

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

ANTONIUS THOMAS ELIFAS KASHINDULA

(HIGH COURT REVIEW CASE NO.: 1525/2007)

CORAM: MULLER, J

Delivered on: 09 October 2007

SPECIAL REVIEW JUDGMENT

MULLER, J: [1] The accused in this matter stood trial for several charges involving rape, attempted rape and assault with the intent to do grievous bodily harm. When he appeared in court on 01 October 2007 he was convicted of contempt of court and sentenced to 3 months imprisonment.

[2] The magistrate submitted the proceedings in respect of this conviction to me as a special review on 03 October 2007, which was put before me on 05 October 2007. Because of the urgency my queries were faxed to the magistrate

on 05 October 2007, consisting of the two letters which reads as follows:

“Due to the urgency of the matter the magistrate is requested to respond by fax immediately to the following queries of the Judge:

1. *It appears that there was an interpreter, Mr Aitewa. Was the proceedings interpreted to the accused and the accused’s answers interpreted to the court?*
2. *Was the accused informed that he could be convicted of contempt of court on what he said and his demeanour in court?*
3. *Why was the accused not afforded the opportunity to respond or to apologise?*
4. *Why was the accused not afforded the opportunity to reply in mitigation after conviction?*

“In addition to the queries of the Honourable Judge faxed this morning:

There appears to have not been compliance with s 108(2) of the Magistrate’s Court Act.

Please explain.”

[3] The magistrate also responded on the same day by fax. His replies to my two letters were:

- “1. Your honourable Judge, Ms Aitewa was the Court Interpreter. Accused was told that the Court will proceed with contempt of Court proceedings due to his insult “that is shit man.”
2. *He was informed. The Court asked him if he was aware that he is in front of the Court, and his answer was “I would not follow the Court.”*
3. *After this answer, the Court did not deemed it fit to ask him to respond or to apologise. His answer said it all enough and his behaviour was uncalled for.*
4. *After the conviction accused started to walk out from Court and refused the Court Orderly to return him though this was omitted on the record as the Court finds it not fit.*
5. *If the proceeding is not in accordance with the proper administration of*

justice, I am indebted to you, your honourable Reviewing Judge."

"Your honourable Reviewing Judge, this accused person insult the Court. Although it is not on record, that the Court complied with Section 108 (2) of the Magistrate's Court Act, yes indeed the statement is not submitted but it is my opinion that the Court proceedings on record are enough."

[4] I quote the typed record of the proceedings that occurred in court on 01 October 2007 and that were submitted to me *in extenso*:

"On 01/10/2007

*Nangula
Gabriel
Aitewa
Accused present*

Rem until 29/10/2007 for P.G.D accused in custody, is a prisoner.

*Accused says, why are you postponing my case? that is shit ,an.
Court: Why are insulting?*

A: My case is postponed, postponed.

Q: Are in Prison, for what offence?

A: I do not know.

Q: Are you aware that you are in front of the Court?

A: I would not follow the Court.

Court: The Court observed that accused refused to stand in the dock, with hands in his pockets and showing very rude with his behaviour.

Judgment: Guilty Contempt of Court

P.P Three months imprisonment."

Sentence: Three (3) months imprisonment Contempt of Court."

[5] Section 108(2) of the Magistrate's Court Act, No 32 of 1944 is mandatory. Not only is the magistrate obliged to submit the grounds and reasons of the proceedings, certified by him, to the Registrar of this Court for a review by a judge, but he is also obliged to furnish a copy thereof to the accused. The

magistrate only submitted the record of the proceedings, the charge sheet and the charges against the accused. He did not furnish the Registrar with grounds and reasons and did not certify the documents that he did submit to the Registrar. Furthermore, he obviously did not furnish the accused with the documents that s 108(2) required him to do and consequently did not afford the accused an opportunity to respond thereto, if he wished to do so. The magistrate replied to my query that he did comply with s 108 (2), but clearly did not. Although the failure to comply with s 108 (2) does not affect the conviction and sentence as such, that what the judge is required to review, was not submitted to the Registrar in terms of statutory requirements and the magistrate's failure to furnish it to the accused, did prejudice him.

[6] I am constrained to review the proceedings in magistrate's court of the 01 October 2007 on what I have before me.

[7] The magistrate's complaint was that the words used by the accused in court, namely "...*that is shit man*" were insulting. My first query was whether an interpreter acted during the proceedings, but the magistrate only confirmed that Mr Aitewa was the interpreter. The relevancy of the interpreter interpreting what the accused said, is obvious. The question is: Were the words interpreted to the court the accused's own words or that of the interpreter? This issue, and the case law in that regard, was extensively discussed in a review decision by myself and the Judge-President in *S v Johannes Paaie*, Case No CR 110/2005,

delivered on 28 October 2005 and in particular what is stated on page 20-23 thereof. Incidentally the words used in that case were nearly the same, namely “*that is a shit story.*” The magistrate took exception thereto and convicted the accused of contempt of court. Guidelines in respect of the offence of contempt of court *in facie curiae* in terms of s 108 of the Magistrate’s Court Act, No 32 of 1944 were set out in that judgment with the specific purpose that magistrates should take notice thereof. The magistrate in this matter obviously did not read that judgment. In any event, on the strength of the record and the opportunity that the magistrate had to clear this issue up, it is not possible to determine whether the words that the magistrate found insulting were that of the accused or that of the interpreter. On this point alone it cannot be found that the proceedings were in accordance with justice and the conviction must be set aside.

[8] It is clear from the authorities on this issue that magistrates should not be over-sensitive and should use the power provided to them by s 108(1), carefully.

Mens rea is required and wilfulness is a requirement for a conviction of this offence. (See: *S v Johannes Paaie, supra*, 15; *S v Nyalambisa* 1993 (1) SACR 172 (Tk) at 1759).

[9] A magistrate has to inform an accused that his words or conduct are contemptuous and should afford him the opportunity to explain his words or conduct or to apologise. (*S v Johannes Paaie, supra*, p 13). The magistrate said

this was done and the accused responded *"I would not follow the court"*. Although it is again not clear that these were his words and not that of the interpreter, it also does not make sense. In any event, the record does not reflect what the magistrate said in his reply to me, namely that the accused was indeed informed that he may face a conviction of contempt of court. The record reflects that the magistrate said: *"Are you aware that you are in front of the court?"* This can certainly not be elevated to the required caution as mentioned before. I cannot conclude that the magistrate did comply with what he was required to do.

[10] Similarly was the accused not afforded any opportunity to make any submission in mitigation. He was sentenced forthwith.

[11] I have sympathy with the magistrate's dilemma where the conduct of an accused before him seems contemptuous. Such conduct may very well lead to a conviction of contempt of court in terms of s 108 (1), but then the magistrate should act with caution and comply with all the requirements set out in the Act and the case law. If the magistrate does not, the conviction cannot stand. well lead

[12] In all the circumstances the conviction for contempt of court and the sentence imposed are set aside.

MULLER, J