

STATE
versus
TAURAI MACHONA

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 23rd March 2006

Criminal Review

UCHENA J: On the 15th March 2006 court officials from Chivhu Magistrates' Court travelled to Mvuma for purposes of holding a circuit court in that town. Mvuma is a gazetted circuit court for Chivhu magistrates' court. The magistrates' and prosecutors' statements in the record indicate that they performed their official duties and left Mvuma on their way back to Chivhu. They stopped at Njiva Business Centre to relieve themselves. According to the prosecutor when they stopped at Njiva Business Centre which is 20 metres from the Masvingo Highway they found the accused viciously assaulting a female shop attendant. Prison officers who were travelling with the court officials tried to arrest the accused who resisted arrest and insulted them in the process.

After a while the magistrate warned the accused not to resist arrest as the prison officers were acting in their capacity as officials of the court since they were coming from Mvuma circuit court and it was still during business hours.

The accused ridiculed the magistrate and uttered derogatory words to the magistrate and prison officers. The magistrate then seriously warned the accused of contempt of court. The accused did not take heed of the magistrate's warning and was summarily convicted of contempt of court and sentenced to 90 days imprisonment.

The magistrate's statement tells a similar story and confirms that he summarily convicted the accused of contempt of court and sentenced him to 90 days imprisonment.

These events were eventually reported to the Provincial Magistrate Chivhu who made inquiries and visited Chivhu Prison. He confirmed that the

accused's conviction and incarceration took place at Njiva Business Centre. He forwarded the reconstructed record of proceedings created at Chivhu magistrates' court long after the accused's conviction and incarceration to the Chief Magistrate pointing out the irregularities in this case.

The Chief Magistrate forwarded the record to the Registrar of this court for review.

In terms of section 29(4) of the High Court Act [*Chapter 7:06*] this court can review any criminal proceedings by inferior courts brought to its notice which are not in accordance with real and substantial justice notwithstanding that no application for review has been made and that the record has not been submitted for review in terms of the Magistrates Court Act.

The facts of this case reveal that Chivhu Magistrates court's places of sitting mentioned in this case are Chivhu and Mvuma. This case was not heard at either of them. It was heard and competed at a Business centre between Mvuma and Chivhu which is 20 metres away from the Masvingo Highway. Judicial Officers must exercise their powers with caution and in terms of the law. In this case the court could not have been sitting at an ungazetted sitting place and the facts do not in my view constitute contempt in *faciae curiae*.

CR Snyman in his book "*Criminal Law*" fourth edition at page 327 says:-

"The courts have held that the power of a court summarily to punish X in cases where this form of crime is committed is essential in order to uphold the dignity and authority of the court, but they have also emphasised that this power is an extremely drastic weapon which should not be resorted to lightly but only with the utmost care and circumspection." (emphasis added)

In the present case the magistrate seems to have used powers, he did not have and without care and circumspection.

The magistrates' court is a creature of statute. It cannot exercise powers which were not given to it by Statute. Section 71(1) (a) of the

Magistrates Court Act which provides for summary contempt trials does not provide for contempt trials by the roadside. It provides for contempt trials during the sitting of the court.

CR Snyman in his book "Criminal Law" referred to earlier at page 326 says:-

"A peculiarity of this form of the crime (contempt in faciae curiae) is that the presiding officer (judge or magistrate) has the power summarily to act against the alleged offender. In the case of other crimes there is usually a lapse of time - at least months between the commission of the crime and the trial of the alleged offender. However if somebody commits contempt in facie curiae, the presiding officer may there and then act against him by subjecting him to an immediate trial for contempt of court and if he is convicted, imposing a punishment upon him. The High Court may do this by virtue of its inherent, common law powers. Whereas the magistrate's court has this power by virtue of the provisions of section 108 of the Magistrates Court Act." (emphasis added)

The learned author therefore clearly indicates the summary trial as a distinguishing feature between *contempt in faciae curiae* and *contempt ex faciae curiae*.

At page 325 Snyman in his book already referred to says:-

"Contempt of court in facie curiae is committed when a person who is inside the court insults the presiding judicial officer while the court is engaged in its proceedings or as it is sometimes said in (open court)" (emphasis added)

There is no doubt that no court was sitting at Njiva Business Centre. It is clear from the prosecutor and magistrate's statements that there were no court proceedings going on at Njiva Business centre. Court proceedings had ended at Mvuma Circuit Court.

There was therefore no basis of convicting the accused of contempt of court even at common law. The magistrate's courts in this country as in South Africa can not summarily convict an accused of common law contempt. In the case of *S v Musa* 1997 (2) ZLR 149 at 153A-B CHINHENGO J said:-

“The magistrate has no common law powers of committal in the circumstances of the present case – his powers are statutory, as provided in the Magistrates Court Act.”

I therefore must examine the provisions of the Magistrates Court Act to determine whether the magistrate had authority to act in the manner he did. Section 71(1) a of the Magistrates Court [*Chapter 7:06*] provides as follows:

“71(1) If any person, whether in custody or not

(a) Wilfully insults the magistrate during his sitting in court or any clerk or messenger or other officer of any court during his attendance therein or;

(b) wilfully interrupts the proceedings of or otherwise misbehaves in court; or

(c) being a witness, refuses to answer any legal question relative to the matter in issue;

It shall be lawful for any police officer or private person by order of the magistrate to take such offender into custody and detain him until the rising of the court, and the magistrate may by warrant under his hand commit any person so offending to prison for any period not exceeding three months.....” (emphasis added)

This offence can therefore be committed by any person who insults the magistrate or other court officials during the sitting of the court. The offender can be confined till the rising of the court and the magistrate may summarily convict him and by warrant commit him to prison.

In the present case there was no court sitting at Njiva Business Centre as the officers had gone there to relieve themselves. The magistrate and the court officials had not gone there in furtherance of the court’s business. If they had gone there to hold an inspection in loco then it could have been said the court was sitting and court proceedings were in progress. It was therefore not possible for the accused to have committed contempt in the face of the court, in terms of section 71(1)(a) of the Act. The court had already risen when it completed its business at Mvuma circuit court.

I appreciate that in terms of section 24 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the magistrate on seeing the accused assaulting the female shop attendant was entitled to act. He was however merely entitled to arrest the offender or verbally order his arrest.

Section 24 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides as follows:-

“24(1) It shall be lawful for any judge, magistrate or justice who has knowledge of any offence by seeing it committed, himself to arrest the offender or by a verbal order authorise others to do so.

(2)The persons authorised in terms of subsection (1) are empowered and required to follow the offender if he flees and to execute the order on him out of the presence of the judge, magistrate or justice.”

All section 24 allows the magistrate to do is to arrest or order the arrest of the offender. In my view subsection (1) and (2) were meant to preserve the dignity of the judge, magistrate or justice by arresting the offender to stop an injustice continuing in his presence and allowing those ordered to arrest the offender to do so in his presence or his absence. In my view while a magistrate can personally effect the arrest, where there are others he can order to do so for him, as was the case in the present case, he will preserve the dignity of his office if he takes the back seat as suggested by subsection (2).

After effecting the arrest the magistrate had no authority to conduct a hearing as no contempt had been committed during the sitting of the court. He should merely have caused the accused to be referred to the nearest police station.

In the circumstances the magistrate erred when he convicted and sentenced the accused person for contempt of court when no contempt in terms of section 71(1)(a) of the Magistrates Court Act had been committed.

The accused’s conviction and sentence are set aside. A warrant for the accused’s immediate release from prison is issued.

KUDYA J, agrees.....