IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

REVIEW CASE NO.: 4249/2003

In the matter between:

THE STATE

And

LESLIE SOLOMONS **ACCUSED**

REVIEW JUDGMENT DELIVERED ON 11 DECEMBER 2003

DLODLO, A.J

1. The matter came before me by way of automatic review in terms of section 302 of Act 51/1977 as amended.

2. Mr. Leslie Solomons, a member of the public who appeared in Paarl Magistrate's Court, was summarily convicted on two counts of contempt of court in *facie curiae* under section 108(1) of the Magistrate's Court Act 32 of 1944 as amended, ('the Act'). Section 108(1) of the Act provides: 'If any person……. willfully insults a judicial officer during his sitting or a clerk or a messenger or other officer during his attendance at such sitting, or willfully 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 R2 000 (Two Thousand Rand) or in default of payment to imprisonment for a period not exceeding six (6) months or to such imprisonment without the option of a fine.'

3. Mr. Solomons was thereafter sentenced to undergo imprisonment for six (6) months; as a result of comments he made as he was escorted from the dock to the cells, he was sentenced to another six

(6) months imprisonment.

4. The material facts appear from the transcript. According to the Magistrate as he was busy explaining the rights of another accused person, Mr. Leslie Solomons sprang/jumped up and made the observation “Meneer u praat nie so met kinders moet praat nie” or words to that effect.The accused is said to have left the courtroom. He was brought back to the courtroom by the court orderly on instruction by the Presiding Magistrate.

5. The Magistrate asked the accused what his name was. The accused gave his name as Leslie Solomons. Certain further questions (not important for these proceedings) were put to the accused. The accused was asked about the remarks he made and he answered as follows: “Meneer het die manier om te praat, so het ek vir Meneer gesÍ met die kinders nie. Ek sit al – ek luister al drie (3) sake wat meneer praat met die mense. Ons het mos respek vir mekaar. Meneer is mos ‘n Edelagbare, man. Sien, meneer het nie respek nie. Ek hoor dan hoe sÍ meneer vir die kind, man. Ek kan my stem lig as ek daar sit as meneer nie regte uiter daar nie, man. Jy sÍ vir die ander man sommer, “Het jy R5 000? Geluk vir jou.” Is dit reg? Is mos nie reg nie. Lyk my jy onderskat die mense. Moenie so is nie, meneer, man wat wil jy met my maak?”

6. The Magistrate went on to say that he would then continue to investigate why the court should not find the accused guilty of contempt of court. That explanation evoked the following reaction from the accused:“Nee, jy kan nie vir my aankla vir minagting van die Hof nie. Neem my na ‘n ander Hof toe, man, dan kan ek daar

verduidelik my storie. Jy is ‘n groot man, man. Jy kan nie so praat met kinders nie.”

7. Thereafter the following appears on record:

“Hof: Goed. U het die reg op ‘n regsverteenwoordiger. U het die reg om u eie prokureur aan te stel, met ander woorde. U kan aansoek doen om regshulp as u nie prokureur kan bekostig nie, of u kan u eie verdediging hanteer. Wat is u keuse?.....

Beskuldigde: Watter keuse?.....neem my na ‘n ander Hof toe, man, dan kan ek die magistraat daar verduidelik. Wil jy dan nou sommer die verhoor met my hou. Ek is dan die hof hier agter die hof, man. Hier sit die mense, hulle hoor. Ek kan my stem lig as jy nie reg praat met die kinders hier nie, man. Wat maak jy sommer vir my die beskuldigde hier in jou hof? Is mos nie reg nie, man. Hou op praat van prokureur of neem my na ‘n ander hof toe of kla my aan. Hierso is ‘n speurder, jy is nie ‘n speurder nie, meneer, man, jy is ‘n magistraat.

Hof: Meneer Solomons, oefen dan die keuse uit dat hy sy eie verdediging gaan hanteer. Is dit korrek so?

Beskuldigde: .....nee, man, waar. Ek het nie lus vir jou nie, meneer. Gee vir my ander mense. Sit my in ‘n ander hof, ek sal gaan tot daar. Stuur my na ‘n ander hof.....”

Hof: Goed, die Hof neem dan aan dat u nie wil ‘n prokureur hÍ en dat u nie wil regshulp hÍ nie.

Beskuldigde: Nee, jy neem so aan, man. Ek neem nie so aan nie. Ek sÍ mos jy vat jou eie woorde.”

8. The Magistrate proceeded to convict the accused of contempt of court. The Magistrate sentenced the accused to undergo Imprisonment for six (6) months without the option of a fine. This sentence evoked further emotions. The accused made the following utterances as he was dragged to the cells:

“Ek is ‘n vry man, jy stuur my tronk toe.....kyk hier, is net jy en daai boer, ek kan mos sien julle is rassiste.....Jy is ‘n

rassis, Meneer. Hoekom stuur jy my tronk toe?.....Het ek gesteel of iets hierso, hé? Het ek mense doodgemaak? Jy stuur my.....Jy is nie reg nie, jy is 'n rassis, ek sÍ so, man, die Hof"

9. On the instruction by the Magistrate the accused was brought back to the dock and he once more summarily dealt with him and again pronounced him guilty of contempt of court. The Magistrate again sentenced the accused to undergo Imprisonment for further six (6) months. Again this was without the option of a fine.

10. Upon reading these proceedings I had the following query sent to the Presiding officer.

"Can it be said in this matter the accused person:

a) was informed of the charge with sufficient details?

b) Had adequate time and facilities to prepare a defence?

Would justice not have been better served if the magistrate reported the matter to the Director of Public Prosecutions and rather left it to that Department?

Was the accused given an opportunity for explanation and apology?

11. It took long to get a response from the magistrate. He eventually responded. It is not my intention to set out his response here as in my opinion he does not address the key issues at all. I will only set out the magistrate's conclusion as I intend to deal with it later in this Judgment.

"It is then submitting with respect, that the convictions are in order, and that it should be confirmed. It is further submitted, with respect, that the sentence should be set aside and replaced

with an order in terms of section 284 of Act 51 of 1977, that he be kept in custody until the court adjourns."

12. It cannot be said in these proceedings that Mr. Solomons chose to conduct his own defence. The Magistrate assumed that thát was the choice he could infer from Mr. Solomon's conduct. Despite Mr. Solomon's protest that "nee, jy neem so aan, man. Ek neem nie so aan nie. Ek sÍ mos jy vat jou eie woorde" The right of an accused person to get legal representation is recognized in our country. (See ***S v Wessels and Another*** 1966(4) SA89(c), ***S v Mabaso and Another*** 1990(3) SA185

The right to legal representation is presently constitutionally enshrined. Section 35(3) (f) and (g) of the Constitution of the Republic of South Africa Act 108 of 1996 provides as follows:

"(3) Every accused person has a right to a fair trial, which includes the right –

(f) to choose, and be represented by, a legal practitioner, and to be

informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by

the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

In ***S v McKenna*** 1998(1) SACR 106(c) at 112 Ngcobo J (Friedman JP concurring) stated as follows:

"To give meaning to the right to legal representation, an accused person has to be given a fair opportunity of obtaining legal representation. A refusal to give an accused a fair opportunity of obtaining legal representation has been held to constitute a gross irregularity warranting the setting aside of the conviction and sentence."

13. Section 35(3)(f) of the Constitution Act 108 of 1966 guarantees the right to legal representation of an accused person even at

the State's expense, if need be.

It would be an extremely dangerous practice for Courts to 'assume' that an accused person does not want to be legally represented. On the contrary, the Court must be satisfied that the accused person's choice to undertake his defence is indeed an informed decision.

In the instant case, on this aspect alone, the magistrate committed an irregularity of such magnitude that the conviction and sentence cannot stand.

14. Another point worth dealing with is that Mr. Solomons continuously insisted that he be taken to another Court where he would explain his side of the story. This appeared to be an unimportant point to the Magistrate. I say this because nowhere in the proceedings was it explained to Mr. Solomons that he does not have to be taken to another court as the court he was in was empowered by section 108 of the Act to deal with the matter. It is one of the difficulties members of the public are faced with in that when one of them is alleged to have insulted the Magistrate and that the same magistrate must deal with the dispute and make a finding. The point of being taken to another court made by Mr. Solomons, was thus valid, if the matter is viewed objectively. Ordinarily it does not happen that a litigant also sits as a Judge in the same matter. Mr. Solomons, in my view, was owed an explanation why this apparent 'anomaly' must happen. Such explanation would have gone a long way to making our Courts user-friendly ------something which is still by and large sadly lacking in this country.

15. There is also a question of whether or not section 108 proceedings are in conflict with the accused' rights to a fair trial and to equality before the law as

provided by section 8(1) of the Constitution. This is a debatable matter. For purposes of this judgment it is enough to refer to ***s v Lavhengwa*** 1996(2) SACR 453(W) where a magistrate was part litigant and part Judge as he conducted an enquiry in terms of section 108(1) of the Act. The Court held in that case that this offended the fundamental right to equality before the law enshrined in section 8(1) of the Constitution.

It went further to hold that however, it was reasonable to curtail the right to equal protection of the law in cases of summary proceedings for contempt of court under section 108(1) and that such curtailment was justifiable in an open and democratic society based upon freedom and equality and did not negate the essential content of the right to equal protection of the law. It was held that the curtailment was saved by the provisions of section 33(1) of the Constitution. I have said this remains a debatable matter. It is not necessary to take it any further for purposes of this judgment.

16. Equality before the law requires that each person is accorded equal concern and respect both in formulation and the application of the law (See Chaskalson et al ***Constitutional Law in South Africa*** at 14 – 12) I am in agreement with the finding by the Court in the ***Lavhengwa*** case. There can be no question of denying the necessity for the continued existence of the summary procedure under discussion. Experience shows that there are numerous circumstances that require swift and immediate action to restore order in Court proceedings. There may be disruptive disturbances precluding further continuance of the proceedings, disobedience to lawful orders etc. As early as in 1952 when it was not even envisaged that this country would ever be democratic and have the supreme law of the land, namely the present constitution, Schreiner JA (as he then was) in ***R v Silber*** 1952 (2) SA 475 (A) at 480 stated: "The power to commit summararily 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 the party affected is given less than the

usual opportunity of defending himself, make it necessary to restrict the summary procedure to cases where 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."

17. In agreeing with the finding in ***Lavhengwa*** matter I hasten to set out the provisions of section 36 of the constitution which limit the scope of certain rights:

"36

i) the rights in the bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –

a) the nature of the right;

b) the importance of the purpose of the limitation - ....." The right to equal protection of law is, in my view, (also according to Lavhengwa case) limited on reasonable and justifiable ground by the above quoted provisions of section 36 of the Constitution. The limitation is reasonable in that summary procedure in section 108(1) of the Act are in place to protect and preserve the dignity of our Courts. But in the instant case, given the acrimony and emotions, the level of the accused' sophistication, the interest of justice would have been better served by the magistrate recusal from the proceedings. Mr. Solomons' insistence "neem my na 'n ander Hof" was nothing but "please recuse yourself."

18. Section 108(1) of the Act has been the subject of discussion before the Constitutional Court in ***S v Mamabolo (ETV and Others intervening)*** 2001(5) BCCR 449 (cc).

It was held amongst many other things that it was now settled law that the right under section 35(3) of the Constitution "embraces a concept of substantive fairness" and that it is "a comprehensive and integrated right" composed of a number of elements.

19. Section 35(3) of the Constitution provides:

"(3) Every accused person has a right to a fair trial, which includes the right –

a) to be informed of the charge with sufficient detail to answer it;
b) to have adequate time and facilities to prepare a defence;
c) to a public trial before ordinary Court
h) to be presumed innocent, to remain silent, and not to testify during proceedings'
i) to adduce and challenge evidence;
j) not to be compelled to give incriminating evidence….."

One only needs to read the transcript to conclude that it is more than apparent that Mr. Solomons did not understand the contempt of court charge then preferred against him. No attempts were made to make him understand. The proceedings were clouded by emotions.

20. It would appear that Mr. Solomons was not aware that he had offended the Court by remarking as he did. Interestingly section 108(1) of the Act requires the offence to have been committed wilfully. The proceedings before the magistrate took an unusual format. There was clearly not a single aspect where the Court

and Mr. Solomons understood each other. It is also debatable whether or not Mr. Solomon's remarks can be construed as an insult to the magistrate.

I accept that he (Solomons) had no business to remark at the manner the magistrate addressed certain young accused persons. But the remarks as such are difficult to be construed as insultive. The remarks were allegedly made by Mr. Solomons who then went out of the courtroom. There is also a question mark on the aspect of disruption of the proceedings.

21. Shouldn't the magistrate merely have either ignored these remarks or called Mr. Solomons in and warn him strongly against the behaviour?

I am mindful of the fact that the Reviewing Court should not lightly interfere in matters of this nature. But it is my view that the matter had no importance at all. It was blown out of proportion by the magistrate himself. The second conviction clearly came about as a result of annoyance and frustration on the part of Mr. Solomons. He subjectively asked himself (as he actually said – he is no thief, he is no murderer) what has he done to deserve such a harsh punishment. Once more this goes to the requirement that he should have been informed of the charge with sufficient details so as to enable him to understand. It is my view that he was not given adequate time and facilities to meaningfully prepare his defence. This could easily be achieved by standing the matter down for a moment. Mr. Solomons would then have had the opportunity to think thoroughly about the matter and considered his then position.

22. The magistrate is now of the view that the correct sentence should have been

detention until the Court adjourns in terms of section 284 of Act 51/1977. This is clearly an admissions or realization on the part of the magistrate that the incident was of an insignificant nature. It certainly did not warrant the kind of sentence meted out to Mr. Solomons in *casu*, which is certainly shocking by any stretch of imagination .

I am of the view that conviction and sentence cannot stand in this matter. It follows, therefore that both conviction and sentence must be set aside.

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DLODLO, A.J

I agree and it is so ordered.

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HLOPHE, J.P