R. v. *Atkinson*[1]
THE ROLE OF THE TRIAL JUDGE

CASE SUMMARY

This case arose out of a charge of "corruptly paying a reward to an agent as consideration for doing an act related to the business of his principal" contrary to s. 383 (1) (a) (i) of the Criminal Code of Canada.[2] The Court of Queen's Bench trial judge, sitting without a jury, found the accused guilty and granted him an absolute discharge.[3] The New Brunswick Court of Appeal dismissed the accused's appeal from the finding of guilty.[4]

One of the several Grounds of Appeal submitted by the appellant was that "the trial judge, by his questions and remarks during the trial, unduly interfered with the conduct of the trial and deprived the accused of a fair trial."[5] The alleged interferences included:

1. Asking questions of witnesses which were leading and/or resulted in evidence being adduced.[6]

2. Unnecessary intervention during counsel's examination of witnesses.[7]

3. Conducting extensive cross-examination of witnesses after both counsel had completed their examinations of the witnesses.[8]

4. Interrupting witnesses to express disbelief in their testimony.[9]

5. Making repeated inquiries of the Crown as to whether or not an investigation of perjury charges against a witness had been commenced.[10]

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[1] *R.* v. *Atkinson* (1981), 33 N.B.R. (2d) 137 (N.B.C.A.).

[2] *Ibid.*, at p. 139.

[3] See 30 N.B.R. (2d) 649 (N.B.Q.B.).

[4] A motion for Leave to Appeal to the Supreme Court of Canada was dismissed. *R.* v. *Atkinson* (1982), 36 N.B.R. (2d) 358.

[5] *Supra*, footnote 1 at p. 163.

[6] "Appellant's Notice of Motion" for Leave to Appeal to the Supreme Court of Canada, pp. 125 & 126. This was in reference to the Trial Transcript, Vol. 1, at pp. 189 & 199.

[7] *Ibid.*, at p. 128.

[8] *Ibid.*, at p. 129.

[9] *Ibid.*, at p. 130.

[10] *Ibid.*, at p. 132.

6. Expressing "wonderment that there is only one accused here in this trial"[11] during the introduction of documentary evidence and prior to any material witnesses being called by the Crown.[12]

In dismissing the appeal, the New Brunswick Court of Appeal held that a trial judge's "duty to ascertain the truth not only justifies but, on occasion, requires judicial intervention" provided such interventions do not result in prejudice to the accused.

HISTORICAL BACKGROUND

The role of the trial judge is probably best described by Denning L. J. in *Jones* v. *National Coal Board*[13] where he stated:

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role.[14]

In further describing the trial judge's role, Denning, L. J. stated:

> The judge's part in all this is to harken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the 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.[15]

While most authorities recognize the occasional necessity of judicial intervention during the course of a trial,[16] attempting to draw a line between what is and is not permissible intervention is not always easy.[17] Some cases indicate that while a judge may interfere to clarify points, he

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[11] *Ibid.*, at p. 135. This was in reference to the Trial Transcript, Vol. 1, p. 111.

[12] *Supra*, footnote 1 at p. 168.

[13] [1957] 2 Q.B. 55 (C.A.).

[14] *Ibid.*, at p. 63.

[15] *Ibid.*, at p. 64.

[16] *R.* v. *Denis*, [1967] 1 C.C.C. 196 (Que. C.A.); *Ogwa* v. *Alli*, (1972) 4 N.B.R. (2d) 423 (N.B.Q.B.); *R.* v. *Torbiak and Campbell*, (1974) 26 C.R.N.S. 108 (Ont. C.A.).

[17] See *R.* v. *Pavlukoff*, (1953) 17 C.R. 215 (B.C.C.A.).

is not to adduce evidence himself.[18] A Judge may remedy a failure on the part of counsel to adduce a fact essential to the case.[19] However, rather than adduce the evidence himself, authorities indicate that "it would be preferable . . . to bring it to the attention of counsel so that he might remedy the deficiency. . . .".[20]

A measure of the amount of interference which is not acceptable was stated by Denning, L. J. in *Jones* v. *National Coal Board:*

> A judge of acute perception, acknowledged learning, and actuated by the best of motives, has nevertheless himself intervened so much in the conduct of the case that one of the parties — nay, each of them — has come away complaining that he was not able properly to put his case; . . .[21]

Case law also indicates that interventions should be as infrequent as possible during the cross-examination of witnesses as it tends to destroy the very gist of cross-examination; ie. "the unbroken sequence of question and answer."[22]

If it should become necessary for a trial judge to interfere during a trial, Lord Green M. R. in *Yuill* v. *Yuill* has indicated that it is "generally more convenient to do this when counsel has finished his questions or is passing to a new subject."[23]

With respect to comments made by a trial judge concerning the credibility of witnesses, Porter, C.J.O. stated, in *R.* v. *Augello and Tascarella,*[24]

> He [the judge] . . . unquestionably has the right in the course of his charge to the jury to express his views as to the effect of the evidence and the credibility of witnesses, provided that he instructs the jury that they are the sole judges of the facts and the credibility of the witnesses and are not in any way bound to accept his views. Nevertheless we do not think it to be in the interests of a

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[18]This restriction was approved of in *Ogwa* v. *Alli, supra,* footnote 16; see also *Bora et al.* v. *Wenger,* [1942] O.W.N. 185 (Ont. C.A.).

[19]*R.* v. *Torbiak and Campbell, supra,* footnote 16; *Ogwa* v. *Alli, supra,* footnote 16.

[20]*Ogwa* v. *Alli, supra,* footnote 16 at p. 440. This approach was approved by Dickson, J. of the S.C.C. in his David B. Goodman Memorial Lecture, "The Role and Functions of Judges," (1980) 14 Gazette 138 at p. 143.

[21]*Supra,* footnote 13, pp. 63 and 64. It is interesting to note that not only did the appellants in the instant case complain of the judge's interventions but so too did the Crown complain, in their appeal on sentencing, of an intervention by the trial judge. See "Appellant's Notice of Motion" for Leave to Appeal to S.C.C. at p. 121.

[22]*Jones* v. *National Coal Board, supra,* footnote 13 at p. 65. *Yuill* v. *Yuill,* [1945] 1 All E.R. 183 (C.A.).

[23]*Yuill* v. *Yuill,* at p. 185. See also Dickson, J., "The Role and Functions of Judges," *supra,* footnote 20.

[24][1963] 3 C.C.C. 191 (Ont. C.A.); Dickson, J., "The Role and Functions of Judges," *supra,* footnote 20.

> fair trial for the Trial Judge to make statements during a witness's testimony which indicate his disbelief in the testimony being given. Nor should questions put by the Judge be so framed as to be open to the criticism of unfairness.[25]

Concern over the appearance of a fair trial was also indicated by Schultz, J.A. in *Delaney & Co. Ltd.* v. *Berry and Berry*[26] where, in expressing disapproval of lengthy examinations of witnesses, he stated,

> . . . [I]f a trial judge examines a witness at length it is often difficult for him to avoid the appearance of bias or prejudice.[27]

The importance of the appearance of an unbiased and fair trial is a concept basic to our judicial system. As stated in *R.* v. *Sussex Justices, Ex. p. McCarthy:*

> . . . a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[28]

Reflecting the concept of fairness, *R.* v. *Torbiak and Campbell* stated:

> Since the limits of the allowable conduct are not absolute, but relative to the facts and circumstances of the particular trial within which they are to be observed, every alleged departure during a trial from the accepted standards of judicial conduct must be examined with respect to its effect on the fairness of the trial.[29]

It was also indicated in *R.* v. *Pavlukoff*[30] that, depending upon the facts of a case, "the court might not consider that the comment . . . resulted in any miscarriage of justice and would in consequence dismiss the appeal."[31]

THE PRINCIPAL CASE

In the instant case, the Court of Appeal, having read the entire transcript of the trial,[32] did not take issue with the fact that "a substantial number of questions were asked by the trial judge or that remarks were

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[25]*Ibid.*, at 192. The recent case of *Campbell* v. *R* (1981) (N.S.C.A.) (unreported) has indicated that rules of conduct for a trial judge set out in cases dealing with jury trials apply just as well to a judge sitting without a jury.

[26](1965) 49 D.L.R. (2d) 171 (Man. C.A.).

[27]*Ibid.*, at p. 174.

[28][1924] 1 K.B. 256 at p. 259.

[29]*Supra*, footnote 16 at p. 110.

[30](1953) 17 C.R. 215 (B.C.C.A.).

[31]*Ibid.*, at p. 218.

[32]*R.* v. *Atkinson, supra*, footnote 1 at pp. 163 & 164.

made by him."[33] However, it held that in light of a trial judge's "duty to ascertain the truth"[34] and in view of the circumstances of the case, the appellant was not prejudiced and was therefore not deprived of a fair trial.[35]

It would appear then, that the Court applied the test of "fairness" as approved in *R.* v. *Torbiak and Campbell.*[36] The instant court's final statements to the effect that the "evidence is abundant, strong and convincing in every respect" and the accused's guilt was "established beyond any reasonable doubt,"[37] seems to indicate that the court was perhaps also following the "no miscarriage of justice" doctrine as set out in *R.* v. *Pavlukoff.*[38] It would also appear that the importance of obtaining the truth as pointed out by Denning L. J. in *Jones* v. *National Coal Board*[39] was underlying the reasoning of the instant court. In deciding, therefore, whether or not the accused's conviction should be affirmed, the Court of Appeal seems to have applied accepted legal principles.

ANALYSIS

Unfortunately the Court of Appeal did not choose to deal with each alleged intervention separately making it, therefore, difficult to assess the actual basis upon which the court may or may not have held each intervention to be acceptable. It would appear, in light of the authorities previously cited,[40] that taken individually, the interventions do not conform to what is considered acceptable conduct for a trial judge. However, the Court of Appeal reasoned that:

> Upon close scrutiny of each alleged intervention of the trial judge, in the context in which it occurred, as well as upon a consideration of their combined effect, we are satisfied that they did not result in a "judicial interference amounting to prejudicial error."[41]

It therefore appears that while, not necessarily approving or disapproving of the trial judge's conduct, it was accepted based on the reasoning that no prejudice resulted to the accused.

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[33] *Ibid.*, at p. 167.

[34] *Ibid.*, at p. 168.

[35] *Ibid.*, at p. 167.

[36] *Supra*, footnote 29.

[37] *R.* v. *Atkinson*, *supra*, footote 1 at p. 168.

[38] *Supra*, footnote 30.

[39] *Supra*, footnote 13.

[40] See footnotes 13-31.

[41] *R.* v. *Atkinson*, *supra*, footnote 1 at p. 168.

Although this was the basic ratio of the decision, one cannot help but take notice of the reasoning applied in determining the issue at hand. The Court seems to have placed considerable weight on the fact that:

> . . .this was not the usual trial and that the nature of some of the evidence, in particular the too obvious and convenient alleged lack of memories, were at best, frustrating to any fair-minded and experienced trial judge and at worse, probable instances of perjury.[42]

Upon reading this statement, the question which comes immediately to mind is; what did the Court of Appeal mean by the phrase "this was not the usual trial"? On the surface, this trial seems to have been a very typical criminal trial; *ie.* it was comprised of the basic elements of an accused and an offence under the *Criminal Code of Canada.* Therefore it would appear that the phrase was in reference to the circumstances surrounding the case; ie. that it involved employees and members of the Government as well as the finance committee of a political party. If this is what was being referred to, one must question whether, the identity of persons involved in a trial should be a criteria upon which to decide whether or not a trial judge's conduct deprived an accused of a fair trial? Or, more specifically, should the principles governing the conduct of a trial judge be altered in any respect when the persons involved in the trial are Government employees and members of the Legislative Assembly. This proposition would seem to conflict with the basic "Rule of Law" established by A. V. Dicey; ie. that every person is equally subject to the law.[43] This rule was approved of by the Supreme Court of Canada in *Roncarelli* v. *Duplessis.*[44] The rule of law might also be stated in these words: the law should be applied equally to all persons. If so, it would then appear that the Court of Appeal was incorrect in using the "unusualness" of the trial as a criteria upon which to justify the trial judge's departure from the accepted rules of conduct.

The sole intervention upon which the Court of Appeal did express an opinion was with regard to the trial judge's remarks concerning the credibility of witnesses. The court expressed doubt that those remarks would have been acceptable had the instant case been a trial by judge and jury.[45] This is in keeping with the principles outlined in *R.* v. *Augello and Tascarella.*[46] However, the instant court seems to have ignored the effect that such statements might have on subsequent witnesses, regardless of whether the trial was by judge and jury or by judge alone. In a case where the events in issue have occurred several years in the past, a

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[42]*Ibid.*, at p. 167.

[43]"Administrative Law, Cases, Text, and Materials"; Evans, Janesch, Mullan, Risk; 1980; Edmond-Montgomery Ltd., Toronto, Canada.

[44][1959] S.C.R. 121 (S.C.C.).

[45]*R.* v. *Atkinson, supra,* footnote 1 at p. 167.

[46]*Supra,* footnote 24.

witness whose memory is not very clear with respect to those events, might be intimidated by the trial judge's verbal expressions of disbelief in the testimony of previous witnesses who have claimed a failure of memory. This is of particular concern where a trial is as publicized as in the instant case. In the interest of obtaining the truth,[47] therefore, it would seem wise to avoid causing undue anguish to subsequent witnesses who sincerely may be unable to accurately recall the events in issue.

Expressing opinions as to the credibility of witnesses during their testimony may also result in a trial judge having to later reverse his opinion should subsequent evidence prove the testimony to be truthful. This would lead to awkward situations which should be avoided if at all possible.

While the Court of Appeal did not comment upon each of the alleged interventions separately, the authorities previously cited[48] would seem to indicate disapproval in theory, of the trial judge's conduct. However, with respect to one of the alleged interventions, there appears to be no case law directly on point. This was the intervention made by the trial judge after some of the documentary evidence had been presented in court and prior to the Crown calling any material witnesses whereby the trial judge expressed his "wonderment that there is only one accused here in this trial in view of some of the exhibits that we have read."[49] While this statement may have been "simply an expression of the trial Judge's concern that others should also be on trial," as the respondents suggested,[50] and not an indication of a predisposition of the guilt of the accused, as the appellants contended,[51] it would seem preferable for a trial judge to avoid making remarks which might be construed as giving the appearance of an unfair trial. This is in keeping with the concept stated in *R.* v. *Sussex Justices, Ex. p. McCarthy.*[52]

What then is the effect of the decision in the instant case? It will probably be cited in the future as an application of the law as stated in *R.* v. *Pavlukoff,*[53] *Jones* v. *National Coal Board*[54] and *R.* v. *Torbiak and Campbell.*[55] However, because the Court of Appeal did not specify at

[47]The importance of this object is stated in *Jones* v. *National Coal Board, supra,* footnote 13.

[48]See footnotes 13-31.

[49]Appellant's Notice of Motion for Leave to Appeal to the S.C.C. *supra,* footnote 11.

[50]Respondent's Submission to the N.B.C.A., pp. 51 & 52.

[51]Appellant's Notice of Motion for Leave to Appel to the S.C.C. at p. 135.

[52]Note: See *R.* v. *Sussex Justices by P. McCarthy, Supra,* footnote 28. (In the civil case of *Tecchi* v. *Cirello,* [1968] 1 O.R. 536 (O.C.A.) where a trial judge definitely did pre-judge the accused prior to the defence having presented any of its evidence, the court held that this was enough to dispose of the appeal.)

[53]*Supra,* footnote 30.

[54]*Supra,* footnote 13.

[55]*Supra,* footnote 29.

any point in its judgement the actual conduct which it seems to be condoning, only those who are familiar with the case will be aware of its impact.[56]

CONCLUSION

It would appear that the New Brunswick Court of Appeal has extended the role of the trial judge to include the previously mentioned alleged interventions, provided those interventions have not resulted in prejudice to the accused. By so doing, the Court has raised the following question: How much further can judicial intervention be extended before it will be said that the accused was deprived of a fair trial or, perhaps even more importantly, that our concept of the judicial system as described in *Jones* v. *National Coal Board*[57] has been fundamentally altered? The answer to that question will lie within the discretion of the courts confronted with this issue in the future. It is therefore disappointing that the Supreme Court of Canada refused the opportunity to address this issue by denying the appellant's application for Leave to Appeal.[58] This is particularly so in light of the fact that they have yet to provide lower courts with guidelines on the role of a trial judge.

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[56]Because of the wide spread publicity this trial received, numerous courts are undoubtedly aware of the conduct in issue.

[57]*Supra*, footnote 13.

[58]*Supra*, footnote 4.

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