizarre". It hardly merited the intensive, wide-ranging and destructive cross-examination to which it was subjected by Mr Sheer.

The conviction on the robbery charge led inevitably to conviction on the count of attempted murder. It was clear before the Caravelle came to a halt, that the gang were prepared to shoot in order to attempt to escape, since shots had been fired at the police while the motor chase was still on the go. When everybody emerged from the Caravelle, appellant not only did nothing to indicate that he dissociated himself from the robbers and their actions, but followed them carrying part of the booty. So although he was not himself armed, he was still participating in their common purpose to perfect what they had pre-planned and executed so far.

That brings me to the application which was brought during the course of the trial, for the recusal of the trial judge.

The principles underlying such an application are not in dispute. They have recently been dealt with by this court in Council of Review.

South African Defence Force and Others v Mönnig and Others 1992 (3) SA 482. and BTR Industries SA (Ptv) Ltd v Metal and Allied Workers' Union 1992 (3) SA 673. The exceptio recusations should succeed where it is based on some financial or personal connection or interest, or conduct outside the walls of the courtroom, on the part of the decision maker which could reasonably create the impression of bias on his part. An applicant's suspicion of partiality must be one which might reasonably be entertained by a lay litigant. The test to be applied is an objective one. The hypothetical reasonable man must be viewed as if placed in the circumstances of the litigant raising the exceptio.

The circumstances of the litigant complaining of the conduct of the judge during the trial itself, differ materially from those of one who relies on outside factors which he cannot judge on the strength of personal observation - factors which raise questions such as: Could senior Defence

Force officers be unbiassed in judging an attack on the legality of actions and policies of the Defence Force? Or the President of the Industrial Court, in a lengthy dispute before him between labour and management, be unbiassed despite having in mid-litigation participated in a seminar arranged by management's industrial relations consultants and in which management's lawyers all presented papers? Or more mundanely, would the magistrate be prepared to make an adverse credibility finding against an important state witness if that witness is his own wife? - merely as examples. Schreiner JA pointed out the differences between the two in R v Silber 1952 (2) SA 475 (A) at 481C-H, a matter similar to the present one in that the application for recusal was not made at the outset of the trial but when it was well on its way. There too

> "the grounds relied upon for suggesting bias were not facts outside the course of proceedings such as are ordinarily put forward as reasons why the judicial officer in question

should not try the case. The grounds related purely to what had happened in the course of the trial. Neither counsel has been able to find any reported case in which an application for recusal has been made in the course of a trial on the ground that the judicial officer has shown bias by his conduct of the proceedings. And this is not surprising, since the ordinary way of meeting any apparent bias shown by the court in its conduct of the proceedings would be by challenging his eventual decision in an appeal or review. Bias, as it is used in this connection, is something quite different from a state of inclination towards one side in the litigation caused by the evidence and the argument, and it is difficult to suppose that any lawyer could believe that recusal might be based upon a mere indication, before the pronouncement of judgment, that the court thinks that at that stage one or the other party has the better prospects of success. It unavoidably happens sometimes that, as a trial proceeds, the court gains a provisional impression favourable to one side or the other, and, although normally it is not desirable to give such an impression outward manifestation, no suggestion of bias could ordinarily be based thereon. Indeed a court may in a proper case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours the other party, but no reasonable person, least of all a person trained in the law, would think of ascribing this provisional attitude to, or identifying it with, bias".

S v Rall 1982 (1) SA 828 (A) sets out guidelines to ensure that in seeing that justice is done the judge also ensures that justice is seen to be done. It is unnecessary to repeat them here. The question is whether the trial judge's questioning of appellant strayed outside of those guidelines at all and if so, could reasonably create the appearance, not at some passing stage in the course of the trial but in making an overall assessment, that his approach to the defence evidence was not objective and impartial.

The record shows that appellant was not put off his stride by any questions put to him by the Bench. And in the judgment his demeanour in court was not faulted. The record creates an overall impression of patience, care and even-handedness on the part of the trial judge. He made copious notes, often holding up the proceedings to enable him to let pen keep pace with spoken words, and inviting counsel to confirm the

correctness of what he was recording in paraphrased form. When Mr Sheer put adverse inferences which he threatened in due course to argue, to defence witnesses, he was on a number of occasions pulled up by the Bench for flaws in his logical process.

What triggered the application for recusal, was the questioning of appellant by the judge at the end of appellant's testimony. Some of the questions led nowhere: appellant merely repeated what he had said before, and satisfied the curiosity of the judge about the workings of the immobilizer on the keyring with a spare key for the BMW which remained in appellant's pocket. Then the questions moved on to the events in Nuggett street after the Caravelle had stopped. Appellant had given various versions on various occasions about what - if anything - had happened between himself and Geoff immediately before appellant fell, having received two gunshot wounds. He at no stage said that

Geoff had shot him, merely that he believed this to have occurred; or that one of the abductors had done so. This did not tie in with the police evidence. The court questioned him as to why he had not done almost anything other than follow the robbers who had abducted him; more especially since Geoff of whom he was particularly frightened, was immediately ahead of him and between him and the rest. It was this line of questioning that led to the application for recusal:

> "... why didn't you, when you saw these people running away ahead of you, why didn't you run just past any two or three cars and stand there and put your hands up? - There was cross-fire and I did not (intervenes)
>
> No, there was not any cross-fire, sorry, there was not any cross-fire there. -- There were shots, that I could hear.
>
> Shots had been fired, exchanged between the police - one shot from the police which hit, Pero hit the body of the Caravelle. That was after there had been fire through the side door of the Caravelle. The Caravelle came to a stop, then there was no firing. - No, but that is the police version and it is like the court is accepting that as absolute.
>
> Yes. -- I have my own version.

Well, deal with it on the basis that the court accepts the police evidence to the effect that these people or the people first to leave the Caravelle had already reached a place somewhere near halfway up the block when you and Geoff was still fairly close to the pavement - they were well ahead of you. -- Yes, I see .. (intervenes)

15 on Ludick's estimate or the draughtsman's estimate, I do not know whose it is, 15 paces ahead of Geoff. — Yes, what I am saying is I could hear the shots at that time. Which direction they came from I cannot say.

There is no evidence other than your evidence that there was cross-fire going on at the time when you started to run away. — Because 1 am the only one here against the police evidence.

And the other thing is this, you see Geoff running with the bag, red bag which you must have seen him or somebody else bringing into the Caravelle when you left, before you departed from Main Street where you had waited. Did you see somebody arrive with a bag like that? -- No, all I know is that they were carrying things. Maybe that bag was also there, I do not remember.

Yes, there he is carrying the bag and he has got his back towards you and you were four paces behind him, you see there the robber is going with his spoils. MNR. BAM: Edele, met die grootste respek, ek is nou in 'n baie moeilike posisie maar ek voel my verplig om op hierdie stadium dit op rekord te plaas dat ek moet beswaar

maak teen die vrae wat die agbare hof stel.

HOF: Hoekom? Hoekom, meneer?

MNR. BAM: Met die grootste respek, edele ..

HOF: Hoekom?

MNR. BAM: Omdat dit argumentatief is, edele, in die eerste plek en in die tweede plek is daar sekere veronderstelings wat gemaak word deur die agbare hof in hierdie kruisondervraging. Met die grootste respek sê ek dit, van die beskuldigde.

HOF: Nou ja toe, het jy klaar gepraat?

MNR. BAM: Soos dit u behaag.

HOF: Nou ja goed, now you can answer my questions. On the supposition that the police evidence is accepted that the leaving occupants of the van had left a few seconds before you did and were well up in Nugget Street and the last one to leave before you did was Geoff and that he had also got ahead of you by about four paces running north in Nugget Street, you could see those people running up there in that street. Why didn't you turn around and run in some other direction, any direction of your choice? -- Like I indicated earlier on firstly 1 was confused and secondly, 1 wanted to run for shelter. My safety was at stake here. That was my first consideration. And seeing people running in a northerly direction I then found myself also running in that direction.

Did you then see them running in a northerly direction? -- Yes.

> Well what makes you feel like also running in a northerly direction? — Because everybody is going in that direction so I felt that I could find shelter somewhere here and also that I was confused.
>
> Were you following them to get shelter? Did you think they would give you shelter or show you shelter? — I was also only running for a safe place, wherever I would find that safe place.
>
> But you were running towards the people that abducted you? — Not only them but all the other people were running in that direction, even the bystanders were also running in that direction.
>
> Anything else you would like to say about this point? — Yes, on a separate point m'lord, not this one"

and appellant then went on to complain that certain documentary exhibits not relevant to this part of the trial, had been forged; after which the court adjourned for the day.

When it was resumed, the application was formally launched. During the lengthy debate (all of which was recorded and in which the judge took an active part), it appeared that the judge had been under the

impression that there was no police evidence at all about shooting by the police while the appellant was still in the intersection. The judge had in the meanwhile gone through his notes with a fine comb and discovered that his impression had been wrong. He said, i.a.,

> "I should not have said the words, (I) accept what the police say, 1 should have said the words 'the undisputed evidence of the police was ...' which would have more conveyed what I said. But then I would have been wrong, because I would have overlooked this one sentence".

Counsel contended that the court had challenged appellant, and more than once, on the basis that the police evidence was acceptable and his not, leading to appellant's believing "that there is no hope of a fair trial with this sort of thing being put to him". The learned judge commented:

> "Well, if we had sat later and we had looked up the evidence or played back the record, the position would have been dealt with there and then, because I would have said 1 am wrong."

The copious quotation makes it clear that the thrust of the questioning by the Bench was to give the appellant every opportunity to explain pr/ma facie inexplicable conduct. Any possible objection there could have been to its tenor, was overcome when the judge explained what he had intended to say, and conceded that he had been wrong in missing a sentence in the evidence of Scholtz. An apprehension of bias based on this line of questioning would not have been a reasonable one. Cf S v Radebe 1973 (1) SA 796 (A),812F-H; and, by analogy, Martin v Durban Turf Club and Others. 1942 AD 112, 134.

Mr Bam also argued that an earlier question put to appellant: "Were you following them so that they could lead you to a safe place?" conveys blatant scepticism of appellant's testimony. In context it is clear that the judge was merely repeating what appellant himself had said a moment earlier; which he also did in the passage just quoted.

There were other passages complained of which relate to earlier questioning also on detail of events after the Caravelle had stopped at the Nuggett street intersection, which undermine rather than support the application. Under cross-examination appellant tentatively and then with greater conviction as he went on, had said that he had deliberately pulled in behind the parked vehicle at the robot to create an opportunity for himself to escape from his abductors. He had formed the plan to do so when he saw the police, who

> "were at that time already alert, so that was an opportunity for me.
>
> Why? -- Because if I take a chance trying to run out of the vehicle as the shooting had already started, two things could happen. 1 can run to the police, provided they had already realised that I am innocent and if that does not happen I would also get injured whilst trying to run away, shot while trying to run away.
>
> COURT: Did you think of that? --I think I did think about it.

Let me just understand this. At what stage did you jump out of this vehicle? -- After the police had made a U-turn and we were now facing the same direction.

I jumped out after I had seen that the police had made a U-turn? -- Yes.

And were chasing us, chasing the Caravelle? — Yes.

The Caravelle. But I meant can you tell me when you left the vehicle in relation to the other people in the car? — I do not recall when.

Well, was your plan to, although Geoff was sitting there in front with a firearm, was it your plan to jump out the moment that your car came to a stop? - Yes and when the police were already quite close.

Yes, and it was your plan to take a chance, to take the risk that Geoff might shoot you when you were getting out of the vehicle? — Yes.

That was your plan? -- Yes.

And is that what happened? --It happened.

So Geoff was still sitting in the seat when you jumped out? -- If I remember well, yes.

Well, do you know whether any of the others had got out before you? — I am saying this subject to correction but 1 believe that they had already started jumping out". In the light of appellant's claim that he had deliberately tried to create an

opportunity to escape and the qualification he added relating to potential

dangers, there can be nothing improper or irregular in trying to discover what use if any he made of that opportunity.

That applies also to Mr Barn's complaint that it was improper of the court to put pressure on appellant to commit himself as to the number of persons who had been in the Caravelle and the order of their going when the vehicle was brought to a halt at the Nuggett street intersection, when he said that he did not know. The passage he highlighted reads:

> "Well, give me an idea? You must have known, you saw these people board the Caravelle after the robbery, you were waiting behind the driver's wheel and you could see them coming in. You must know how many people there were in the Caravelle? You also saw them, 1 think, in the wing mirror, walking on the pavement before they went into the bank and you also saw them in the parking garage. How many people were there? How many robbers were there? — 1 think there were five or six."

There is nothing unfair about the question, which recounts aspects of appellant's own evidence which makes an "1 don't know" answer no

answer at all. In context, the question was one that demanded to be asked. It was preceded by woolly vagueness in appellant's replies to Mr Sheer's probing his motivation for running after the robbers:

> "...I think it was that everyone was running into that direction, robbers and those that were not robbers, as well as bystanders. They were all running in that direction. I think also I ran in that direction in that confusion.
>
> Did you see them running up the road? — Who?
>
> The robbers? --I think I did see them, I do not recall.
>
> You saw the police stop their vehicle and you saw the police chasing after you? -- I did you (sic) see the police when they were running after me.
>
> COURT: Just a minute, I do not follow. There is something here that - I do not want to become confused. You say you saw the others running? — Yes.
>
> Where were they running in relation to you? -- Are we talking now about the direction or the distance? I do not know what is being referred to.
>
> You take any time you like; tell me what you saw? What was happening at the time when you saw them running? - It seems that 1 saw them running away into the direction in which I was.
>
> Well, tell me, were they running ahead of you or were they running behind you? -- They were ahead of me.

How many were ahead of you? – I do not know."

There can be no possible suggestion of impropriety or irregularity in the passages challenged, per se, and even less taken in proper context.

Mr Bam also stressed other passages which appear earlier in the record. The first of those to which he referred us, records questions put to appellant by the court which interrupted Mr Sheer's cross-examination, on the issue whether appellant had or had not opened the sliding door of the Caravelle when it stood parked in Main street waiting for the return of the robbers. Mr Sheer had reminded appellant that he had earlier said that he did not recall who in fact opened the door. Appellant replied with a question: "At what stage?" and the judge repeated Mr Sheer's question. That the reply the accused then gave led to further questioning is hardly surprising since he said

"I said, if I remember well, the door stood ajar. I

> furthermore said that if Mr Dyke alleges that I opened the door further - if that is what he says - I will not dispute it."

The court was understandably curious as to why, if the door was ajar, not wholly closed, so that the robbers emerging from the bank would have been able to open it further themselves, it was necessary for appellant to do so. Appellant was also entitled to the opportunity afforded him to try to explain why he could not have escaped on that occasion, whoever opened the door of the Caravelle: the suggestion being that if Geoff had done so, appellant could have got out at the driver's door while Geoff s back was turned. If it was appellant who had done so on Geoffs instructions, could he not have got out at the sliding door himself? Appellant's replies given to the questions put, were vague, ambiguous, unsatisfactory, larded with "maybe", "if", "I think", "1 do not remember". The final question put to him was -

> "Now, isn't the position this am I being fair or unfair to you if I say, that you are not clear at all about what you call 'the door issue?' I mean, clear insofar as your recollection is concerned? -- Yes, this door issue confuses me, I do not remember it well."

The court had not succeeded in clarifying what appellant's counter was to the evidence of Dyke. There was in my view nothing improper in the court's attempt to try to obtain such clarity. The suggestion that the questioning amounts to cross-examination and displays bias against appellant, has no merit.

After the application had been refused appellant returned to the witness box. The defence witnesses already referred to, viz Van Wyk and Hlatswayo, were then called. Arising out of certain aspects of the defence case, Mr Sheer sought leave and was permitted to recall some of the state witnesses and the trial ambled on until eventually the appellant was convicted and sentenced.

Mr Bam tried to make something of the fact that the court had reminded Mr Sheer that he was entitled to call evidence in rebuttal of new matter which had been proferred in the course of the defence case. But sec 186 of the Criminal Procedure Act No 51 of 1977 entitles the court itself to call witnesses and obliges it to do so

> "if the evidence of such witness appears to the court essential to the just decision of the case".

In short, appellant made out no case for the recusal of the judge, and on the record his convictions were inevitable.

That leaves the question of the sentences imposed.

The trial court did not misdirect itself in any way, nor can it be said that appellant was treated so severely that that in itself would entitle this court to interfere. Appellant expressed no remorse since he never acknowledged that he had sinned. On all the evidence he did so from

greed, not need. He had an adequate income, money in the bank, a BMW, and had had opportunities not afforded many of his compatriots. Privilege should be accompanied by commensurate responsibility. Although he was a first offender, the offences he participated in constituted an attack on orderly society, planned with military precision, which that society is not called upon to tolerate with much compassion. Some he did receive, in that the sentences imposed were ordered to run concurrently.

The appeal is dismissed.

L VAN DEN HEEVER JA

CONCUR:

JOUBERT JA) F H
GROSSKOPF JA)