

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

High Court Case no: 60/07
Magistrates Court Case no: 10/07
Date Delivered: 14/09/07

In the matter of:

THE STATE

versus

BRIAN MPOKOTHU

ACCUSED

Coram: **BOSIELO AJP et MOCUMIE AJ**

JUDGEMENT ON SPECIAL REVIEW

MOCUMIE AJ:

1. The accused, Mr Brian Mpokotho was charged with contempt of court in *facie curiae* in the Magistrate Court, Kimberley on 17 May 2007 and was summarily convicted as charged. He was sentenced to R200.00 or 15 days imprisonment and in addition 30 days imprisonment which was suspended conditionally. His application for a deferred fine was granted.
2. In order for an accused to be convicted of contempt of court in *facie curiae* the trial court must find that the accused had *actus reus* coupled with the necessary *mens rea*. Contempt *in facie*

curiae means contempt of the Court committed “in the face of the court..”, in other words in the presence of the presiding officer while the Court is in session. It is committed when a person who is inside the Court insults the presiding officer or otherwise misbehaves in a manner calculated to violate the dignity of the Court or judicial officer while the Court is engaged in proceedings.

CR Snyma Criminal Law 4th ed, 325. Importantly the wrongful conduct complained of or displayed must be intentional.

3. A presiding officer is in control of his or her Court room and the proceedings therein. Ordinarily Court officials including interpreters ought to seek permission from the Court to leave whilst the Court is in session unless they wait for the Court to adjourn. The presiding officer may then hold a person in contempt of Court if the person wilfully disrupts the proceedings, misbehaves in a manner that impacts on the dignity of the Court.

4. Section 108(1) of the Magistrate’s Court Act 32 of 1944 (“the Magistrates Act”) provides:

“108 (1) If any person, whether in custody or not, wilfully insults a judicial officer during his sitting ... or wilfully interrupts the proceedings of the Court or otherwise misbehaves himself in the place where such court is held, he shall ... be liable to be sentenced summarily or upon summons to a fine not exceeding R2000.00 or in default of payment to imprisonment not exceeding six months or to such imprisonment without the option of a fine...”

5. I now then turn to the facts of this case. The accused, who was an interpreter in the Magistrate court of Kimberley on 16 of May 2007, left the Court during the proceedings without informing the Presiding officer or asking for his or her permission to leave the Court. Upon investigation it was discovered that the accused had

also left the office without informing his immediate superior, Mr Bungxu. As a result two outstanding cases were postponed. On 17 May 2007 Mr Mpokotho was charged with contempt of court, summarily convicted and sentenced as shown above in para 1.

6. In his plea explanation the accused proffered the following:

“At this moment, I will elect to remain silent. To say nothing to the Court”. But on questions put to him by the Court he said:

“The reason why I left this Court, yesterday was because the accused person elected to speak English on the trial and even with the leave of the Court, the Court did ask this person if he wants to converse in English and even the attorney and the accused confirmed he will speak English and from there on, I left the Court, because I had one of the accused who appeared before the trial could proceed, he was given ... so I had to take that accused to the “casualties”, (It must be Cashiers), that he can be helped. I even went to the prosecutor and informed him that I am going to the cashiers and the trial is proceeding in English and that is why I left the Court that time...”

7. In its judgment the Court noted that: *“The Court’s satisfied and you are found guilty of contempt of Court.”*

8. The Magistrate gave no reasons for convicting the accused. It is only during sentencing that it became apparent how incensed the Magistrate felt about the interpreter’s conduct the previous day. He says: *“You are putting this Honourable court in disrepute and you show signs of disrespect and a disgrace to this Court”*. One can only assume that he believed that the accused’s conduct fell within the ambit of Section 108 (1) of the Magistrate’s Court Act 32 of 1944.

9. From these facts it is undisputed that the accused's services as an interpreter when he left the Court whilst it was in session were not required as the proceedings were conducted in English and all parties understood English, including the accused in that matter. Secondly the presiding officer had confirmed with the accused in that matter as well as his or her attorney that the accused will speak in English, thus dispensing with the use of an interpreter. Thirdly the interpreter as is common practice in the Magistrate Courts across the country where the majority of the accused are uneducated, illiterate and unsophisticated, left the Court to help an accused who had appeared earlier on with some administrative problem in the cash hall, as the Court orderly was apparently not available.

10. Interestingly enough it is also apparent from the record that although the interpreter stated under oath that he had informed the prosecutor of his whereabouts, the Court simply did not accept his evidence. Instead, the court chose to accept the words of the prosecutor who was not under oath and who addressed the Court from the bar that *"... My response was that Mr Mpokoto did not tell me where he was heading to..."*

11. I am of the view that although there is a definite need in all Courts for the power to punish the contemptuous conduct summarily as affirmed in **S v Lavhengwa** 1996 (2) SACR 453 (W), this power is an extremely drastic weapon which should not be resorted to lightly but only with the utmost care and circumspection. See **S v Nel** 1991 (1) SA 730 (A); **S v Sokoyi** 1984 (3) SA 935 (NC)

12. The conduct complained of or displayed must be such that it disrupts the orderly process of judicial proceedings at that material time. In this case the interpreter conducted himself in an unbecoming manner. He did that under the pretext of assisting a person who needed

assistance. Whether this is true is irrelevant. The fact that the Court thereafter could not function without an interpreter is what ought to have been addressed properly. There were several avenues available to the Presiding officer.

13. The interpreter could have been reported internally to face disciplinary action. The disciplinary action could have determined exactly what transpired and how such conduct could be avoided in future. This conduct not only impacts on the Court's decorum but access to court. (sec 34 of the Constitution). Better still the matter could have been referred to the DPP to decide whether to prosecute or not, so that the accused could have an opportunity to testify, call witnesses if he so wished, employ the services of a legal representative and to cross-examine state witnesses. This is what is envisaged by Section 35 (3) of the Constitution which articulates the right to a fair trial.

14. On the facts in this case I cannot find any deliberateness and premeditation on the part of the interpreter either to bring the court into disrepute or to disrupt the court's orderly functioning. If anything his little escapade just went horribly wrong. Quite clearly this is not a matter which calls for summary prosecution. I am of the view that the magistrate overreacted to put him through a summary trial of this nature in which his constitutional right to a fair trial including the right to have adequate time to prepare a defence and to be represented by a legal representative were transgressed. (s(35) (3) of the Constitution) The case of **S v Nel** *supra* is still authoritative in this regard. See too **S v Ntshwene** 2004 (1) SACR, 506 Tkd at 541 [14].

"An officer of the Court should rather be dealt with privately or administratively". See **re Da Silva Pesseguiero v Tshinanga** 2006 (1) SACR 388 (T) at 393 [21].

15. Most recently in **S v Lewis** case no 610/00 delivered on 2 March 2007 the Supreme Court of Appeal with reference to **S v Nel** *supra* stated:

"It should also be added that it may at times be more dignified to simply ignore conduct that may technically constitute contempt of court or to treat it less harshly than to convict the perpetrator of the offence. A rebuke or some other indication of disapproval should in most cases be an adequate measure to discourage cell phone transgressions (in this case disappearing acts of interpreters) in Court."

In the circumstances and relying on **S v Lewis** (*supra*), I am of the firm view that the circumstances of this case did not warrant the drastic

and summary procedure adopted by the magistrate which infringed the accused's right to a fair trial.

In the result I make the following order:

ORDER

1. The conviction and sentence imposed by the Magistrate on 17 May 2007 is set aside.
2. The matter should be referred to the Director of Public Prosecution for a decision whether to prosecute or not, if necessary.

**BC MOCUMIE
ACTING JUDGE
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION**

I concur.

**L O BOSIELO
ACTING JUDGE PRESIDENT
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION**