

SOUTH AFRICA / JUDGMENT

S v James (17/18) [2018] ZAECBHC 10; 2019 (1) SACR 95 (ECB) (7 September 2018) [2018] ZAECBHC 10

COURT

Eastern Cape High Court, Bhisho

BEFORE

Hartle, Smith, D Van Zyl

CASE / FILE NUMBER

17/18

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

Case No. 17/18

Case reference E1993-17

THE STATE

and

SAKHEKILE JAMES

REVIEW

JUDGMENT

HARTLE J

- [1] This matter came before me by way of automatic review ostensibly on the basis of the unrepresented accused having been convicted of assault with intent to do grievous bodily harm for which he was sentenced to imprisonment for a period of thirty-six months.
- [2] There appears to be no warrant to interfere with either the conviction or sentence imposed, both appearing to be in accordance with justice.

[3] What is of concern however is that it co-incidentally appeared during the review oversight of the matter that the accused was also convicted of contempt of court committed in facie curiae and sentenced to two months imprisonment in this respect. The matter was not referred for that reason on the face of it although

contraventions under section 108 (1) of the Magistrate's Court Act, No. 32 of 1944 provide in peremptory terms for such a review.[1]

[4] My colleague Smith J who first read the file queried the basis for

the additional sentence whereupon the magistrate drew the reviewing judge's attention to the accused's bad behavior in court which had culminated in his conviction in this respect.

[5] The response to the query is as follows:

"I would like to inform the Honourable Judge that (the) accused started to disrespect the court at page 43 where he made (a) noise in court. He was uncontrollable (and) hitting (the) Court Orderlies. His demeanour in court was bad. He did not hear (the) Magistrate at page 64. (He) said that he will not appeal. Fuck off appeal (rights)."

[6] The immediate prequel to the conviction is reflected in the record at the indicated page as follows:

"...Stand up, Mr James, The Clerk of the Court is the Recording Operator here. Sir, at least this is too much now, whenever I am doing this case, you are always, stand up, sir, stand up. Stand up, Mr James. I just recently warned you not to shout, to respect the Court of Law. You don't respect, even I myself, you don't respect me. I don't have a problem now of finding you guilty of Contempt of Court summarily. Do you understand that? The phone is supposed to switch off, that is what the Clerk ... Stand up, Mr James. Mr James, Mr James, stand up. Mr Nojaholo, please interpret. You may stand up. Mr James, Mr James, Mr James. Mr James, I just recently warned you not to make a noise in Court. Now you are making a noise. Why you are shouting everybody? Sir, I find you GUILTY of Contempt of Court summarily. Sorry, no you are shouting everybody sir, you don't want to listen. These are the Court Orderlies. If you are making a noise in Court, they are supposed to intervene. And you are just, before me, you just bumping now the Court Orderly. Sir, why are, why now you don't respect the Court of Law? Why, I am looking at you now, you don't want to listen to them. These are Court Orderlies. Sorry Ma'am, Mr James is the one, I was busy asking, at the

time he just elected to make a noise here at Court. There is the reasons for the Court Orderlies to come, to be three of them, because Mr James is making a noise. And he is the one who asked you to come and give evidence on his behalf."

[7] Without minimizing that there was in fact an atmosphere in court, it is not apparent how it escalated as it did on page 43. I carefully scrutinized the record before the show down, as it were. At worst the accused appeared - as unrepresented litigants do, to not appreciate the niceties of cross examination. He had been urged by the magistrate to listen, to stay focused on what was relevant and to wait to speak and to allow the interpreter to interpret for him and to ask a single question at a time. At some juncture the magistrate explained that he had

to listen to what the interpreter says and added “Sir, this is a court of law. You have to behave.” She repeated that he had to listen and wait for the interpreter and to ask one question at a time, allowing the latter in turn to interpret. Again she reminded him that “this is a court of law”. The proceedings appeared to continue normally during the accused’s own testimony but on 7 March 2018 when the trial resumed, the prosecutor brought to the court’s attention that the accused was chewing. He looked to the court for redress:

“PROSECUTOR: Your Worship, if I am going to be undermined when I am doing my duties, I am not going to be able to prosecute this mater. Because I saw him chewing.”

- [8] The magistrate confirmed that she herself had seen the accused chewing and told him to take out his bubblegum. A brief spat ensued during which time the prosecutor clamored to be heard above the noise and requested a brief adjournment of the proceedings. The magistrate continued to engage with the accused as follows:

“COURT: I can even play the record. Can you please take off your Chappies, sir, because it is going to disturb you unless you are talking. Mr James, Mr James, Mr James ...

PROSECUTOR: Your Worship ...

COURT: Sir, sir, Mr James ... Mr James ...

PROSECUTOR: I request a two minute adjournment, Your Worship.

COURT: Mr James, you must respect the Court, sir, this is the Court of Law. Sir, what is your problem? Sir, this is a Court of Law. I am not going to warn you again. Sir, this is the Court of Law, I am not going to warn you again, sir. It is not the first time that you are talking when I am talking. I am not going to warn you sir, again. The Interpreter has the right to tell the Court what is happening. Like the Court Orderly. Do you understand that? Even the Clerk of the Court also observed that you are chewing. Sir, I am telling you, this is the Court of Law, I am not going to warn you again. I don’t have a problem, so I can’t see you chewing again. You may sit down at the present moment.”

- [9] The defence witness took the witness stand, was sworn in and it is then that the exchange at page 43 of the record played itself out.

- [10] Evidently the prosecutor was deeply aggrieved by the accused’s demeanor, reminding the court at the time of the sentence proceedings that he should be appropriately sentenced:

“... Your Worship, I would like to refer this Honourable Court to the demeanour of the accused since this matter commenced.

Your Worship, the accused does not have any respect for anybody. The accused portrayed a behaviour that is so alarming, that you cannot even compare with that of a dog. He does not have any respect.”

- [11] Section 108(1) of the Magistrate's Court Act gives the Magistrate's Court the power to invoke summary proceedings for contempt where the contempt is committed in facie curiae. The sub-section provides as follows:

"Custody and punishment for contempt of court.—(1) If any person, whether in custody or not, wilfully insults a judicial officer during his sitting or a clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where such court is held, he shall (in addition to his liability to being removed and detained as in subsection

- (3) of section 5 provided) be liable to be sentenced summarily or upon summons to a fine not exceeding R2 000 or in default of payment to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine. In this subsection the word "court" includes a preparatory examination held under the law relating to criminal procedure."

- [12] A lower court, being a creature of statute, has no inherent right to punish an offender summarily for contempt of court. Its powers in this respect are derived from and limited to the basis provided for in section 108(1) of the Magistrate's Court Act.

- [13] A review or appeal court should be slow to interfere with a conviction by a lower court under this section. Innes JA stated as follows in *R v Benson*[2] in this respect:

"It seems to me that an appellate tribunal should be very slow to interfere with the measures which a lower court of record considers

it necessary to take in self-protection and in order to secure the decorum of its proceedings . . . It is difficult for a Court of appeal in a matter of this kind to realise the atmosphere in which the incident took place and all the circumstances surrounding it, which are so essential for a right estimate of its real character."

- [14] Despite the expected deference to be shown to the lower court, however, which must of necessity be supported in its endeavors to self-protect and ensure the decorum of its proceedings, to restore its authority promptly and to allow matters to proceed, magistrates are nevertheless required when invoking the provisions of section 108 (1), to carefully apply the principles which have been enunciated by our courts in respect of the procedure of summarily sentencing an offender for contempt of court in facie curiae.

- [15] These were helpfully set out by White J in *S v Nyalambisa*: [3]

"(a) Contraventions of court etiquette or interferences of court procedure which are of a trivial nature should be ignored or dealt with by the presiding magistrate in a restrained manner. Magistrates should be wary of making an issue of such minor contraventions and thereby escalating them into major confrontations between the court and the offender - S v Nel 1991 (1) SA 730 (A) at 749F. A quiet rebuke and a request that the perpetrator either desist from the offensive act, or leave the courtroom, will often be more advantageous to the dignity and decorum of the proceedings than making an issue of the violation. ...

- (b) The summary proceedings referred to in s 108(1) should be exercised cautiously and only when such procedure is absolutely necessary to maintain the order or dignity of the court. Although there are undoubtedly cases of contumacious behaviour which require prompt and summary action, in the majority of cases it will suffice if the magistrate orders that the perpetrator be arrested and tried in the normal course for contempt of court. In *R v Silber* 1952 (2) SA 475 (A) at 480F Schreiner JA stated:

'The power to commit summarily for contempt in facie curiae is essential to the proper administration of justice . . . But it is important that the power should be used with caution for, although in exercising it the judicial officer is protecting his office rather than himself, the facts that he is personally involved and that the party affected is given less than the usual opportunity of defending himself make it necessary to restrict the summary procedure to cases where the due administration of justice clearly requires it. There are many forms of contempt in facie curiae which require prompt and drastic action to preserve the court's dignity and the due carrying out of its functions.'

Furthermore, a magistrate must bear in mind that when he acts in terms of s 108(1) he is the 'witness, prosecutor and Judge' - *Duffey v Munnik and Another* 1957 (4) SA 390 (T) at 391F - and that this is an undesirable state of affairs. This situation can be avoided by ordering that the offender be tried in the normal course, in which event the magistrate involved will testify, but another magistrate will adjudicate over the matter. A magistrate should also satisfy himself, especially when he has been the butt of personal insults, that he is in a fit emotional state to try and sentence the perpetrator. If there is any doubt in his mind on this issue, the magistrate should either stand the case down till later on the same day, or order that the offender appear in his court on the following day, or order that the offender be arrested and charged with contempt of court in the normal course. If the magistrate postpones the matter to the following day, he will then still be entitled to deal with it summarily in terms of s 108(1) - *R v Lloyd* (1905) 22 SC 347.

- (c) It is implicit in s 108(2) that everything which transpires in the court must be recorded, and that the record be sent on review to the Supreme Court - *S v Mongwe* 1974 (3) SA 326 (T).
- (d) It is trite that the audi alteram partem principle of natural justice does apply to the summary procedure set out in s 108(1); that the offender must be informed of the contempt of court the magistrate believes he has committed, and that he must be afforded an opportunity to deny or explain his actions - *Duffey v Munnik and Another* (supra); *S v Mkize* 1962 (2) SA 457 (N); *S v Mahlope* 1962 (3) SA 311 (T); *S v Nel* (supra at 748G)."

[16] In *S v Nel*[4] the Appellate Division held that when a court applies the summary procedure to determine a person's guilt or innocence for contempt of court in facie curiae, the general rule is that the audi alteram partem principle does apply. Only in exceptional cases does it not apply. A departure from the rules of natural justice would for example be justified where there is a flagrant contempt committed in facie curiae where the court is itself a witness to the act of contempt and in circumstances which require prompt and drastic action to preserve the court's dignity and the due carrying out of its functions. Each situation is to be

determined on its own merits. Certainly in the case where the conduct of the person concerned is not so unequivocal so as to justify the assumption that the person undoubtedly intended to be contemptuous, then in such cases the audi alteram partem rule should be observed and the person given an opportunity of making an explanation and of apologizing.

- [17] In *S v Lavhengwa*[5] (in which the constitutionality of summarily punishing contempt of court in facie curiae is confirmed) the court stressed that the safeguards of the rules of natural justice must, however, be complied with. The court noted though that in the summary procedure the essentials of the charge were always well known and frequently obvious to the accused but that where the circumstances indicate that the accused might not be aware of the facts underpinning the charge, there was a duty on the magistrate to inform the accused. The court added that occasional failure to comply with this requisite, did not render the procedure unconstitutional.
- [18] The court further held that the proceedings did not create a duty on the accused to prove a defence or excuse and certainly the procedure triggered by section 108 (1) did not mean that the accused was liable to be convicted despite the existence of a reasonable doubt. What was important was whether the summary proceedings maintained the accused's right to be convicted only upon proof that he contravened section 108 (1) beyond a reasonable doubt. Finally, the question whether the accused was denied the right to legal representation was a factual question which had to be investigated in each case.
- [19] The court also set out guidelines for magistrates when implementing the provisions of section 108 (1). These are as follows:

"1. The magistrate should first carefully consider whether he/she should resort to the normal procedure of referring the matter to the Attorney-General or the summary procedure. Considerations which would become important at this stage are whether or not he can disregard the accused's conduct as unimportant (s v Nel (supra at 749G)) or merely stupid and not wilfully contumacious (R v Silber (supra at 483 E)) or whether the matter can be disposed of by merely removing the accused from the court (Duffey v Munnik (supra at 395 E)) or whether the conduct is insulting or insolent in its nature towards the magistrate personally. In the instances mentioned above it would be better to take evasive action (such as e.g. the removal of the accused from the court or an adjournment or requesting an apology from the accused or reporting him to his professional body

if the accused is a practitioner) which would obviate the necessity to embark upon a trial under s 108 (1) or to take the normal route of referring the matter to the Attorney-General rather than resorting to the summary procedure.

2. If, however, the circumstances are such that the summary procedure is called for (e.g. in cases of disobedience to rulings, interruption of the proceedings etc.) he should warn the accused of his intention to proceed with a summary trial under the provisions of s 108 (1) of the Magistrate's Courts Act. Depending on the accused's prior knowledge of the contents of s 108 (1), it would be advisable for the magistrate to read out the section to the accused so as to inform him of the provisions thereof and thus inform the accused of the nature of the

offence with which he is being charged.

3. The magistrate must then proceed to inform the accused of the latter's conduct which in his view contravened s 108 (1) and which of the three categories mentioned in section 108 (1) his conduct is alleged to have transgressed.
4. The magistrate thereafter should inform the accused of his constitutional rights as set out in s 25 (3) of the Constitution and enquire from the accused whether he wishes to remain silent, testify, give an explanation or call witnesses. If the accused is a lay person he should be afforded the right to obtain legal representation should he wish to do so, subject to such time and feasibility constraints as may seem reasonable in the circumstances of the case. Depending on the decision of the accused, the magistrate should then afford the accused full opportunity to exercise his rights in order to ensure that his constitutional rights are not infringed nor that the rules of natural justice are transgressed.
5. After the accused has been given an opportunity to exercise these rights the magistrate should then weigh up all the circumstances, evidence and arguments and convict the accused only if the facts before him prove beyond a reasonable doubt that the accused wilfully contravened any of the offences mentioned in s 108 (1)."[6]

[20] In the present case the accused may well have behaved unacceptably and cocked a snoot at the decorum of the court by resisting instructions

or requests from the court staff, but it appears that he was not given proper prior warning of the implications thereof or given an opportunity to explain himself before he was summarily convicted. The magistrate should have exercised restraint as well. Instead she appears to have lost her cool and succumbed to the incendiary atmosphere. The fact that she had to be reminded by the prosecutor to sentence the accused for contempt of court confirms to my mind that she had responded impetuously to the accused's

provocation at the time. The accused is of course unlikely to have given an exculpatory explanation or to have ameliorated his bad behavior by a sensible excuse, given that he continued to conduct himself indecorously to the bitter end - eschewing even a review of his conviction on the primary charge, but this was clearly not a situation where he could not have been warned appropriately and given an opportunity to react. As was stated by White J in *S v Nyalambisa*: [7]

"It seems to me that the audi alteram partem principle is so ingrained in, and is such a fundamental part of our law of criminal procedure, that a person has an unassailable right to be heard before judgment is given, irrespective of the flagrant nature or circumstances of the offence he is alleged to have committed, or his degree of knowledge of criminal procedure."

[21] This approach, of placing a premium on the accused's right to a fair trial, even where the contemptuous behavior seems outrightly

offensive and constitutes a disruption to court proceedings, was adopted by this division in *S v Phomadi*.^[8] The court held that section 108 (1) did not expressly authorize a summary procedure in the narrow sense, i.e. that a conviction could follow without the accused being afforded the opportunity of being heard. The *audi alteram partem* still applied and an accused person had to be afforded the opportunity to give evidence, and call witnesses, both with respect to conviction and sentence.

[22] In a scenario such as in *casu* where the matter escalated all of a sudden, the accused was obviously taken by surprise and was not given the chance even to react in time before the full might of the summary proceedings came down on him. He ought to have been apprised of how and why his behavior was offending and made to understand that the infraction was punishable in law. It would thereupon have been up to him to adjust his behavior or respond formally to the curial procedure which was instead suddenly foisted upon him without any apparent recognition that it was underway.

[23] Despite the order which I intend to grant herein, it remains open to the magistrate to refer the matter to the Director of Public Prosecutions to consider whether the accused should be prosecuted for the apparent contravention of section 108 (1) of the Magistrate's Court Act.

[24] In the result, I issue the following order:

1. The conviction and sentence in respect of the contempt of court committed in *facie curiae* are set aside.
2. The conviction and sentence in respect of the assault with intent to do grievous bodily harm charge are confirmed.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

D VAN ZYL

DEPUTY JUDGE PRESIDENT

OF THE HIGH COURT,

BHISHO

DATE OF JUDGMENT: 7 September 2018

[1] Section 108 (2) provides in respect that: "In any case in which the court commits or fines any person under the provisions of this section, the judicial officer shall without delay transmit to the registrar of the court of appeal for the consideration and review of a judge in chambers, a statement,

certified by such judicial officer to be true and correct, of the grounds and reasons of his proceedings, and shall also furnish to the party committed a copy of such statement.” It appears that the accused was convicted on 7 March 2018 already, the record only being transmitted to this court on 18 July 2018 sans the prescribed statement of the magistrate of the grounds and reasons for the proceedings.

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[2] 1914 AD 357 at 359.

[3] [1993] 3 All SA 678 (Tk).

[4] 1991

(1) SA 730 (A).

[5] 1996

(2) SACR 453.

[6] Supra at page 495 c – 496 a.

[7] Supra at page 682.

[8] 1996

(1) SACR 162 (E).

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