IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

High Court Reference Number: 2770/2001

Magistrate Serial Number: 91/2001
Case Number: 172/2001

In the matter between: **- REPORTABLE -**

THE STATE

and

HENRY JURIES Accused

REVIEW JUDGMENT DELIVERED ON 11 FEBRUARY 2003

KNOLL J:

This matter was sent by the magistrate at Mosselbay for review in terms of section 108 (2) of the Magistrate's Courts Act No. 32 of 1944. (Hereinafter referred to as the "Magistrate's Act"). Section 108 of the Magistrate's Act reads as follows:-

> "*(1) If any person, whether in custody or not, wilfully insults a judicial officer during his sitting or a clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where such*

court is held, he shall (in addition to his liability to being removed and detained as in sub-section (3) of section 5 provided) be liable to be sentenced summarily or upon summons to a fine not exceeding R2000 or in default of payment to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine. In this sub-section the word "court" includes a preparatory examination held under the law relating to criminal procedure.

2) In any case in which the court commits 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."

In the instant case, the statement required by section 108 (2) is included by the magistrate and he notes thereon that a copy thereof was sent to the accused.

On the 8th of June 2001 the accused appeared before the magistrate in the periodic court at Groot Brak river on a charge of housebreaking with the intent to steal and theft. His rights to legal representation were explained to him and he elected to conduct his own defence. He pleaded not guilty to the charge. The complainant in the matter, a Mr Koos Du Preez, was called by the state to testify. The evidence is mechanically recorded and has been transcribed. The accused cross-examined Mr Du Preez. It was during this cross-examination that the incident

transpired that led to him being convicted of a contravention of section 108 of the Magistrate's Act and sentenced to six months imprisonment.

During the course of the cross-examination the accused repeated questions which had already been answered by the complainant. The magistrate stopped him and explained that the complainant had repeatedly given him an answer to the questions asked. The second time that the magistrate stopped the accused, his reaction was as follows:-

> "*<u>BESKULDIGDE</u>: Edelagbare, as ek so verkies soos wat ek nou kan sien dat die hof nie my aanvaar wat ek het om te praat nie dan staan ek af in die hof dan vra ek nou 'n hoërhof.*
>
> *<u>HOF</u>: U moet nou net versigtig wees hoor? U moet nou net nie dat ek vir u hierso vir minagting van die hof beginne knyp hierso nie. So pasop ek waarsku net vir u dat u besig is om minagting van die hof te pleeg. So indien u dit dalk nie weet nie het ek nou vir u gesê. So laat dit weer gebeur dan is dit minagting van die hof en u sal gevonnis word. Ek het vir u toegelaat met oneindige geduld wat ek altyd aan die dag lê om vrae te vra vir die getuie. Maar nou herhaal u die vrae en dit is nie nodig om vrae te herhaal nie. Hy het by herhaling het hy daardie vrae beantwoord. Nou as u iets nuuts het waaroor u verder wil vra dan is u welkom om dit te doen dan kan u voortgaan."*

The accused proceeded to ask a few more questions during the course of which the accused made the remark "*oom jy is mos nie reg nie man*?" to the complainant. In his section 108 (2) statement the magistrate explained that, at that stage, the

accused pointed with his finger to his head when referring to the 74 year old complainant in this manner. The court said the following to the accused:-

> "*HOF: Jy gaan nie weer vir 'n persoon so iets sê in my hof nie hoor?"*

The accused then proceeded with his cross-examination, running into further trouble with the magistrate as he did so.

The magistrate described the proceedings as follows in his 108 (2) statements:-

> *"Op bladsy 14 is sy arrogante houding duidelik te merk uit die volgende voorval- beskuldigde het weereens 'n vraag herhaal en het die hof hom daarop gewys dat die getuie die vraag reeds beantwoord het. Die beskuldigde het daarop gesê:*
>
> 'Hy het dit nie aan my verduidelik nie edelagbare.' - en wat daarop volg. (bladsy 14)."

The passage at page 14 reads as follows:-

> "*BESKULDIGDE: Hy het nie dit aan my verduidelik nie, edelagbare.*
>
> *HOF: Nou aan wie het hy dit verduidelik?*
>
> *BESKULDIGDE: Hy het dit aan die hof verduidelik.*
>
> *HOF: Nou presies.*

BESKULDIGDE: Maar ek vra vir hom mos nou die vrae.

MEGANIESE ONDERBREKING

HOF: Kom terug in die beskuldigde bank in meneer?

BESKULDIGDE: Ek sien nie kans vir dié hof nie man.

HOF: Meneer ek bevind jou skuldig aan minagting van die hof aangesien jy hierso vir die hof skree: Ek sien nie kans vir dié hof nie man en jy loop uit die bank uit terwyl ek vir jou sê jy moet terugkom meneer. Is daar iets wat u wil sê voor vonnisoplegging weens minagting van die hof?

BESKULDIGDE: (Geen antwoord).

HOF: Is daar enige iets wat u wil sê?

BESKULDIGDE: (Geen antwoord).”

The accused was then summarily sentenced to six months imprisonment.

In his statement the magistrate described the actions in court at the relevant time as follows:-

“*Die beskuldigde het uit die beskuldigdebank geloop en sy arms in die*

lug rondgeswaai. Hy het gemompel en die woord 'fok' woord (sic) kon gehoor word. Hierdie hof het hom beveel om terug te kom na die beskuldigdebank. Die hofordinans was behulpsaam hierin. Toe beskuldigde in die beskuldigdebank terug was, het hy vir die hof gesê:-

'Ek sien nie kans vir die hof nie man!'"

In his statement the magistrate explains that after sentencing he attempted to explain to the accused that the conviction and sentence were subject to automatic review as also his rights in this regard. However, the accused pushed the court orderly to one side and left the court.

The magistrate's reasons for both conviction and sentence were requested.

As to conviction, my concerns were expressed as follows:-

"*a) Waarom was 'n summiere verhoor nodig? Was dit nie 'n aangeleentheid wat verkieslik na die Direkteur van Openbare Vervolgings verwys moes word nie?*

b) U het nie aan die beskuldigde verduidelik dat hy geregtig is op regsverteenwoordiging voor u hom skuldig bevind het nie, waarom nie?

c) U het nie aan hom verduidelik wat minagting van die hof behels nie en het hom nie 'n kans gegee om redes voor te lê waarom hy nie daaraan skuldig bevind behoort te word nie; waarom nie? Is dit nie konstitisioneel verpligtend nie?

d) Die beskuldigde was inhegtenis aangehou. Sou dit nie raadsaam gewees

het om die saak te laat afstaan en hom tot bedaring te laat kom in die selle alvorens u enigsins 'n skuldigbevinding van minagting van die hof oorweeg het nie?"

This enquiry was sent to the magistrate as well as to the Director of Public Prosecutions. Advocate Tarental of the Director's office, to whom I wish to express my appreciation, prepared a helpful memorandum with which the Director agrees. The Director supports the summary actions of the magistrate as being necessary and appropriate and supports the conviction. I shall refer to his submissions as I deal hereunder with each question posed.

The objectionable behaviour clearly took place *in facie curia*. Section 108 (1) empowers the magistrate to sentence summarily, or upon summons, any person contravening its provisions. A magistrate must therefore decide which of the two courses is the most appropriate to follow, given that the legislature has been held to have made provision for a summary sentencing in order to protect and maintain in the eyes of the general public "*the waardigheid van die hof en die behoorlike administrasie van die regspleging*." (S v Ntsane 1982 (3) SA 467 (T) at 473 A - B).

The appellate division has held that:-

"*The power to commit summarily for contempt* in facie curiae *is essential to the proper administration of justice. ... But it is important that the power should be used with caution for, although in exercising it the judicial officer is protecting his office rather than himself, the fact that he is personally involved and that the party affected is given less than the usual opportunity of defending himself make it necessary to restrict the summary procedure to cases where the due administration of justice clearly requires it. There are many forms of contempt* in facie

curiae *which require prompt and drastic action to preserve the court's dignity and the due carrying out of its functions." (R v Silber 1952 (2) SA 474 (AD) at 480 G to H).*

In S v Nel 1991 (1) SA 730 (A)at 748 E and following, the then appellate division, had occasion to revisit the aforesaid statement. Botha JA at 748 F to G concluded as follows:-

"*Waar daar dan verwys word na 'prompt and drastic action' moet dit beskou word as 'n verwysing na summiere optrede in die enge betekenis van die uitdrukking, dws waar die skuldigbevinding (en vonnis) nie voorafgegaan is deur enige waarskuwing of geleentheid om vertoë te rig nie.*"

The learned judge of appeal went on to refer to a number of provincial decisions subsequent to the decision in R v Silber (*supra*), *inter alia,* Duffey v Munnik and Another 1957 (4) SA 390 (T) and R v Hawkey 1960 (1) SA 70 (SR). In these latter cases it was held that, although there might be cases where the accused's actions obviously constitute contempt of court where it is necessary and appropriate to summarily fine and punish the offender without conducting any investigation to satisfy the court that there was indeed contempt of court, there were cases where the actions of the accused may not be so unequivocal as to justify the assumption that the person undoubtedly intended to be contemptuous. It was held that, in the latter cases, the *audi alteram partem* rule should be observed, by allowing the

accused person the opportunity of giving an explanation for his actions and/or apologising.

Botha JA came to the conclusion at 749 F - 750 D, bearing the aforesaid provincial decisions in mind, that certain aspects of the procedure with regard to contempt of court *in facie curiae* required elucidation.

> "*As 'n Regter of landdros besluit dat die betrokke minagtende optrede nie van so 'n aard is dat dit maar net oor die hoof gesien kan word nie, dan is daar vir hom twee moontlike weë oop. Hy kan die aangeleentheid na die Prokureur-generaal verwys om te besluit of die betrokke persoon in die gewone loop van sake vervolg gaan word. Dit sal die aangewese weg wees as dit nie noodsaaklik is om vinniger teen die betrokkene op te tree ter wille van die beskerming van die aansien of die gesag van die hof of die handhawing van die ordelikheid van die verrigtinge nie. Aan die ander kant, as daar wel so 'n noodsaaklikheid bestaan, sal die Regter of die landdros self die aangeleentheid daar en dan in behandeling neem. Besluit hy om dit te doen, dan tree hy 'summier' teen die betrokkene op, in die wye sin van die woord, dws in teenstelling met die gewone regsprosesse wat geld by strafregtelike vervolgings. Maar hy sal in so 'n geval nogtans in die reël nie 'summier' teen die betrokkene optree in die enge sin van die woord nie, dws deur hom skuldig te bevind aan minagting sonder om hom eers die geleentheid te gee om aangehoor te word. Die gedagte om iemand skuldig te bevind aan 'n strafregtelike oortreding sonder*

dat hy 'n kans gegun is om vertoë te rig dienaangaande, is so 'n drastiese afwyking van die fundamenteelste beginsels van ons regstelsel dat dit nie gedoog kan word nie, behalwe in uitsonderlike omstandighede. Alhoewel daar geen onwrikbare reël is dat 'n persoon eers aangehoor moet word voordat hy regsgeldig skuldig bevind kan word aan minagting nie, is dit 'n heilsame uitgangspunt dat hy 'n geleentheid gegun behoort te word om die hof toe te spreek alvorens hy skuldig bevind word. Of 'n skuldigbevinding regtens geregverdig is sonder 'n voorafgaande geleentheid om vertoë te rig, hang af van die besondere omstandighede van elke geval. Onder meer sal daar gekyk moet word na die aanloop tot die optrede wat minagtend is en die aard van die optrede self; en daarby is dit van belang of die betrokke persoon 'n regspraktisyn is of 'n leek, en in laasgenoemde geval, wat sy kennis en ervaring is van hofprosedures."

In S v Phomadi 1996 (1) SACR 162 (E) at 164 h ff Melunsky J, Jennet J concurring, expressed some doubt whether the decision in Nel's case (*supra*) at 750 D - F, limiting the application of the *audi alteram partem* rule to cases in which there are exceptional circumstances, would pass constitutional muster.

Subsequent to the decision in S v Nel (*supra*), the Witwatersrand Local Division of the High Court was required to decide upon the constitutionality of section 108 of the Magistrate's Act in S v Lavhengwa 1996 (2) SACR 453 . Claassen J, with whom Cameron J, as he then was, concurred, concluded at 494 h that the summary procedure for contempt under section 108 (1) of the Magistrate's Act "*does not per*

se conflict with the constitutional rights set out in ss 8 (1), 25 (3) (b), (c) or (e) as relied upon by the appellant" in that case. Its constitutional validity was confirmed. However certain guidelines were formulated, at page 495 b - 496 a, for use when implementing the provisions of section 108 (1), in order for a summary procedure to conform with the provisions of the Constitution Act 200 of 1993.

"*In my judgment a conviction under section 108 (1) after a summary procedure will stand if the magistrate had adopted the following rules and principles:*

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...or merely stupid and not wilfully contumacious....or whether the matter can be disposed of by merely removing the accused from the court.....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 eg 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 rather than resorting to the summary procedure.

2. *If, however, the circumstances are such that the summary procedure is called for (eg, 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 Magistrate's Court 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 being charged.*

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 conduct is alleged to have transgressed.*

4. *The magistrate thereafter should inform the accused of his constitutional rights as set out in section 25 (3) of the Constitution and enquire from the accused whether he wishes to remain silent, testify, give an explanation or call witnesses. If the accused is a lay person he should be afforded the right to*

obtain legal representation should he wish to do so, subject to such time and feasibility constraints as may seem reasonable in the circumstances of the case. Depending on the decision of the accused, the magistrate should then afford the accused full opportunity to 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 his 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 wilfully contravened any of the offences mentioned in section 108 (1).”*

It is my view, that these guidelines are equally applicable under the provisions of the Constitution Act 108 of 1996. From the above authorities, it seems to me that although occasions may present themselves where summary action is necessary, every judicial officer must consider whether summary action is absolutely necessary or whether an alternative would serve the same purpose. Once having embarked upon the course of summary action, it is necessary to be aware that an accused is entitled to a fair trial in all cases where he faces punishment and accordingly it is necessary to observe the rules of natural justice as well as comply with the accused’s constitutional rights in this regard.

In deciding whether or not to proceed summarily in the wide sense against a person, a magistrate is afforded a discretion within certain defined limits. Thus he must exercise that discretion judicially.

I agree that a court of appeal or review should not lightly interfere with a magistrate’s decision to so proceed because it is difficult for the former court to

appreciate the atmosphere within which the incident took place. [S v Poswa 1986 (1) SA 215 (NC) at 221 C - E].

The magistrate in the instant case has not indicated which category of offence, referred to in section 108, he was of the view the accused's conduct contravened. In my view, however, his conduct in walking out of the court was an interruption of the proceedings and his remark thereafter was insulting to the court. Accordingly his behaviour would fall within the first and second category of offence and within the provisions of section 108.

Having considered the circumstances set out by the magistrate and the record, as also, the submissions of Advocate Tarantal, I have come to the conclusion that in the circumstances of this matter, I cannot find that the magistrate incorrectly adopted the summary procedure in the wide sense referred to in S v Nel (*supra*). The need was there to contain the behaviour of the accused, whose conduct was disruptive of the proceedings and contemptuous of the court. It was also appropriate to there and then apply the provisions of section 108 of the Magistrate's Act in order to restore and maintain dignity and order in the court. A courtroom is a public place and, in the circumstances of this case, it was appropriate to show the public that the type of behaviour that the accused displayed would not be tolerated.

The questions that arise, however, are whether the rules of natural justice were sufficiently complied with and whether the accused's constitutional rights were sufficiently observed.

An interesting question is raised by Melunsky J in S v Phomadi (*supra*) at 166 h - j. The learned judge points out that section 108 (1) does not expressly authorise a summary procedure in the narrow sense, i.e. a conviction without affording the accused an opportunity of being heard. It is also doubtful whether the summary procedure in the narrow sense may be implied in the section, for a court will be slow

to imply a provision that is in conflict with the fundamental rights of an accused person. The learned judge took the matter no further as it was not relevant in that matter. Assuming that section 108 (1) allows, in exceptional circumstances, for a summary procedure in the narrow sense, it is necessary to examine whether there were exceptional circumstances present in the instant case which would justify such a course.

In the instant case, both the magistrate and Adv Tarantal submit that the fact that the accused had been warned that his earlier behaviour [in criticising the magistrate and stating that he wished to come before a higher court] was contemptuous and that, should it be repeated he might attract the consequence of being sentenced for it, was sufficient and that the accused's actions thereafter were openly contumacious and that he behaved as he did with knowledge of the possible consequences.

There may have been merit in this submission, in my view, had it been apparent that the accused had understood the concept "*contempt of court*", the type of behaviours which would constitute contempt of court and the consequences thereof. There is no indication that the magistrate assured himself of this when he initially warned him. It must be borne in mind that the accused is a lay person who was defending himself. His level of education or familiarity with court proceedings was not gauged.

Furthermore, although, it may seem overly technical to distinguish section 108 of the Magistrate's Act from the common law, however, it is, in my view, necessary because S v Nel (*supra*) refers to the common law. A magistrate has no jurisdiction to summarily sentence an accused for contempt under the common law, he must act in terms of section 108 (S v Lavhengwa (*supra*)). I agree with Claasen J in S v Lavhengwa (*supra*) at 465 h that it is conceivable that conduct falling within the

three categories of offence in section 108 need not necessarily amount to contumacious conduct under the common law, but could nevertheless constitute a contravention of the section. (See also S v Memani 1994 (1) SA 515 (W) 517 H - 518 A).

In order to comply with the constitutional provision that an accused is entitled to be sufficiently informed of the charge against him, the magistrate, should, in my view have explained the provisions of, and the different categories of offence in, section 108 to the accused, as was held in Lavhengwa (*supra*).

In my view, in addition, it would be important for a magistrate to explain to an accused that should his conduct again contravene the provisions of the section, he might be sentenced without further reference to him. This was not done in the instant case.

In my view for these reasons, the warning given to the accused prior to his conviction for contempt, was not such that it would constitute exceptional circumstances.

I am further of the view that the circumstances described by the magistrate do not indicate a situation where the accused was out of control. The court orderly had managed to bring the accused back into the dock. The magistrate was also able to ask him if he wanted to say something before sentence. There could be no reason why he could not have done the same before conviction. Although after he was sentenced the accused pulled himself free from the hold of the court orderly and walked out of court, it cannot be assumed that he would have behaved in the same fashion had his rights been explained to him prior to conviction. In my view, the circumstances surrounding the incident did not justify summary conviction in the narrow sense.

Both Adv. Tarantal and the magistrate in the instant case submit that it was not necessary to explain to the accused that he was entitled to legal representation, because he had already elected to continue a trial on a more serious count without legal representation. In my view, this is insufficient reason not to give the accused an opportunity to obtain legal representation should he so wish. He was not expecting to face a charge under section 108 of the Magistrate's Act during the

course of his trial; he no doubt did not understand the court procedures and may well have wished to take advice in this regard. He had the right to do so. In my view, there were also no exceptional circumstances which would justify a departure from the principle that the accused was entitled to legal presentation, should he have chosen it, on this charge.

Although the magistrate's reaction under the circumstances of this case was perhaps understandable, it is necessary always to be aware of the need for restrained action because of the importance of being fair to all accused persons who appear in our courts. Fairness in courts will enhance the respect in which they are held, it is not necessary to act summarily in the narrow sense in order to do this.

The failure to observe the proper procedure in this case, was in my view an irregularity in the proceedings which led to a failure of justice. The accused was not given a fair trail and as a result, in my view, there must be some doubt as to whether he was intentionally or wilfully acting in contravention of section 108, with the necessary appreciation of the wrongfulness of his actions.

Accordingly, in my view, the conviction and sentence in this matter must be set aside.
The following order is made:-

a) The conviction of the accused of the contravention of section 108 of Act 32 of 1944, as well as his sentence thereon is set aside and he is found not guilty and discharged.

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KNOLL J

I concur.

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VAN HEERDEN J