ZULU v. THE PEOPLE (1990 - 1992) Z.R. 62 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER AND SAKALA, JJ.S.
2ND AND 22ND OCTOBER, 1991
(S.C.Z. JUDGMENT NO. 7 OF 1991)

Flynote

Court - Contempt of - No limitation on Court acting in terms of Rules of Supreme Court of England (as they apply to Zambia) to dispose of contempt of court as it arises - While generally improper for Judge to deal summarily with contempt, where contempt committed in face of Court, nothing illegal or unfair in Judge doing so.
Court - Contempt of - What amounts to - alleging bias without adequate substantiation.

Headnote

During a criminal trial the appellant, who was appearing as counsel for the defence, made an application for the trial Judge to recuse himself, supported by an affidavit on which the deponent made allegations against the impartiality of the Judge. The Judge found the actions of the appellant to be in contempt of Court, but proceeded to call witnesses over a number of days. The Court then convicted the appellant of contempt and sentenced him to a period of imprisonment. On appeal it was contended that the trial Court had been obliged, in terms of s. 116 of the Penal Code, to either deal with the matter summarily or to refer it to the Director of Public Prosecutions, that the appellant had not received a fair trial as the trial Judge had not been impartial and independent, and that the appellant's conduct did not amount to a contempt to Court.

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Held:

(1) That the trial Judge had derived his power to punish for contempt of Court from the Rules of the Supreme Court of England (as they applied to Zambia). These powers were wider than s 116 in that there was no limitation on the Court to dispose of a contempt of court on the same day as it arose.
(2) Further, that the enquiry the trial Judge had instituted was unnecessary, as he had already made his finding of contempt as it arose.
(3) Further, that, while it was generally improper for a Judge to deal summarily with a contempt, as it was undesirable for him to appear to be both prosecutor and Judge, where a contempt was committed in the face of the Court there was nothing illegal or unfair in holding an enquiry by the Judge before whom it was committed.
(4) Further, that the contempt consisted of the allegation that the trial Judge was not impartial and, unless the application for recusal was substantiated by reliable evidence, it amounted to contempt in itself. In this case the application was based on a flimsy affidavit of a man who was not even within the Court's jurisdiction.
(5) Accordingly that the appeal against conviction had to be dismissed.
(6) Further, that, although the trial Court was not limited in the sentence it could be imposed, there were mitigating factors which justified a suspended prison sentence being imposed.

Cases referred to:

(1) Ambard v A-G for Trinidad and Tobago [1936] A.C. 332 at p. 335.

(2) R. v Gray [1900] 2 Q.B.D. 36 at p. 40.
(3) Reverend Tegerepayi Gusta and Another v The People (1988-89) Z.R. 78.
(4) Balogh v The Crown Court at St. Albans [1974] 3 All E.R. 283.
(5) Parashuram Detaram Shamdasani v King Emperor [1945] A.C. 264 at page 270 T.L.R. 448.
(6) Longwe v The People S.C.Z. Judgment No. 130 of 1976.
(7) Musonda v The People (1976) Z.R .215 (at page 217).

For the appellant: R.N. Ngenda, Richard Ngenda and Associates.
For the respondent: E. Sewanyana, State Advocate.

Judgment

SILUNGWE, C.J.: delivered the judgment of the Court.

This is an appeal against conviction and sentence for contempt of court, under order 52 of the Rules of the Supreme Court of England, as read with s.116(3) of the Penal Code Cap. 146.

The appellant was here acting for the defence in a murder case. Before judgment could be delivered, that is after final submissions for the defence had been made, the appellant handed to the learned trial judge an affidavit and made an application for the learned trial judge to rescue himself from that case on the ground set out in the affidavit the gist of which we shall refer to hereinafter. The learned trial judge found the action of the appellant to be a contempt of court and proceeded to call witnesses over a period of a number of days.

After hearing witnesses called by the Court, the appellant elected to give evidence on oath. The Court thereafter delivered a lengthy judgment in which it found the appellant guilty of contempt and sentenced him to 12 months' imprisonment with hard labour.

In his judgment, the learned trial judge set out the contents of the

affidavit submitted by the appellant. These were to the effect that the deponent (who, it was ascertained, was no longer in the country) had seen at an office in Cha Cha Road, Lusaka, a letter dated June 14, written by four judges, including the learned trial judge, Mr Justice Musumali, addressed to Mr Fredrick Chiluba, the President of the Movement for Multi-Party Democracy (in short, MMD) and copied to Mr Levy Mwanawasa, the Vice-President of MMD.

In the affidavit, the deponent went on to say that the letter had been signed by each of the four judges who had each written his own paragraph and signed it separately. In para. 8 of the affidavit, the deponent averred that, in the same letter, the learned trial judge had informed MMD that he would fix Kambarange Kaunda (President Kaunda's son in the murder case) and that he would make history that President Kaunda and his wife would never forget: he would convict and sentence Kambarange Kaunda to death.

The learned trial judge then set out the evidence of the witnesses from MMD who had been referred to in the affidavit and recorded that they had denied receiving or seeing the letter in question.

The learned trial judge further set out a summary of the evidence of the appellant in which the appellant had argued that he had not sworn the affidavit and had maintained that the learned

trial judge should have given evidence to show that he had not written the alleged letter.

The learned trial judge then went on to set out an admission by the appellant, namely, that the appellant had told a High Court judge in April, 1991 that he was going to embarrass the judiciary.

The learned trial judge then found the appellant guilty of contempt of court and convicted him accordingly.

As we have already indicated, the contempt of court charge was pursuant to order 52 of the Rules of the Supreme Court of England (hereinafter referred to as order 52) as read with s. 116(3) of the Penal Code. We shall return to the provisions of s. 116(3) and to order 52.

Every judge has power immediately to convict and punish for a contempt of court committed in the face of the Court. In *Halsbury's Laws of England*, 4th ed., para. 5, the following is recorded on ''contempt in the face of the Court''.

> ''5. Conduct amounting to contempt. The power to fine and imprison for contempt committed in the face of the Court is necessary incident to every court of justice. Although the boundaries of this kind of contempt have not been precisely defined, a contempt in the face of the Court may be broadly described as any word spoken or act done in, or in the precincts of, the Court which obstructs or interferes with the due administration of justice or is calculated to do so.''

Contempt of court includes any word spoken or act done calculated to bring a court into contempt or to lower its dignity and authority. Further, contempt of court may be shown either by language or manner. Whether particular words or behaviour amount to a contempt is a question of fact in any particular case. Language which might be perfectly proper if uttered in a temperate manner may be grossly improper if uttered in a different manner.

However, no wrong is committed by any member of the public who

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exercises his ordinary right of criticising in good faith any words said or any act done in the seat of justice. As Lord Atkin rightly said in A*mbard v A.G. for Trinidad and Tobago* [1]:

> ''Justice is not a cloistered virtue; she must be allowed to suffer the respectful, even though outspoken comments of ordinary men.''

In another case, *R. v Gray* [2], Lord Russell, C.J., stated this:

> ''Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court.''

And, in para. 6(7) of *Halsbury's Laws of England* already referred to, the following appears:

> ''(7) Contempt of litigants, counsel or solicitor. It is of the highest importance that advocates, whether counsel, solicitors or litigants in person, should be allowed considerable latitude in the manner in which they conduct a case. Consistently with this the Courts have shown a reluctance to punish advocates for contempt. Language or

> behaviour which is outrageous or scandalous or which is deliberately insulting to the Court is, however, punishable as a contempt in the face of the Court, though not every act of discourtesy of a court by an advocate amounts to contempt. Insults to counsel or opposing litigants, and offensive advocacy, do not in general amount to a contempt of court unless calculated to lead to a brawl in court.''

One of the most crucial arguments advanced in this case was whether what had transpired here amounted to contempt of court. This is one of the arguments canvassed by the learned counsel for the appellant and which we propose to deal with later as it is convenient to follow the arguments in the sequence in which they were presented to us.

The first argument was that the learned trial judge had acted *ultra vires* s. 116 of the Penal Code in that the provisions of ss. (2) of the section and the case of *Reverend Tegerepayi Gusta and Another v The People* [3] had not been complied with. The subsection is in these terms:

> ''116(2)When any offence against para. (a), (b), (c), (d) or (i) of ss. (1) is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the Court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding 40 kwacha or, in default of payment, to imprisonment without hard labour for one month.''

The salient feature of this subsection highlighted by Mr *Ngenda* was that at any time before the rising of the Court on the same day, the Court may deal with the matter summarily. It was stressed that the law did not allow the judge to deal with the matter at a later date. Mr *Ngenda* rested this argument on *Gusta* [3], a decision of this Court. In that case, we held that when a judge invokes the provisions of s. 116 of the Penal Code, then the only courses open to him are either to proceed under ss. (2), that is, to deal with the matter on the same day before the rising of the Court; or to report the matter to the Director of Public Prosecutions who could investigate and institute proceedings if he thought fit. We went on to say that it was not within the power of a court to deal with such a matter

at a later date and that if this were done, the procedure would be (and it was in that case, as it was in *Sebastian Zulu v The People* which we have just decided) *ultra vires* s. 116(1)(a) and (2) of the Penal Code.

This particular case, however, is distinguishable from *Gusta* [3] and *Zulu* [4] in that the learned trial judge invoked order 52 and s. 116(3) of the Penal Code ss. (3) of s. 116 of the Penal Code reads as follows:

> ''116(3) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of a court to punish for contempt of court.''

It is clear, therefore, that in reality the learned trial judge derived his power from order 52 which (applies to this country and) empowers the High Court and the Supreme Court to punish for contempt of court. The Courts' powers under order 52 are wider than those provided for under s.116(1)(a) and (2) of the Penal Code in the sense that there is no limitation on the Court to dispose of a contempt of court on the same day that it arises.

In our view, the enquiry that the learned trial judge instituted was unnecessary because he had made his finding of contempt of court as soon as it arose. There was thus no need for him to have gone further than that. However, the learned trial judge explained his action on the basis that he did not want to be seen to be covering up for himself; rather, he wished to give the appellant 'an opportunity to say openly to the Republic the basis of his and Kundiona's allegations against him'. The learned trial judge continued in his judgment:

> ''To have swiftly dealt with him would have meant to some people that there was something I was afraid to be divulged to the public by him if I were (not) to allow him a free say in this matter. But he had come up with nothing against me as already explained. Mr Zulu appears to have come up with the offending affidavit believing that a tribunal would then be instituted. One of the first things he said when I put him on this charge was that he would only talk when an independent tribunal was established, he repeated that a number of times, until he realised that that was not going to help him.''

As the learned trial judge had found the appellant guilty of contempt of court, knowing that the letter referred to had not been written by him, there was no need to conduct an enquiry.

The appeal based on the first argument is unsuccessful. The second argument was that the appellant had been a victim of an unfair trial because the learned trial judge had not been impartial and independent. It was contended that the learned trial judge had acted both as a prosecutor and an adjudicator, contrary to the rules of natural justice, in particular that no one shall be a judge in his own cause.

In support of the second argument, Mr *Ngenda* submitted that, although the Court had power to punish for contempt under order 52, where the contempt is committed in *facie curae*, that power should be exercised in exceptional circumstances. He cited the case of *Balogh v Crown Court at St. Albans* (5). In that case, Lord Denning, the learned Master of the Rolls, said at page 288, para. e-f:

> ''This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the judge

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> and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately - so as to maintain the authority of the Court - to prevent disorder - to enable witnesses to be free from fear - and jurors from being improperly influenced - and the like. It is, of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt.''

Lord Denning, M.R. continued as follows in para. h:

> ''As I have said, a judge should act of his own motion only when it is urgent and imperative to act immediately. In all other cases he should not take it on himself to move. He should leave it of the Attorney-General or to the party aggrieved to make a motion in accordance with the rules in R.S.C. order 52. The reason is so that he should not appear to be both prosecutor and judge; for that is a role which does not become him well.''

In the first place, Mr *Ngenda* recognised the fact that a court has power, on its own motion, to punish for contempt where the contempt is committed in its face. His contention was that that power should be exercised on the Court's own motion in exceptional circumstances such as those referred to by Lord Denning, M.R., in *Balogh* (5), namely, ''only when it is urgent and imperative to act immediately so as to maintain the authority of the Court to prevent disorder . . . with scrupulous care and only when the case is clear and beyond a reasonable doubt.''

We agree that, in accordance with *Balogh* (5) and other authorities referred to therein, it is generally improper for a judge to deal summarily with a contempt, as it is undesirable for him to appear to be both prosecutor and judge. Despite these authorities, however, where a contempt is committed in the face of the Court there is nothing illegal (or even unfair) in the holding (under order 52) of an enquiry by a judge before whom the contempt is committed. It is envisaged that such cases would be very rare as the great majority of contempts committed in the face of the Court would be such that there reality would be nothing to enquire into.

Whilst we have found that the enquiry held by the learned trial judge was unnecessary, we would not agree with Mr *Ngenda* when he submitted that the trial was a mockery, since the reason for holding the enquiry had been clearly explained by the learned trial judge.

Mr *Ngenda's* third argument related to the alleged non-compliance with procedure. It was submitted that the learned trial judge had made three procedural misdirections, contrary to the rule of procedure applicable to criminal cases. The following were the alleged procedural misdirections: (a) that the learned trial judge had adjourned the hearing to another date when s.116 of the Penal Code requires a court before which a contempt is committed in view of the Court to summarily dispose of the contempt case on the same day that it arises; (b) that no formal charge had been read to the appellant and that no plea had been taken; and (c) that the learned trial judge had ordered the appellant to testify.

The point raised under (a) above was misconceived as the learned trial judge had proceeded in terms of order 52, having expressly excluded s.116(1)(a) and (2) of the Penal Code. In this circumstance, it was not illegal to dispose of the contempt on an adjourned date.

As to the point raised under (b), we have previously pointed out that

the enquiry held by the learned trial judge was unnecessary because he had already found the appellant guilty of contempt of court. In any event, however, the charge had been put to the appellant; he had pleaded to it; a case to answer had been found and, the appellant's rights had been explained to him. This part of the argument is also misconceived.

In relation to the third part of Mr *Ngenda's* argument, it was not in dispute that the learned trial judge had erred by ordering the appellant to testify earlier in the proceedings. But, as soon as the learned trial judge appreciated the error, he retracted it and there was no obligation for the appellant to give evidence or to say anything at all in his own defence. Subsequently, however, the appellant gave evidence on his own behalf after rights had been explained to him.

In the circumstances, it was unnecessary for Mr *Ngenda* to make capital out of a procedural error that had subsequently been recognised and corrected during the enquiry proceedings but after the appellant had been adjudged guilty of contempt of court.

Mr *Ngenda's* fourth argument was that the learned trial judge had misdirected himself in law by holding that the appellant was guilty of contempt for having prepared the affidavit and handed it to the Court. He went on to say that the question of contempt of court by a lawyer did not arise because the lawyer was duty bound to bring to the attention of the Court any allegations of bias and the grounds for the allegations. In aid of his argument, he cited the case of *Parashuram Detaram Shamdasani v King Emperor* (6) where Lord Goddard made the following observations at page 270:

> ''The usefulness of the summary power of punishment for contempt depends on the wisdom and restraint with which it is exercised. To use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended.''

The latter comments are not relevant to this case. The contempt here consisted of the allegation that the learned trial judge was not impartial and, in this respect, it is appropriate to quote a further comment by Lord Goddard in the same case when he said:

> ''No doubt were a litigant (or counsel) to suggest in court that its officers were corrupt . . . the Court might consider it contempt.''

In this case, there is no doubt that the learned trial judge was correct in considering the appellant's remarks to be contempt.

Mr *Ngenda* continued to argue that the appellant had made an interlocutory application asking the learned trial judge to rescue himself and that his client was, therefore, obliged to file an affidavit in support of the application.

In our view, the making of an application to judge to rescue himself on the ground, as in this case, that he is biased, is in itself a contempt in the face of the Court unless the application is substantiated by reliable evidence. In this respect, reliable evidence means evidence which can be tested in cross-examination and found to be cogent. Here, the appellant's application for the learned trial judge to rescue himself was based on the flimsy affidavit evidence of one man who, to the appellant's knowledge,

was not even within the jurisdiction of the Court. In our opinion, the appellant's conduct was reckless in the extreme and constituted contempt of court because, unlike *Shamdasani* (6) the appellant's conduct was not merely offensive, but it was outrageous and scandalous and was, therefore, punishable as contempt in the Court, on the authority of para. 6(7) or *Halsbury's Laws of England* already referred to.

We feel that the appellant could safely have drawn the allegation against the learned trial judge to the attention of high judicial authorities, had he so wished. Rather recklessly, however, he chose a calamitous method. The serious situation in which he placed himself could have been avoided.

For the reasons given, the appeal against conviction is dismissed.

The fifth and final argument was about sentence. Mr *Ngenda* argued that the learned trail

judge had misdirected himself in law by sentencing the appellant to 12 months' imprisonment with hard labour.

It was not in dispute that the appellant had been sentenced to 12 months' imprisonment with hard labour under the provisions of s. 38 of the Penal Code which prescribe the sentence for all misdemeanors that are otherwise not provided for under the law.

The appellant in this case convicted under order 52 which sets out the inherent powers of the High Court to convict for contempt of court. There is no limit to the sentencing powers of a judge under that order and the use of s. 38 of the Penal Code was wrong in law. For this reason, the appeal against sentence is allowed and the sentence of 12 months is set aside.

Mr *Ngenda* argued that the limit to the sentencing power of the learned trial judge was contained in s. 116(1) of the Penal Code, namely, six months simple imprisonment or a fine not exceeding 50 kwacha.

However, in view of the fact that the provisions of s. 116 of the Penal Code were not invoked by the learned trial judge, the limitation to sentences referred to in that section does not apply to this case.

We note that when the appellant handed the offending affidavit to the learned trial judge, he did not make its contents known in open court so that although we have found that the contempt of court consisted of the application to the learned trial judge to rescue himself, the details of the injurious remarks about the judge were not made public.

We find this contempt to have been very serious indeed but because of the mitigating factor to which we have referred, we consider that an appropriate sentence in this case should be less than that imposed by the learned trial judge. Mr *Ngenda* argued that, in accordance with the principles laid down by this Court in the case of *Longwe v The People* (7) (unreported) which were repeated in (*Musonda v The People* (8) (reported), a fine, rather than a prison sentence, would have been more appropriate in the present case. In *Musonda* (8) we reiterated at page 217, that:

> ''Where the Legislature has seen it fit to prescribe a sentence of a fine or imprisonment or both, a first offender, in a case where there are no aggravating circumstances which would render a fine inappropriate, should be sentenced to pay a fine with imprisonment only in default.''

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In this particular case, we have already held that the punishments referred to in s.116 of the Penal Code do not apply and no particular punishments have been prescribed by order 52.

Here, the learned trial judge considered that the contempt was so serious that it could not adequately be dealt with by the imposition of a fine. We see no reason to disagree with the learned trial judge's view of this most serious contempt of court. However, because of the mitigating factor to which we have referred, and the appellant's apology, we impose a suspended sentence of three months' simple imprisonment, suspended for a period of one year condition that he does not commit a similar offence within that period.

Appeal allowed in part.