REV. TEGEREPAYI GUSTA AND ELIAS NYATI v THE PEOPLE (1988 - 1989) Z.R. 78 (S.C.)

SUPREME COURT
GARDNER, J.S., BWEUPE AND CHAILA, AG. JJ.S.
12TH OCTOBER 1988
(S.C.Z. JUDGMENT NO. 29 OF 1988)

Flynote

Criminal law and procedure - Contempt of Court - Procedure - Contempt in view of the Court.

Headnote

The appellants committed what the Judge trying the case in which they were involved believed was contempt of Court. He set the matter down for enquiry to be dealt with at a later date. On the later date he found contempt

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proved. The appellants appealed and argued that under the provisions of the Penal Code, s.116, where the act was committed in the face of the Court the matter must be dealt with summarily before the rising of the Court on the same day.

Held:
Where the contempt was in view of the Court the matter should be dealt with on the same day. Otherwise the matter should be reported to the Director of Public Prosecutions who can investigate and institute proceedings if he sees fit.

Note: The Court referred to the case at a later date and indicated that the Judge may have exercised his powers under Order 52 of the Rules of The Supreme Court of England. The Court concurred with the view of Denning M.R .expressed in *Balogh v The Crown Court* that a Judge should deal with contempt himself only where the matter was urgent and imperative. In all other cases the matter should be referred to the prosecuting authorities or the aggrieved party to make a motion.

Case referred to:
(1) Balogh v The Crown Court (1974) 3 All E.R. 283

Legislation referred to:
Penal Code Cap 146, s .116
Rules of the Supreme Court (England)

For the appellants: S.J. Banda, Luangwa Chambers.
For the respondent: F.N. Mwiinga, Director of Public Prosecutions.

Judgment

GARDNER, J.S.: delivered the judgment of the Court .

The appellants were convicted of contempt of Court in that it was alleged that their lawyer told a Judge, who intended to try a case between the appellants and their opponents, that the appellants had been informed by their opponents that their opponents had bribed the Judge. The lawyer for the appellants requested that the Judge should retire from the case. The Judge then set down a later date for an inquiry into the matter with a view to deciding a case of contempt of Court. At the hearing he heard evidence and thereafter found that both the appellants were guilty of contempt of Court.

Contempt of Court is dealt with in section 116 of the Penal Code. Therein there are a number of matters which are dealt with as being contempt of Court, and the operative words of the section say that anyone who does any of those things is guilty of a misdemeanour. Subsection (2) of the section reads as follows:

> "When any offence against paragraph (a) (b) (c) (d) or (i) of subsection 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 cognisance of the offence and sentence the offender to a fine not exceeding K40-00, or in default of payment to imprisonment without hard labour for one month . . . "

The important provision of that subsection is that at any time before the rising of the Court on the same day the Court may deal with the matter summarily. It was not within the power of the learned Judge to deal with the matter at a later date. In this particular case, after a report had been made to the learned trial Judge in chambers by counsel for the

appellants, the learned Judge said that he would hold an enquiry, and called for the parties and their counsel to appear before him at a later date. If the report by counsel was a contempt by the appellants in view of the Court (a matter which we do not have to decide for the purpose of this judgment), the appellants should have been dealt with on the same day. The proper course in the circumstances was for the matter to be reported to the Director of Public Prosecutions who could investigate and institute proceedings if he thought fit. As it happened the action taken by the learned Judge was not within the provisions of section 116(2) and was therefore *ultra vires*.

The learned Director of Public Prosecutions in this case has indicated that he does not support the convictions. We agree with him that this is a very proper course for him to have taken. For the reasons which we have given, these appeals will be allowed. The convictions will be quashed and the sentences will be set aside.

Postea (13th June 1990).

On 12th October 1988 we delivered the above judgment. At that date of hearing it was assumed by the Court and counsel for the appellants and the State that the learned Judge had dealt with the matter under the provisions of section 116 of the Penal Code.

It has since been drawn to our attention that the learned Judge may have been using his powers of

committal under Order 52 of the Rules of the Supreme Court of England. If this were the case, then the action taken by the Judge was not *ultra vires*. However, we would refer to the remarks made by Lord Denning, M.R. in the case of *Balogh v The Crown Court* [1974] 3 All E.R. 283 (1). In that case, at page 288, the learned Master of the Rolls said:

> " As I 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 to 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."

We respectfully agree with these remarks. In civil cases where there is disobedience of an order of the Court; for instance, a refusal to comply with an order for an injunction, it is usual for the other party to apply for an order of committal, although it is not improper for a Judge to make such an order of his own motion . However, where the contempt is criminal or quasi-criminal, such as the abuse of the Court it is not proper to deal with the offence in any manner other than the institution of proceedings under section 116 of the Penal Code.

The order setting aside the committal order will stand, and, as we mentioned before, in view of the fact that we held the Judge's order to be a nullity, there is nothing to prevent the bringing of proceedings under section 116 of the Penal Code by the Director of Public Prosecutions if he considers it proper to do so.

Appeals allowed.
Convictions set aside.
