

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION: POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES:
(3)	YES/NO REVISED

[Handwritten signature]

REV: 113/2017

THE STATE

V

JOSEPH LEKALAKALA

REVIEW JUDGMENT

MULLER J:

[1] Mr Rulane Baloyi appeared in the magistrate court Mokopane on drug related charges. He was in police custody. When the matter was called on 5 July 2017 Baloyi entered the dock and the prosecutor requested a postponement for further investigation. The presiding

magistrate observed from the bench that Mr Lekalakala, the present accused, who was seated in the gallery passed something to Baloyi by throwing it to him.

[2] The recording of the proceedings had gone astray, but the magistrate kept a hand written record of the proceedings. The record shows, first of all, that the accused was called forward and he was informed by the presiding officer that what he has done is contempt of court in *facie curiae*. The rights of the accused were then explained to him and the accused elected to address the court. The magistrate asked him what he passed to Baloyi. The accused replied that it was a packet containing dagga. He was then asked whether he was aware that it was a court of law and while it is sitting it is unlawful and wrong to supply a prisoner with items without the consent of the police. No answer was given to the question. He was thereafter summarily convicted and sentenced to 3 months imprisonment. There is no indication from the record that he first convicted the accused of contravening section 108(1) nor that he was given the opportunity to adduce evidence or address the court in mitigation of sentence.

[3] The magistrate was requested to give reasons for the conviction and the sentence. The Deputy Director of Public Prosecutions was also requested to assist the court with an opinion. A memorandum was prepared for which I am grateful.

[4] The magistrate, in his very brief reasons, stated that he was very disturbed when the accused informed him that he had wronged certain people and thought that he would be detained if he does something naughty in court. The magistrate expressed himself as follows:

"Court felt very disturbed by the accused's preparedness to go to jail and the manner in which he promoted his detention even through the said package could not be found".

The above statement by the magistrate must be understood in context. The accused appeared in court again on 14 July 2017. The purpose of this appearance, so it seems, was to inform him that his case is subject to review, and that he also has the right to appeal. The accused then informed that magistrate that he lied to him when he told him that he had thrown a packet containing dagga to Baloyi. He admitted that he talked to and touched Baloyi. He further informed the court that he did so because he was afraid of someone who had threatened his life and wanted to be incarcerated to be safe. By the then the horse has already bolted.

[5] The Deputy Director in its memorandum alluded to the fact that the recorded record of the proceedings went missing and that the failure to secure the record nullified the proceedings and for that reason the conviction and sentence should be set aside.

[6] It is well to note that the accused was charged and convicted under section 108(1) of the Magistrates' Court Act 32 of 1944 which applies to magistrates only. The section contemplates three possible situations of unlawful behavior:

- (a) where a judicial officer is willfully insulted during a sitting; or
- (b) where the proceedings of a court is willfully interrupted; or
- (c) where a person otherwise misbehaves in the place where the court is held.

[7] Misbehavior contemplated under (c) could include willful behavior not necessarily directed at the judicial officer to insult him/her, but which is nevertheless serious enough to invoke the provision of section 108(1).

[8] It has been held that the word "misbehave" in section 108(1) connotes impropriety which undermines or interferes with the proceedings to the extent that it undermines the due administration of justice. See *S v Lavhengwa* 1996 (2) SACR 453 W at 466 g-i.

[9] The conduct of the accused during the proceedings in court falls outside categories (a) and (b) and cannot be described as an interruption of the proceedings nor aimed at insulting the presiding officer. (The proceedings was interrupted because the magistrate first dealt with the accused before he returned his attention to Baloyi to postpone the case against him.)

[10] The accused was a member of the public sitting in the gallery when he passed a packet containing dagga to Baloyi who was in the dock whilst his case was being dealt with by the court, by throwing it to him. In my view such conduct is improper and willful misbehavior on his part and is a contravention of section 108(1). Members of the public cannot be allowed to harm the decorum of court proceedings in the way he has done. It undermines the proper administration of justice in the eyes of the public which should be conducted in a calm and dignified atmosphere and in orderly fashion.

[11] The next question is whether the magistrate was justified in dealing with the case in a summary fashion, or whether it should have been referred to the Director of Public Prosecutions to take further steps.

[12] Summary proceedings in terms of section 108(1) is *prima facie* contrary to the provisions of section 35(3) of the Constitution. See *S v Mamabolo (E TV and Another Intervening)* 2001 (1) SA 686 CC par 54-55. However, the need for swift measures to preserve the integrity of the judicial process by means of a summary enquiry into the conduct of the accused is sometimes called for. Be that as it may, the magistrate was under the impression that it is unlawful to supply a prisoner with items without the consent of the police whilst the court is in session. The magistrate seemingly considered the passing of an item to an accused person whilst he was in the dock whilst the court is in session, as unlawful and as such a contravention of section 108(1). It certainly is also an offence under the Correctional Services Act 111 of 1998 to supply an inmate with dagga. The magistrate appreciated that.

[13] It would have been prudent, in my view, upon reflection, to have requested the orderly to retrieve the packet immediately to confirm the contents and to take it from there. If the packet did indeed contain dagga as stated by the accused, he could have been arrested for being in possession of dagga and supplying a prisoner with dagga. Such a course would have achieved the desired result. The court, in *S v Lavhengwa supra* at 495b-496a, has set out guidelines to consider before invoking the provisions of section 108(1). They are worth repeating:

the decision of the accused, the magistrate should then afford the accused full opportunity to feasibility constraints as may seem reasonable in the circumstances of the case. Depending on afforded the right to obtain legal representation should he wish to do so, subject to such time and silent, testify, give an explanation or call witnesses. If the accused is a lay person he should be section 25(3) of the Constitution and enquire from the accused whether he wishes to remain in 4. The magistrate thereafter should inform the accused of his constitutional rights as set out in conduct is alleged to have transgressed.

3. The magistrate must then proceed to inform the accused of the latter's conduct which in his view contravened section 108(1) and which of the three categories mentioned in section 108(1) his being charged.

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 section 108(1) of the Magistrates' Courts Act. Depending on the accused's prior knowledge of the contents of section 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

General rather than resorting to the summary procedure.

1. The magistrate should first carefully consider whether or not 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 willfully contemptuous (*R v Silber (supra at 483E)*) or whether the matter can be disposed of by merely removing the accused from the court (*Duffey v Munnik (supra at 395E)*) 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 section 108(1) or to take the normal route of referring the matter to the Attorney-General.

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 willfully contravened any of the offences mentioned in section 108(1)."

[14] The magistrate failed to adopt the principles set out above. He did not read the provisions of the section 108(1) to the accused. Neither was the accused informed that the court is invoking the summary procedure nor of his constitutional rights to engage the services of a legal representative.

[15] The accused was also not given the opportunity to adduce evidence or to address the court in mitigation of sentence before the sentence was imposed. The trial, as a result, was not fair. It follows that conviction and sentence ought to be set aside.

[16] The accused must be released immediately, if he has not been released.

ORDER:

1. The conviction and sentence are set aside.

2. The Director of the Correctional Services Centre where the accused is detained is directed to release the appellant on receipt of this order immediately provided the accused is not serving any other sentence(s)

LIMPOPO DIVISION: POLOKWANE

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

AML PHATUDI

09/11/2017

I concur

JUDGE OF THE HIGH COURT LIMPOPO DIVISION: POLOKWANE

G.C MULLER