CASE NO:. CR 150/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

SEM EDWARD

(HIGH COURT REVIEW CASE NO. 1512/2007)

CORAM: DAMASEB, J.P. *et* MULLER, J.

Delivered on: 10 October 2007

SPECIAL REVIEW JUDGMENT

MULLER, J.: [1] This matter was submitted to me as a special review in terms of Section 304 (4) of the Criminal Procedure Act, No. 51 of 1977 (CPA). It entails two convictions of the accused. As I understand it, the first conviction was because he failed to attend the Court proceedings on 7 August 2007. He was sentenced to N$100 or 30 days imprisonment. The second conviction was for contempt of Court *in facie curiae* when he apparently uttered insults towards the magistrate after the first sentence was imposed. For the conviction of contempt of Court the accused was

sentenced to N$300.00 or 90 days imprisonment.

[2] The magistrate failed to comply with the provisions of S 108 (2) of the Magistrate's Court Act, no. 32 of 1944 which reads:

> *"(2) In any case in which the Court convicts 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".*

The Divisional Magistrate, Windhoek, who submitted this matter for special review, confirmed that the presiding magistrate failed to comply with S 108 (2). This is a serious failure and one that the Magistrate's Commission should consider. This is not only a failure of an explicit statutory requirement, but the accused has been severely prejudiced by it. In *S v Johannes Paaie*, a review judgment delivered on 28 October 2005, no. CR 110/2005 the entire issue of contempt of Court *in facie curiae* had been discussed with the purpose that all magistrates in Namibia should take notice thereof. In that review guidelines to be followed in such cases were provided to magistrates. It was explicitly stated on p23 of that review judgment that the procedure of S 108 (2) should be followed.

[4] From the record it appears that the accused was before Court on two charges, namely

(a) a contravention of sections 6 and 7 of Ordinance 12 of 1956, to wit

defeating the course of justice; and

(b) resisting a member of the police.

The documents put before me do not contain a charge sheet. According to the typed record the accused appeared for the first time in Court on 11 May 2004 and was remanded in custody. His case was thereafter postponed on several occasions by different magistrates. The reasons for these postponements are not clear, but it seems that the accused wanted legal representation by the Legal Aid Directorate and that could not be finalised. Bail was apparently granted at some stage and a legal representative appointed by the Legal Aid Directorate appeared for the accused.

[5] However, on the particular day, 7 August 2007, the accused appeared in person. On the previous court day, the 11th June 2006, it is recorded that the public prosecutor informed the Court that the accused was in custody and asked for a warrant of arrest to be issued, but to be held over until the 7 August 2007. This was done. It is important that there is no dispute about the fact that the accused was in custody on 11 June 2007. Strangely, it is recorded that the accused (defence) was in person, which cannot be correct, since it seems to be common cause that the accused was indeed absent.

[6] On the fateful day, namely 7 August 2007, the same magistrate, who postponed the matter on 11 June 2007, who also issued the warrant

for the arrest of the accused and who was told that he was in custody, presided. Because the recording of the proceedings on that day are very brief, I quote it *in extenso* but unedited:

"ON 07/08/2007

PRESIDING OFFICER: *Ms Haikango*
PUBLIC PROSECUTOR: *Mr Husselman*
INTERPRETER: *Ms Nakanyala*
ACCUSED: *In person*

SP: *Accused was not at Court on the 11/06/2007 if he can tell the court as to where he was.*

CRT: *Informed accused person that it is a defence in law if failure to appear in court was not done to fault on his part.*

As well as for Legal Representation and Legal Aid assistance.
Own defence but I have applied for Legal Aid, here is the response.

CRT: *Where were you on the 11/06/2007?*

ACC: *I was at the Hospital.*
CRT: *Where is your medical certificate?*
ACC: *My card I have left it there.*
CRT: *I am not asking the medical card but medical certificate indicating that you were at the Hospital.*
ACC: *I did not bring any.*
CRT: *Explanation not accepted.*
Guilty failure to appear in court.
Mitigations: *But our officials at the Prison they are not allowed us to call our lawyers.*

CRT: *Is not about Lawyer you have given one state prosecutor. Court will conduct them. Fine N$100-00 or 30 days imprisonment.*

SP: *Till 10/09/2007 for fixing of trial date with the Lawyer.*
CRT: *Remanded 10/09/2007 for fixing of trial date. Accused in custody.*

POSTEA:

Accused insulted the court by saying Pokoto and Tizing the court. Run out of court does not want to listen to what the court is pronouncing to him and what he was suppose to do when he was being warned by the Court and went to the Hospital. That he should request the Doctor to provide him with medical certificate. Accused uttered words to the court again of saying stupid, tokofo and Police Officer took him to the cells insulting and shouting loud by saying you will

> *never try me next court appearance.*
> *Guilty again for contempt of Court. Fined N$300-00 or 90 days imprisonment i.a."*

[7] I shall commence to deal with the first conviction. From the record it appears that the magistrate required a medical certificate to confirm that the reason for the accused's absence on the 11th June 2007 was that he was in hospital. When he could not produce the medical certificate, she did not accept his excuse (for his absence from Court) and summarily convicted him for "failure to appear in Court". The accused was apparently afforded the right to provide reasons for mitigation. Thereafter he was sentenced to N$100 or 30 days imprisonment.

I find this procedure totally confusing and not in accordance with justice. The magistrate knew that the accused was in custody on 11 June 2007. He could not just be absent. There must have been a reason why he was not brought to Court by his custodians. The magistrate issued a warrant for his arrest, but held it over. The reason provided by the accused on 7 August 2007 is a plausible one. The easiest thing to do when the accused explained that he was in hospital, while he was still in custody and although he did not have a medical certificate, would have been to ascertain from his custodians what the position was or to obtain a medical certificate through them. The public prosecutor should have been asked what his position is or whether he can obtain information from the custodians of the accused. This was not done. What more can an accused, who is in custody, do?

[8] What is further confusing is that the magistrate indicates when the accused was later convicted for contempt of Court, that he was <u>again</u> so convicted, while the record reflects a conviction on the basis that he failed to appear in Court on 11 June 2007. The conviction of "guilty failure to appear in Court" is also unknown to me. Ordinarily, if an accused who is not in custody fails to appear in Court and for whom a warrant for his arrest had been issued, cannot provide a plausible excuse for his absence, that warrant is confirmed and the bail of the accused is cancelled. He is not convicted for this failure. However, once an accused is in custody, his failure to appear in Court must be explained on the postponed date by his custodians. They either failed to bring him before Court or he escaped from prison, in which latter case the warrant for his arrest held over is then enforced.

[9] The conviction and sentence for the accused's failure to appear in Court on 11 June 2007 must be set aside. It is apparent from the record that this "conviction" was the cause for the accused's distress, which led to his conviction of contempt of Court as the magistrate understood and recorded it.

[10] The entire proceedings are recorded by the magistrate under her heading: **"Postea"**. I do not intend to repeat what has been said by this Court in *S v Johannes Paaie*, supra, in respect of a conviction of contempt of Court. The magistrate should have taken notice of it, but obviously did not. When that judgment is considered, as well as the Court decisions on this subject, which have been either referred to or

quoted extensively, the magistrate's decision cannot stand. I shall refer to a few aspects that indicate that the accused could not have been convicted of contempt of Court.

[11] In the first instance, an interpreter was used during the proceedings on 7 August 2007, namely Ms Nakanyala. It appears that during nearly all the previous postponements there was an interpreter. Normally the Court has to be very careful that the words used and which the magistrate found insulting, were in fact the words that the accused used. (*S v Johannes Paaie*, supra, p18-19)
In this instance the situation is even more serious. The gravamen of the accused's conduct and words used by him were not even interpreted, although an interpreter was necessary and present. What the magistrate found to be contemptuous behaviour and insulting language was recorded by herself. There is no indication that she understood the accused's language and it would not have been proper for her to take note of anything that was not said in the official language, namely English. The interpreter neither interpreted what the accused said, nor confirmed what the magistrate recorded.

[12] Despite this blatant error the accused was not afforded the opportunity to put his version to the Court before conviction. Even if his conduct may have been contemptuous, he must be given the opportunity to address the Court in that regard. (*S v Johannes Paaie*, supra, p13; *Cape Tunes Ltd v Union Trade Directories (Pty) Ltd and Others* 1956 (1) SA 105 (N)).

The accused may apologise and must be given the opportunity to do so. (*S v Johannes Paaie*, supra p14; *R v Hawkey* 1960 (1) SA 70 (SR) at 71G-72A.
In this instance the *audi alterem partem* rule was not applied.

[13] The elements of the offence of contempt of Court, namely unlawfulness, contempt of a judicial body and *mens rea* have not been proved. The only version is that of the magistrate, who is both a (the

only) witness, prosecutor and judge in the words of Ramsbottom, J in

Duffey v Munnik and Another 1957 (4) SA 390 (T) at 391F.

(See also *S v Johannes Paaie*, supra, p22; *S v Nyalambisa* 1993 (1) SACR 172 (Tk) at 175e to 176f).

[14] I have not dealt with the accused's letter to the Divisional Magistrate and the reasons provided by him therein, because it does not contain evidence put before the Court. However, it is apparent that the magistrate who presided on 7 August 2007 and who convicted him, should not preside over his criminal case in future and I shall make such an order.

[15] In the circumstances the following order is made:

1. The conviction and sentence imposed on 7 August 2007 in respect of the accused's non appearance in Court on 11 June 2007, to wit guilty of failure to appear in Court and for which he was sentenced to N$100 or 30 days, are set aside;

2. The conviction of contempt of Court and the sentence of N$300 or 90 days imprisonment imposed on 7 August 2007 are set aside; and

3. The magistrate who presided at the proceedings of 7 August 2007 should not preside over the accused's criminal case, whenever it is heard.

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MULLER, J.

I agree

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DAMASEB, J.P.