

Case No. 501/89

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE ATTORNEY-GENERAL, TRANSVAAL

Appellant

and

ABDUL AZIZ KADER

Respondent

CORAM: CORBETT, CJ, JOUBERT, E M GROSSKOPF, NIENABER, JJA et

HARMS AJA

HEARD: 2 September 1991

DELIVERED: 27 September 1991

J U D G M E N T

E M GROSSKOPF, JA

This is an appeal by the Attorney-General of the Transvaal in terms of section 311 of the Criminal Procedure Act, no. 51 of 1977, against an order of the Transvaal Provincial Division. The order appealed against is one upholding an appeal by the respondent against a finding and sentence in a regional court. Leave to appeal to this court was granted pursuant to a petition to the Chief Justice. Section 311 of the Act allows a right of appeal to an Attorney-General only "[w]here the provincial ... division on appeal ... gives a decision in favour of the person convicted on a question of law". The appellant's appeal is accordingly limited to points of law.

The course of the proceedings up to the present was as follows. The respondent, a 27 year old computer operator, was to have been a state witness in a criminal trial in the Regional Court against one Enoch Zulu and six others. These accused were charged, inter alia, with offences in terms of Section 54(1) of the Internal Security Act, no. 74 of 1982. On 17 January 1987 the prosecutor intended to lead the respondent's evidence, but first

wished to apply to have his evidence heard in camera. For the purpose of this application he called the respondent, who duly took the oath. However, before commencing his evidence, the respondent asked for an opportunity to speak to his legal adviser, who was present in court. This request was granted. After consulting his legal adviser, the respondent returned to the witness box. He answered some introductory questions, and was then asked how he would like to give his evidence. His reply was "I would like to be in open court". In the light of this reply, the prosecutor abandoned his application to have the respondent's evidence heard in camera. Before the respondent's examination-in-chief continued, the prosecutor requested the magistrate to caution the respondent ex abundante cautela as an accomplice in terms of section 204 of the Criminal Procedure Act. This the magistrate did. However, when the prosecutor resumed the examination-in-chief, the respondent said that he did not wish to testify. Thereupon the prosecutor asked that the respondent's refusal be summarily dealt with in accordance with

section 189 of the Criminal Procedure Act. After an adjournment, the respondent's legal representative confirmed that the provisions of section 189 of the Criminal Procedure Act had been explained to the respondent, and that he was ready to proceed with an enquiry in terms of that section.

Section 189(1) reads as follows:

"If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2 or in Schedule 3 to the Internal Security Act, 1982 (Act No. 74 of 1982), to imprisonment for a period not exceeding five years."

The trial in which the respondent was called to testify was one relating to an offence referred to in Schedule 3 to the Internal Security Act. The respondent was therefore liable to

a maximum sentence of five years' imprisonment for his refusal to testify.

Section 189(2) provides that, after the expiration of any sentence imposed under sub-section (1), the person concerned may from time to time again be dealt with under that sub-section with regard to any further refusal or failure. In terms of sub-section (3), a court may at any time on good cause shown remit any punishment or part thereof imposed by it under sub-section (1). Sub-section (4) makes provision for an appeal against a sentence imposed under sub-section (1).

To revert to the narrative of events: after the respondent's legal adviser announced his readiness to proceed, a summary enquiry in terms of section 189 ensued. The respondent himself testified. The gist of his evidence is as follows. He was in detention since June 1986. During his detention he was placed in solitary confinement and was interrogated. This caused great stress and led to his being hospitalized in a psychiatric ward. Initially he was in hospital for about two months, and was

later readmitted. At the time when he was called to testify, he was still under medication, and was attending weekly therapy. When asked in examination-in-chief what his reason was for not wishing to testify he said:

"Well firstly I do not know whether I am capable of undergoing the stress of the proceedings in the court ... And furthermore if I should leave after having testified, I will be ostracized by my community."

He was later asked by the regional magistrate what his most important reason was and replied as follows:

"I am afraid that should I undergo severe stresses and medically I would be scarred for life and perhaps have to attend psychiatric care for the rest of my life and the (sic - perhaps 'being') ostracized in my community would contribute to that."

The respondent was cross-examined by the prosecutor and questioned further by the regional magistrate. When his evidence was completed, the enquiry was postponed to enable the respondent to lead further evidence. Subsequently a large body of evidence was adduced, both on behalf of the respondent and by the state. One witness was called by the court. The evidence at the enquiry

related mainly, but not always directly, to the respondent's psychological health.

After hearing this evidence and the parties' submissions, the regional magistrate held that the respondent had not discharged the onus of showing that he had a just excuse for his refusal to testify. The magistrate was informed that the respondent persisted in his refusal. He thereupon sentenced the respondent to two years' imprisonment. The respondent appealed to the Transvaal Provincial Division against the magistrate's finding on the merits as well as on sentence. The Provincial Division (ESSELEN J and LE ROUX AJ) upheld the appeal against the finding, and set aside the finding and the sentence. It is against the order upholding the appeal that the Attorney-General now appeals to this court.

In essence the court a quo made the following findings:

- a) It held that the expression "just excuse" in sec. 189(1) of the Criminal Procedure Act was not limited to a lawful excuse arising from the rules of privilege,

compellability of witnesses or admissibility of evidence.

- b) In particular, the court a quo held that if it were to be humanly intolerable for a person to testify, that would constitute a just excuse.
- c) On the evidence the court held that, if the respondent had been compelled to testify, there would in all probability have been a deterioration in his condition and he would have suffered severe psychic pain.

Moreover, there would have been a very substantial risk of suicide. In view of these circumstances the court held that it would have been humanly intolerable for the respondent to have to testify.
- d) In the result the court held that the respondent had established a "just excuse" for his refusal to testify.

It was common cause before us that the court a quo was correct in burdening the respondent with the onus of establishing a "just excuse".

Mr. Pretorius, who appeared for the appellant, contended firstly (albeit not very strenuously) that the finding of the court a quo set out under paragraph (a) above, was incorrect, and that, on a proper interpretation, the expression "just excuse" (in Afrikaans "voldoende verskoning") was limited to legal excuses arising from the rules of privilege, admissibility and compellability. The expression "voldoende verskoning" should therefore, according to this argument, be read as "voldoende wettige verskoning".

It is an old and established principle of our law that litigants in criminal and civil matters may compel any person who can give relevant evidence in regard to any issue of fact to be tried, to attend court and give such evidence. See S v. Wessels 1966(3) SA 737 (C) at p. 738 G. This rule was, however, never absolute. See Wessels's case at p. 738 H to 739 C. Merula, Manier van Procederen 4.65.4.1 sets out nine classes of persons who are excused from giving evidence. Included amongst these, which I quote only by way of example, are those older than 70

recalcitrant witness to gaol unless he sooner consents to do what is required of him. This procedure could be repeated indefinitely until the recalcitrant witness repented. The Dutch version of "just excuse" was "voldoende verontschuldiging".

The next statute was the Criminal Procedure Act, no. 56 of 1955. Section 212 of this act as originally promulgated largely reproduced the provisions of the 1917 Act. The relevant words were "without any just excuse". The Afrikaans was "voldoende verskoning" as in the present Criminal Procedure Act. And subsequent amendments to this section did not alter these words in either language.

The expression "just excuse" has accordingly been used in the present context in South African statutes for about 75 years, but surprisingly enough its ambit has never been authoritatively determined. The nearest this court has come to doing so was in S v. Weinberg 1966(4) SA 660 (A) at p. 665 H to 666 A, where STEYN CJ said the following:

"The Court below proceeded on the basis that 'just

excuse' in this section means 'legal excuse'. It is arguable that this phrase has a wider connotation, comprising more than compellability as a witness or the admissibility of evidence, that a witness may find himself in circumstances, not within the legal limits demarcated by these concepts, in which it would be humanly intolerable to have to testify, and that the Legislature could not have intended to exclude such circumstances from the ambit of a just excuse. But even if I assume that such a wider meaning is intended, the excuse tendered would have to be of sufficient cogency, taking all the circumstances into consideration, for the witness to be absolved from the duty not to withhold the truth from the Court. In my view the excuse relied upon here would not fall in that category."

This case was the first in which it was suggested that a refusal to testify might possibly be excused if it was "humanly intolerable" to have to do so. The expression caught on, and in several subsequent cases courts have assumed, without deciding, that this suggestion should be followed. See, for instance, S v. Maduna and Others 1978(2) SA 777 (D) at p. 778 H; S v. Leepile and Others (6) 1990(3) SA 988 (W) at 999 A and S v. Yengeni and Others (unreported, CPD delivered on 3 November 1989). In all these cases, however, the court found on the facts

that it was not humanly intolerable for the person concerned to have to testify, and it was not necessary therefore to determine what the position would have been had the facts been otherwise. It was only in the present case that the court a quo was faced squarely with this question, and it decided it in favour of the respondent - see paragraphs (a) and (b) above. The finding set out in paragraph (a) clearly was one of law, and I assume that the same applies to paragraph (b), so that the Attorney-General was entitled to contest their correctness in this appeal. Whether they should be sustained depends on the interpretation of section 189, to which I now turn.

To recap: the question is what meaning is to be attached to the expressions "just excuse" and "voldoende verskoning". On the face of it "just excuse" is a wider concept in its ordinary meaning than, for instance, an expression like "lawful excuse", which would have been more appropriate to connote an excuse sanctioned by existing rules of law. This view is strongly supported by the case of R v. Parker 1966(2) SA 56

(RAD) at p. 59 A-B, where the Rhodesian Appeal Court said the following concerning the Rhodesian counterpart of section 189 which also used the expression "just excuse":

"I am satisfied that, when the Legislature used the word 'just', it did not mean 'lawful'. Had this been the intention it is inconceivable that the word 'lawful', the meaning of which is so much more exact, would not have been used. The word 'just' clearly has a wider connotation than 'lawful' and permits the court to pay regard to excuses excluded in strict law. To hold otherwise would have the effect of equating the two words."

Parker's case was referred to in S v. Lovell 1972(3) SA 760 (A) at pp. 762 H - 763 B, where this court dealt with the meaning of "just" in the expression "just cause" as used in section 126 of the Defence Act, no. 44 of 1957. OGILVIE THOMPSON CJ, in giving the judgment in Lovell's case, did not, however, go further than to assume that "just cause" may be wider than "lawful cause". Of course, it was not necessary for him to go further than that, because even on that assumption the appellant could not succeed. I do not, therefore, consider that Lovell's case, supra, detracts from the persuasive authority of Parker's case, supra.

Ultimately, however, as the court stressed in Lovell's case, supra, the meaning to be attached to "just" must depend largely on the context, and to this I now turn.

Section 189 deals with three types of person, viz.:

- i) a person who refuses to be sworn or to make an affirmation as a witness;
- ii) a person who has sworn or has made an affirmation as a witness, but refuses to answer a question put to him;
or
- iii) a person who has been sworn or has made an affirmation as a witness but refuses or fails to produce any book, paper or document required to be produced by him.

There may be many reasons for a person to refuse or fail in one of the respects set out in the above three paragraphs, and at least some of them would be regarded by most people as constituting a sufficient justification for such refusal or failure. For instance: as regards category (i) an obvious reason why a person may refuse to testify, recognized

since early days, is his state of health. Thus a person who is required to be a witness may establish that it would be severely detrimental to his health to testify. Clearly this must be a "just excuse". And as regards category (iii), the book, paper or document which the witness is required to produce may, for instance, be of very slight relevance, and the cost or trouble involved in obtaining it, immense. Can it be supposed that the legislature would have intended that such circumstances, however extreme, could never amount to a just cause?

I do not wish to multiply examples. The fact is that many can be imagined of circumstances in which a failure by a person to comply with his testimonial duties would be generally regarded as blameless, and his punishment for such failure as unjust. This is a strong reason for interpreting "just excuse" to have a wider connotation than an excuse sanctioned by rules of law. And the words "just excuse", in their ordinary meaning, as I have said, in my view bear this wider meaning. I consider therefore that the court a quo was correct in holding, in its

finding set out under (a) above, that "just excuse" in section 189 is not to be confined to matters of privilege, compellability and admissibility. Indeed, as I have said, Mr. Pretorius did not seriously attack this finding.

It would serve no purpose, I consider, to try to define the circumstances which would amount to "just excuse" for purposes of section 189. Human affairs are unpredictable in their diversity, and a court, when asked to apply section 189, will have to decide each case on its merits, having regard to the general principles underlying this section (which will be considered in some more detail below). Some attempt at definition was made by RUMPFF JA in S v. Heyman and Another 1966(4) SA 598 (A), when he said the following at p. 610 H to 611 B (referring to the similarly worded section 212 of the 1955 Criminal Procedure Act):

"Wat art. 212 betref, waarna hierbo verwys is, kan na my mening n onderskeid getref word tussen die persoon wat weier om die eed af te lê, d.w.s. wat weier om as getuie op te tree, en die persoon wat bereid is om as getuie op te tree, maar daarna op grond van

prosesregtelike of bewysregtelike reëls weier om h bepaalde vraag te beantwoord. Die persoon wat, soos art. 212 meld, in die hof is en deur die hof aangesê word om getuienis af te lê het geen opsie nie. Hy moet bereid wees om as getuie op te tree en kan gedwing word met gevangenisstraf tensy daar h voldoende verskoning vir sy weiering is. Klaarblyklik is daar m.i. net twee soorte verskonings wat hy kan aanvoer. Die eerste staan in verband met sy fisiese of psigiese toestand. Die hof sal vanselfsprekend so h soort verskoning ondersoek en beslis of daar op daardie grond h voldoende verskoning bestaan. Die tweede soort verskoning kan in die reg bestaan deurdát die persoon hom sou kon beroep op h gemeenregtelike of statutêre bepaling waarvolgens daar geen plig op hom bestaan om as getuie op te tree nie.

As die persoon eenmaal die eed geneem het, en dus bereid is om as getuie op te tree, het hy die keuse om h vraag te beantwoord ten opsigte waarvan hy h privilegie mag hê of hy het die keuse om te weier om die vraag te beantwoord. h Voldoende verskoning om te weier om h vraag te beantwoord sou m.i. alleen gesoek kan word in die geldende bewysreg en prosesreg."

The judgment of RUMPF JA was a minority judgment. The issue in Heyman's case was whether a person in respect of whom an enquiry in terms of the then prevailing section 212 was held, was entitled to legal representation. The majority of the court found it possible to answer this question without

considering the meaning of the expression "just excuse". With all due respect, I consider that the views expressed in the passage quoted from the judgment of RUMPF JA were stated too absolutely. While I would agree that the "fisiere of psigiese toestand" of a person could in appropriate circumstances afford a just excuse for his refusal to take the oath, I would hesitate to find that this is the only permissible excuse other than one arising from the legal rules of privilege or compellability. Moreover, although I would agree that a witness who has taken the oath would not have many acceptable excuses, other than those provided by the law of evidence or procedure, for refusing to answer a particular question, I would not like categorically to exclude the possibility that such an excuse may exist.

This is a convenient stage to deal with a contention advanced in the attorney-general's petition for leave to appeal and heads of argument, but not really stressed in oral argument before us. The court a quo relied on the following passage in Haysom v. Additional Magistrate, Cape Town, and Another 1979(3)

SA 155 (C) at p. 161 D-F:

"The phrase ('just excuse') is not defined and no purpose is served by attempting a comprehensive definition of its ambit. The phrase must, as was done in the case of S v Lovell 1972(3) SA 760 (A), be considered in the context of the legislation in which it appears. As to whether the Afrikaans text is the wider in scope, a reference to such dictionaries as HAT Verklarende Handwoordeboek van die Afrikaanse Taal, Kernwoordeboek van Afrikaans, and Tweetalige Woordeboek (Bosman, Van der Merwe en Hiemstra) indicate that the English equivalent of 'voldoende' is 'sufficient', 'adequate', 'satisfactory', the latter meaning more specially in relation to an answer. It is difficult to conceive of an excuse which is 'sufficient', 'adequate' or 'satisfactory' being anything other than 'just', and vice versa."

* In Haysom's case the appellant had been required in terms of section 205 (1) of the Criminal Procedure Act to attend before a magistrate for examination concerning information which he was thought to possess about an offence. Section 205(2) made section 189, inter alia, applicable to proceedings under section 205(1). Haysom refused to be sworn, was sentenced, and appealed to the Cape Provincial Division. The passage quoted above appeared in the judgment on appeal where the court was

considering an argument that "voldoende verskoning" was a wider concept than "just excuse".

Before us it was argued that the interpretation placed on the words "just excuse" when applied to an examination under section 205 (as in Haysom's case) is not authoritative in respect of its interpretation for purposes of a trial. For this argument reliance was placed (in the petition for leave to appeal) on a passage from the judgment in R v. Parker, supra, at p. 59 D-E).

In my view the appellant's argument is misconceived, and Parker's case does not support it. The meaning of section 189 cannot differ depending on whether it is applied in respect of a trial or in respect of an examination in terms of section 205 of the Criminal Procedure Act. What can conceivably differ is the type of excuse which would be regarded as just, and this is indeed all that is stated in the passage from Parker's case, supra. In that passage the court expressed the view that there is a substantially greater chance of a "just excuse" being established in an enquiry like that under section 205 than at a

trial. The court's reasoning (adapted to the wording of our act) was that in a trial the court is investigating issues which are clearly defined, whereas in an enquiry under our section 205 the questions asked are concerned not with well-defined issues but with ascertaining whether the witness has material or relevant information in respect of an alleged offence, in respect of which no charge may in the ordinary course have been preferred against any person.

I am not sure, with respect, that there is substance in the view thus expressed in Parker's case, supra, but if there is, this would, I consider, support the conclusion that "just excuse" is a wider concept than "lawful excuse". In our law section 189, apparently unlike its counterparts considered in Parker's case, is applied both to enquiries and to trials. In ascertaining its meaning, regard must accordingly be had to its role in both sets of circumstances. If there is a greater chance of acceptable excuses existing for a refusal to testify before an enquiry, this would widen the ambit of circumstances in which

an injustice would be done if a restricted meaning is accorded to "just excuse", and increase the likelihood that the legislature would not have intended such a meaning.

I do not think, therefore, that the court a quo was wrong in quoting Hayson's case. For completeness' sake I should add that Hayson's case in any event did not pertinently consider the question now in issue, viz., the ambit of "just excuse", and I do not understand the judgment of the court a quo to have placed much reliance on it.

For the reasons set out above I consider that the expression "just excuse" in section 189 has a wider connotation than merely embracing excuses arising from the rules of privilege, admissibility and compellability. And for the purposes of the present case it seems to me that we should follow, as the court a quo did, the suggestion by STEYN CJ in Weinberg's case, supra, viz., and hold that it would amount to a "just excuse" if a witness were to find himself in circumstances in which it would be humanly intolerable to have

to testify. This seems to me the type of circumstance which the legislature must have had in mind in speaking of a "just excuse". In saying this I am not, of course, attempting to define the concept of "just excuse". There may well be circumstances in which a just excuse may exist even if it is not humanly intolerable for the person concerned to have to testify. And I need hardly say that the "humanly intolerable" formulation is in itself a general guideline which should not be treated as if it were a legislative enactment.

Mr. Pretorius accepted that, if "just excuse" covered more than excuses arising from existing rules of law, then the "humanly intolerable" test applied by the court a quo would be appropriate. He contended, however, that the approach of the court a quo to the question whether this test had been satisfied was wrong. This argument was based largely on passages from Book 8 of Wigmore on Evidence which had been cited in several decisions of our courts. I do not propose quoting these passages but will give the references to the relevant cases in which they

are set out. The propositions derived from Wigmore may be summarized as follows. It is extremely important from society's point of view that potential witnesses should give relevant evidence on matters within their knowledge. (Scherbrucker v. Klindt N O 1965(4) SA 606 (A) at 615 G-H; S v. Leepile and Others (supra) at p. 994 H to 995 A and S v. Heyman and Another, supra, at p. 610 D). All privileges from the duty to testify are exceptional, and must be discountenanced. They should be recognized only within the narrow limits required by principle. (S v. Heyman and Another, supra, at p. 610 E-G, and in S v. Leepile and Others, supra, at p. 995 B-D). A duty rests on each member of society to make his knowledge available to courts of law even if this means a sacrifice of his privacy or would have other disagreeable consequences for him. (S v. Maduna, supra, at p. 783 E-H and S v. Leepile and Others, supra, at p. 995 D - G).

Finally Mr. Pretorius quoted a number of authorities other than Wigmore which stressed the great importance of the

duty to give relevant evidence. See, for instance, S v. Leepile and Others (supra) at p. 999 B; S v. Jolobe and Others (AD, unreported, case no 75/83, delivered on 29 March 1984); S v. Moloto and Others (unreported, TPD, case no A 1987/87, delivered on 24 March 1988); R v. Parker 1965(4) SA 47 (RAD) at p. 51 D, quoting McGuinness v. Attorney-General (Vict.) 63 CLR 73 at p. 102; R v. Parker 1966(2) SA 56 (RAD) at p. 58 F and 59 G and S v. Wessels (supra) at p. 740 E-G.

In the light of these authorities Mr. Pretorius submitted that the public interest in the availability of evidence must be weighed up against the disadvantages which the witness was likely to suffer if he were to testify. In striking a balance the public interest should be accorded much more weight than that of the individual.

The propositions advanced by Mr. Pretorius are amply supported by authority and Mr. Gauntlett, who appeared for the respondent, did not dispute them. The only point which was in dispute was whether the court a quo had correctly applied these

principles. The most pertinent passage in its judgment reads as follows:

"In the instant case the question is whether the physical or psychical condition of the appellant is such as to constitute an adequate or sufficient basis for the refusal to testify (Heyman's case supra 610H). It is of course necessary for the court to bear in mind the words in Weinberg's case supra at 666A namely, that the excuse tendered would have to be of sufficient cogency, taking all the circumstances into consideration, for the witness to be absolved from the duty not to withhold the truth from the court. It follows that if this was not so the underlying statutory intention of the aforesaid section 189 would simply be defeated. In Heyman's case supra at 601 E, it is said that the sentence is intended to be not merely an inducement to testify but also a punishment to which reference is made in sub-section (3) thereof. Moreover the court should not lose sight of the words in the passage from Wigmore on Evidence which is quoted with approval in Schermbrucker v Klindt NO 1965 4 SA 606 (A) 615H, namely:

'The vital process of justice must continue unceasingly. A single cessation typifies the prostration of society. A series would involve its dissolution.'

While it can be accepted that the interests and administration of justice cannot be thwarted effect must nevertheless be given to the aforesaid section. The state in its heads has also referred to further passages in Volume 8 of Wigmore on Evidence which have been quoted in various decisions and which deal generally with the important duty to testify and any

limited exemption therefrom. It is, however, unnecessary to make mention thereof in this judgment."

In my view this passage sufficiently recognizes the importance of the duty not to withhold evidence from the court. The court a quo refers to the passages from Wigmore on which the appellant relies in the present case and there was no need, as suggested by Mr. Pretorius, for the court to quote them all in extenso. Mr. Pretorius further criticized the court for not describing the duty to testify as being of "paramount" importance, an expression used in some of the cases. "Paramount" is defined in the Shorter Oxford Dictionary as "above all others in rank, order or jurisdiction; supreme; ... Superior to all others in influence, power, etc.; pre-eminent". In the present context, it seems to me with respect, it would be wrong to describe the duty to testify as "paramount" since this would suggest that it would always and in all circumstances prevail over any excuse which an unwilling witness might offer. That would, of course, not be correct.

One should further bear in mind that the approach of the court a quo does not appear only from the passage which I have quoted above. The fact that it required the respondent to go so far as to prove that it would be humanly intolerable for him to have to testify was in itself a recognition that the duty to testify weighed much more heavily than the interests of the individual. Taking the judgment as a whole I do not consider that the approach of the court a quo can be faulted.

The final argument raised in the appellant's heads of argument was that the court a quo erred in law by not correctly applying the principles set out in R v. Dhlumayo and Another 1948(2) SA 677 (A) in deciding the appeal from the regional court. In particular it was argued that the court a quo did not give full weight to the advantage which the trial magistrate had in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. I emphasize that the appellant did not contend that there was insufficient evidence on record to justify the findings of the court a quo. The contention was merely that

the court a quo did not properly evaluate the evidence in the light of the findings of the trial magistrate.

Since the argument is based on the alleged non-compliance with the rules enunciated in R v. Dhlumayo (supra), the first question to be determined is what status these rules have. Dhlumayo's case itself provides the answer. Right at the outset of his much quoted judgment in that case DAVIS AJA said the following (at p. 695):

"The question of the lines upon which an appellate court should proceed in an appeal purely upon fact from the judgment of the trial court is obviously even now of extreme importance, and may become of still greater importance in regard to criminal cases in the future. I purposely speak of the lines upon which it should proceed rather than of the rules by which it should regard itself as bound, for of one thing at least I am satisfied. It is particularly undesirable to tie the hands of appellate courts by rules which are not loose and flexible - see Rex v. Abel (1948 (1), S.A.L.R. 654) and cases therein cited. General lines of conduct may be laid down, but they must be such as will assist and not hamper an appellate court in dealing with the problems which may arise in any particular case in the manner most consistent with the attainment of justice. Any principles which may be laid down are in the main clearly only rules of common sense, and not rules of law. The question in every case is first how, as a

matter of common sense, the problems with which an appeal court is faced in the particular case before it are to be approached and secondly how, again as a matter of common sense, when they have been correctly approached, they are to be dealt with so as best to arrive at justice. The only legal principles involved are, so far as I know, the fundamental one that an appeal is a rehearing to which the appellant, who has been given leave to appeal or where no leave to appeal is necessary, is entitled as of right and that - in certain circumstances - the incidence of the onus may be all-important."

Later, he said, more specifically (at p. 695-6):

"The principle which has been adopted that an appellate court will not ordinarily interfere with a finding of fact by a trial judge - with which I shall deal in a moment - is certainly not a rule of law. It probably may be called a 'rule of practice', though I can find no authority which goes so far as to call it such ... It is no more than a common sense recognition of the essential advantages which the trial judge has had, as a consequence of which the right of the appellate court to come to its own conclusions on matters of fact, free and unrestricted on legal theory, is necessarily in practice limited."

From these passages it follows that a court of appeal which does not properly apply the guidelines set out in Dhlumayo's case would not be committing an error of law. It would at most be guilty of dealing with the appeal on facts in

an unsatisfactory manner. This could be corrected on appeal if a further appeal on the facts were available to the dissatisfied party. In the present case no appeal on the facts is available to the attorney-general, and he is accordingly not entitled to question the manner in which the court a quo reached its decisions on the facts.

The court a quo made two findings which may be relevant for the purpose of this part of the case, both set out in paragraph (c) above. The first was what the likely results would be to the respondent if he were to give evidence. This was a matter directly dealt with in the evidence, and the court came to its finding after an analysis of the often conflicting views of the expert witnesses. This was consequently a primary fact, and the finding of the court a quo in this regard was clearly unassailable in an appeal under section 311 of the Criminal Procedure Act. Accordingly we intimated to Mr. Pretorius during argument that we were not prepared to hear his submissions on this point.

The second relevant finding was that the likely results if the respondent were to give evidence were such as to render it humanly intolerable for him to have to do so. This represented a value judgment as to the seriousness for the respondent of the consequence which the court found were likely to follow if he were to give evidence. In Morrison v. Commissioner for Inland Revenue 1950(2) SA 449 (A) at p. 455 SCHREINER JA, delivering the judgment of the court, said the following:

"A question that depends for its answer on matters of degree, on what weight is to be given to this and that variable factor ... seems to me to be ordinarily answerable only for the particular case and to be therefore a question of fact."

This passage applies with particular force to the present issue. Having found what the likely consequences would be if the respondent were compelled to give evidence, the court had to assess how serious these consequences would be for the respondent. This is essentially a matter of degree, on what weight is to be given to this and that variable factor.

Moreover, this finding is applicable only to the respondent. No other person would be able to claim that, because his experiences have been the same as that of the respondent, or because his symptoms are the same, he would necessarily also have a "just excuse" not to give evidence. A court would have to assess de novo whether such experiences or such symptoms have rendered it humanly intolerable for the person concerned to have to do so. Of course, previous decisions on questions such as this could be useful by way of example, but they could never be precedents.

In the result, I consider that the question whether it was humanly intolerable for the respondent to have to testify was also a question of fact and unassailable in an appeal under section 311 of the Criminal Procedure Act.

For the reasons set out above the following order is made.

- a) The appeal is dismissed with costs.
- b) Such costs are to include:
 - i) costs incurred in respect of the application for condonation of the late filing of the application for leave to appeal

in the court a quo, as well as in respect of the application for leave to appeal in the court a quo;

ii) costs incurred in respect of the application for leave to appeal to this court.

c) Costs of two counsel are to be allowed.

E M GROSSKOPF, JA

CORBETT, CJ
JOUBERT, JA Concur
NIENABER, JA
HARMS, AJA