

SOUTH AFRICA / JUDGMENT

S v Mostert (864/13) [2014] ZAWCHC 29 (6 March 2014)

[2014] ZAWCHC 29

COURT

Western Cape High Court, Cape Town

BEFORE

Dlodlo, Rogers

CASE / FILE NUMBER

864/13

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THE HIGH COURT OF SOUTH
AFRICA

(WESTERN
CAPE DIVISION, CAPE TOWN)

High

Court Ref No: 14108

Vredendal

Case No: 864/13

In

the matter between:

STATE
AND
JANNIE
MOSTERT
ACCUSED

Coram:

DLODLO & ROGERS JJ

Delivered:

6 MARCH 2014

JUDGMENT

ROGERS J:

- [1] This matter comes before the court by way of review in terms of s 108(2) of the Magistrates' Courts Act 32 of 1944.
- [2] The accused appeared before the magistrate on 6 December 2013 on which occasion he was joined as the third accused in respect of two counts of rape and one count of attempted murder allegedly perpetrated on 30 November 2013 in relation to the same complainant (a male person). This review is not, however, concerned with those charges but with his conviction and sentencing for contempt of court committed on 6 December 2013.
- [3] The accused was unrepresented as at 6 December 2013. He at first indicated that he wished to conduct his own defence. The magistrate said that this was not advisable given the seriousness of the charges. The accused then said he would like legal aid. The accused's rights in respect of bail were explained to him. The prosecutor said that he would oppose bail. The accused said that he would prefer to obtain legal aid before applying for bail. The case was postponed to 29 January 2014 for further investigation, for the obtaining of legal aid and for a bail application.
- [4] As the accused was being led out of court he directed a most vulgar insult towards the magistrate. It comprised five words: the first word, which I do not intend to repeat, was a derogatory reference to the magistrate's physical appearance; and the other four words were 'Jou ma se poes', an expression probably more frequently in use in the circles in which the accused moved than those of the magistrate. The magistrate required the accused to be brought back into the dock. The magistrate told the accused what he had heard. The accused admitted that he uttered those words. The magistrate asked him to explain his behaviour. The accused said that he was under stress and knew nothing about the alleged rapes and attempted murder. He apparently made an apology of sorts: the magistrate's note records that the accused said: 'Ek sê ek is gestres ek weet niks van die klagtes nie sorry. Ek wil niks verder sê nie ek is gestres en dra niks kennis van die klagtes nie.'
- [5] The magistrate informed the accused that he regarded the accused's conduct as contempt of court and that he intended to act summarily in order to preserve the dignity of the court and to protect the proper administration of justice. The accused said that he did not wish to say anything more. The magistrate advised him that he had the right to appoint a lawyer. The accused again said that he did not wish to say anything more and that he knew nothing of the charges.

[6] Thereupon the magistrate found him guilty of contempt of court in terms of s 108(1) and sentenced him to six months' imprisonment. In accordance with s 108(2) the magistrate transmitted to this court a statement, certified by him as true and correct, of the grounds and reasons for his acting as he did.

[7] The matter having been allocated to me in chambers, I directed a query to the magistrate, the relevant part of which reads as follows:

'... I have no difficulty with the conduct of the magistrate in taking summary action against the accused or with the conviction for a contravention of s 108(1).

I do, however, have a concern about the sentence – six months' imprisonment. This is the maximum penalty which can be imposed in terms of s 108(1). That section provides for a punishment of a fine not exceeding R2 000 or in default of payment to a period of imprisonment not exceeding six months, or to such imprisonment without the option of a fine.

The considerations which should guide the imposition of sentence for contempt committed in the face of the court are set out in *S v Nel* [1990] ZASCA 145; 1991 (1) SA 730 (A) at 752F-753E and are conveniently summarised in Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 10th Ed Volume 1 p 672. The primary purpose of the punishment is not retribution but to enforce the court's authority. Heavy

punishments in these kinds of cases are generally not appropriate. The Appellate Division observed that the lower courts in practice

have been quite modest with punishments for contempt in the face of the court and that this was a practice to be encouraged.

Later in its judgment the Appellate Division said that an accused person should not, in case of contempt in the face of the court, be summarily sentenced to imprisonment without the option of a fine, except in the most exceptional circumstances. It was found in that case that on a second conviction for contempt the trial judge erred in imposing a sentence of three months' imprisonment without the option of a fine. The Appellate Division set aside that sentence and replaced it with a fine of R500 or one month's imprisonment plus a further period of one month's suspended imprisonment.

Kindly comment on the sentence imposed in the light of the above principles and refer me to any authorities of which you are aware which might support a harsher approach.'

[8] The magistrate has furnished a full response in which he contends that the sentence was appropriate. I shall deal presently with the main points made by the magistrate. However, it is convenient first to quote the passage from Jones & Buckle, mentioned in my query to the magistrate, which appears to me accurately to summarise the principles laid down in the leading case of *S v Nel* [1990] ZASCA 145; 1991 (1) SA 730 (A):

(i) The primary object of the summary procedure in terms of which the offence can be immediately dealt with is to maintain the reputation and dignity of the court and to ensure the orderly conduct of its proceedings.

(ii) The most important function of the imposition of punishment is to enforce the court's authority: there is no room for any notion of retribution; there is limited scope for reformation (the purpose of the punishment is to bring the offender to his senses in the very proceedings in which the offence is committed); deterrence is by the same token directed at getting the offender to refrain from continuing with his contemptuous conduct in the proceedings which are underway.

(iii) The primary purpose of the punishment is accordingly to bring about an end to the outrage to the court's esteem and authority.

(iv) There is no direct relationship between the esteem and authority of the court and the extent of punishment – the esteem and authority of the court is too precious to be measured against any punishment which may be imposed for conduct which harms it.

(v) Finally, the person who commits contempt in facie curiae is not an ordinary criminal in the everyday meaning of the word and ought not to be treated as such.

(vi) In view of the foregoing considerations, heavy sentence is generally inappropriate in these cases and the magistrates' courts in the past have rightly been moderate in the punishment they imposed.'

[9] As I pointed out to the magistrate in my query, the punishment he imposed in this case – six months' imprisonment without the option of a fine – is the harshest punishment for which s 108(1) makes provision. Having regard to the principles laid down in *Nel*, I find it difficult to conceive of any case in which such a punishment would be merited for a first conviction. In *Nel* the appellant had been guilty of contempt in the face of the court on two occasions during the course of the same proceedings (a civil motion). He had at various times insulted the presiding judge by accusing him of playing cat and mouse games with him, accusing him of being a coward and of bias. For the first offence the appellant had been summarily convicted and sentenced to a fine of R2 000 or three months' imprisonment. On the second summary conviction he was sentenced to three months' imprisonment without the option of a fine. On appeal the Appellate Division found that both of the sentences were too severe, having regard to the principles which should guide a judicial officer in such cases. On the first conviction the sentence was reduced to a fine of R500 or one month's imprisonment; and on the second conviction the sentence was reduced to a fine of R500 or one month's imprisonment together with a further period of one month's imprisonment suspended on appropriate conditions.

[10] The magistrate in his response in the present matter said that the accused had made an offensive personal remark about the magistrate's appearance and had used very vulgar language. The magistrate contrasted this with the language of the appellant in *Nel* which

contained no vulgarity. In my view, the distinction drawn by the magistrate is fallacious and tends, erroneously, to place the emphasis on the person of the judicial officer and his own feelings rather than on the dignity and authority of the court. While a vulgar insult about one's appearance may give personal offence, I doubt whether it can be said to be more serious than ostensibly more polite language by which a litigant accuses the judicial officer of perverting justice by playing games with him and being cowardly and biased. Imputations of the latter kind strike directly at the heart of the proper judicial function.

- [11] The magistrate submits that the language used by the accused person is an important indication of his intention. Of course, an intention to impugn the dignity and authority of the court is a necessary element for any conviction on a charge of contempt in the face of the court. I nevertheless accept that the language or conduct constituting the contempt is an important element in assessing the gravity of the offence. However, and for reasons I have explained, the magistrate erred in apparently regarding a personal and vulgar insult directed at the judicial officer as being by its very nature more serious than ostensibly more polite language which impugns the integrity with which the judicial officer is performing his or her work. A reasonable person who heard the insult which the accused in the present case uttered would treat it as simply that – vulgar abuse. The reasonable person might take more seriously allegations by a litigant that the judicial officer is performing his or her judicial function in a biased or cowardly fashion.
- [12] The magistrate has also contrasted the present case with *Nel* by submitting that in *Nel* the contempt occurred in the course of a heated argument. I do not regard the purported distinction as valid. The litigant in *Nel* was guilty of sustained submissions which were derogatory of the judge. This was so even in respect of the first conviction, which followed only after the litigant failed to heed the judge's warning to the litigant mind his language. Despite the conviction and sentence for the first contempt, the litigant later continued with his derogatory submissions. In the present case, by contrast, the accused made a single short insult as he was led out of the dock. His response to the magistrate was that he was stressed because he knew nothing about the rapes and attempted murder. He apparently said sorry. The magistrate, in his s 108(2) statement, does not say that he did not believe the accused's explanation that he was stressed. One does not know at this stage whether the accused is or is not guilty on the charges of rape and attempted murder. However, one can understand that a person who has just been arrested on such charges and who faces potentially lengthy incarceration while awaiting trial would be under emotional stress. Unlike *Nel*, the accused's conduct in the present case strikes me as an insult made in the heat of the moment and in circumstances of

personal stress.

- [13] I would add that in Nel the contempt occurred midway through the proceedings. In the present case, by contrast, the accused made the insult as he was leaving the dock, after the completion of the day's proceedings. What he said did not interfere with the ongoing conduct of the proceedings though it was an affront to the dignity of the court and was thus rightly dealt with summarily by the magistrate.
- [14] The magistrate in his response refers to the statement in Nel that a person who commits contempt in the face of the court is not an ordinary criminal and ought not to be treated as such. The magistrate goes on to express his respectful agreement, pointing out that the litigant in Nel appeared in motion proceedings whereas the accused in the present case was appearing on very serious criminal charges. Punishment should fit the offender and the offence, he says. This in my view constitutes a serious misdirection. The point made in Nel was not concerned with the character of the proceedings during the course of which the contempt occurred (civil or criminal) but with the character of the special crime of contempt in contrast with other 'ordinary' crimes. It was thus irrelevant that the accused in the present case committed contempt in the course of criminal proceedings rather than civil proceedings. Apart from the fact that the distinction drawn by the magistrate is erroneous, there was no basis for treating the accused as if he were guilty of rape and attempted murder. He has yet to be tried and convicted for those offences and is entitled in the meanwhile to be presumed innocent.
- [15] For all the reasons stated above, the sentence imposed by the magistrate cannot stand. I must emphasise that nothing said in this judgment is intended to condone the behaviour of the accused. It was entirely unacceptable and did indeed amount to contempt committed in the face of the court. If the accused were to repeat such conduct, he would face more severe sanctions. At this stage, however, and with a view to giving effect to the principles laid down in Nel, a much lighter sentence would suffice to bring about an end to the outrage to the court's esteem and authority and to bring the accused to his senses.
- [16] Because of the approach adopted by the magistrate, he did not enquire into the accused's ability to pay a fine. If there was information in that regard, I would have been inclined to impose a sentence of a fine in a specified amount, failing payment of which imprisonment of one month. However, and in the absence of such information, I think the preferable course would be simply to impose imprisonment of one month, suspended for three years on appropriate conditions.

DLODLO J:

- [17] I concur. The accused's conviction for contempt of the court in violation of s 108(1) of the Magistrates' Courts Act 32 of 1944 is confirmed. The sentence imposed by the magistrate is set aside and replaced with the following sentence: 'The accused is sentenced to imprisonment of one month, suspended for three years on condition that the accused does not again commit contempt in the face of the court, committed during the period of suspension. The sentence is ante-dated to 6 December 2013.'

DLODLO JROGERS J

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