

In the matter of:

BONGINKOSI NKUMANE

and

SECTION 89 OF THE MAGISTRATE'S COURT ACT

District of Hhohho

25/05/92

ORDER ON REVIEW

Rooney J.,

On the 4th February this year Mr. M.L.M. Maziya committed Mr B. Nkumane a public prosecutor to custody for ten days for contempt of court. Mr Maziya is a Senior Magistrate and at the time of the incident was presiding over a court at Lavumisa. He made a report to the High Court under section 89 of the Magistrate's Court Act.

On the 19th February, I requested the Director of Public Prosecutions to indicate whether or not he supported the action taken by the magistrate in this case. His reply was dated the 19th April and the file was left for further consideration until my return from leave. I am indebted to the Director for his careful submissions on the case.

In his report the magistrate recited the history of a criminal case in which two persons were charged with the theft of building materials in October last year. One of the two accused person having been released on bail, did not appear before the court on the 17th December. On the 31th December the magistrate set the matter down for trial on the 4th February on the basis that if the accused who had absconded was not arrested before that date he would proceed with the trial of the other accused.

The Magistrate's statement continues.

"On the 4th February, we first did a few remands and postponements. Mr Nkumane (who was prosecuting that day) then called the case in question. He then handed the docket over to the interpreter (Mr Ernest Thwala) and said something which I could not hear. I however, took it to mean he was directing Mr Thwala to put the charges. He had all along been calling the cases without handing the dockets over to the interpreter. Mr Thwala appeared to be studying the docket. At that time, I started writing that the charge was being put even though the interpreter had not yet done so.

Before I could finish I then asked Mr Thwala why he was not putting the charge. It's then that Mr Thwala stated that the prosecutor had infact applied that the charge be withdrawn. Without any further ado I just cancelled whatever I had written and started writing that the charge was being withdrawn. However whilst still writing this I immediately recalled that the case had been set for trial and the Crown had been put on terms. I perused the record and confirmed it. I then cancelled what I had already written i.e. that the charge was being withdrawn.

I then directed the interpreter to put the charge to the accused person. At that time Mr Nkumane stood up and loudly applied that the case be withdrawn. I asked him why as the matter was supposed to be for trial. He said if the case were to be proceeded with the present accused would put all blame on the shoulders of the other one so as to secure an acquittal. I told him that this factor had been considered even in the ealier remand hearing but it was nevertheless agreed that the case would proceed at all costs. He insisted that it be withdrawn. It was at that stage that I told him that it was not proper for him to interfere with my instruction that the plea be taken. I again directed Mr Thwala to put the charge. Mr Nkumane then sat down and Thwala put the charge, the accused pleaded not guilty.

I then called upon Mr Nkumane to address me and advance stronger reasons as to why the case should be proceeded with otherwise than by way of trial. I further told him that it's either he advanced such reasons or led evidence as I was not at all prepared to grant his application for withdrawal on the basis of the reason he had advanced.

To my surprise Mr Nkumane remained transfixed in his chair and did not say anything. I pleaded with him about three if not four time to respond. He however remained seated and said nothing, much to the amusement of some of the people sitting in the gallery. At this time even an attorney of the High Court Mr T. Masina, was present having just walked in. I paused for a while thinking that the prosecutor might respond, it availed nothing. I then acquitted the accused person and ordered that Mr Nkumane be removed from the Court room and detained in custody for ten days (10) for contempt of court."

Later on the same day, Mr Nkumane telephoned the magistrate from Lavumisa police station and he tendered his profuse apologies for what had happened. The magistrate accepted the apology and released the prosecutor on his own recognisance pending the transmission of the record to the High Court for review.

The magistrate went on to indicate his interpretation of section 89 of the Act. He considered that Mr Nkumane had been guilty of misbehaviour in that having been informed that the magistrate was not prepared to have the case dealt with otherwise than my way of trial as he could not grant the prosecutor's application for withdrawal unless he advanced convincing reasons, he did not respond in any way. Despite the pleas of the magistrate, Mr Nkumane remained silent. The magistrate regarded Mr Nkumane's silence as not only rude but unethical. The amusement of the gallery at the situation indicated that the dignity of the court was being undermined. The magistrate considered that he had not only a right but a duty to discipline the prosecutor.

The magistrate considered that Mr Nkumane's decision to remain "transfixed in his chair" amounted to undiluted contempt. Mr Nkumane should have stood before the court while the magistrate was addressing him.

The magistrate referred to an earlier incident involving Mr Nkumane and another magistrate. Apparently Mr Nkumane had been rebuked for being late. This led to an intervention by Mr Maziya who took the opportunity to lecture Mr Nkumane on the importance of court etiquette and manners.

Section 89 reads:-

"(1) if any person, whether in custody or not, wilfully insults any judicial officer during his sitting or any 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 being liable to be removed and detained be liable to imprisonment for any period not exceeding one month or to pay a fine not exceeding forty rand for every such offence or, in default of payment, to such imprisonment.

(2) In any case in which the court commits or fines any person under this section, the judicial officer shall without delay transmit to the registrar of the High Court, for consideration and review of the Judge in chambers, a statement certified by such judicial officer to be true and correct, of the ground and reasons of his proceedings, and shall also furnish to the party committed a copy of such statement."

The magistrate said that he ordered Mr Nkumane to be removed and detained. He did not proceed to sentence him to imprisonment or to impose a fine. As detention could not be for an indefinite period, the magistrate decided that ten days would be appropriate.

The Criminal Procedure & Evidence Act sets out the various punishments which may be inflicted by the courts. No distinction is drawn between detention and imprisonment. Section 89 of the Magistrate's Courts Act does not create a new form of punishment. Detention in this connection should not be regarded as a punishment per se. It is incidental to the removal of the offender from the court. It is analogous to an arrest. As soon as Mr Nkumane was detained he became liable to the penalties provided after a trial either before Mr Maziya or another magistrate. If this was contempt in facie curia, he was still entitled to be heard before sentence was pronounced. I assume that if Mr Nkumane had been given the opportunity to do so he would have apologised to the court in the same terms as he did later on the telephone. That might have been an end to the matter.

The obligation to send a statement to this Court for review only arises "in any case in which the court commits or fines any person" under section 89. The file contains no warrant for the committal of Mr Nkumane to prison. It is not at all clear, in the absence of such warrant, where he could lawfully be detained.

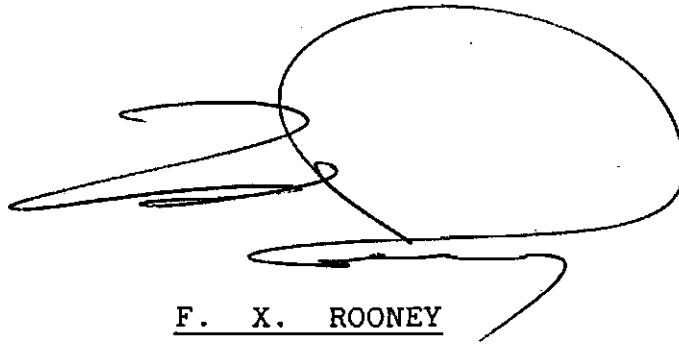
It does not appear either from the record of the proceedings or the magistrate's statement that Mr Nkumane was given any opportunity of being heard in his defence or of offering any apology before the magistrate summarily ordered his arrest and detention. It is clear that the magistrate regarded this as a punishment for contempt. I do not consider the procedure followed to be in order. [R. v. Hawkey 1960 (1) S.A 70].

The power to punish summarily conferred upon a judicial officer by the corresponding section of the Magistrates Courts Act of South Africa (section 108 of Act 32 of 1944) should be used with caution. [ see R.v. Silber 1952 (2) S.A. 475 at 480].

It was rude of Mr Nkumane to remain seated and silent when the magistrate addressed him. However, as the D.P.P. pointed out, the prosecutor had withdrawn the case against the accused person under section 6 of the Criminal Procedure & Evidence Act and the proceedings were technically at an end. The prosecution have this statutory right, which a court would not interfere with unless the Director or his subordinates were acting mala fides or in abuse of the process of the Court [Dlamini and others v. Minister for Justice 1982-86 S.L.R. 367.

I think the magistrate was affronted by Mr Nkumane's public discourtesy. He ought to have warned the gentleman that he would take the matter further. He would have been justified in complaining to the D.P.P. about the conduct of his subordinate. But, it was not necessary to adopt so drastic a course against Mr Nkumane.

I am unable to support the action taken by the magistrate. The conviction for contempt and all its consequences are set aside.

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke.

F. X. ROONEY

J U D G E