

IN THE COURT OF APPEAL FOR THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

CRIMINAL APPEAL NO. 10 OF 1999
[HIGH COURT MISCA. APPLICATION NO 3/99]
[RELATED TO CRIMINAL TRIAL NO. 50/97]

In the matter between:

MAAME BAFFOUR-AWUAH

Appellant

vs.

THE STATE

Respondent

Mr. D. Bayford and Mr. J. Salbany for the Appellant
Mrs. S. Mangori for the Respondent

J U D G M E N T

CORAM: A.N.E. AMISSAH P.
LORD W.I.S. ALLANBRIDGE J.A.
G. FRIEDMAN J.A.

AMISSAH P.

The State charged one Seponono Harvey with murder, in that on or about 7 October 1996, she killed one Lameck Moyo. Seponono Harvey came before Justice Aboagye for trial in the High Court. She and the deceased lived together as husband and wife just before the death of the deceased. The trial began on 17 November 1998. During the course of the trial, and before the accused had given

evidence, the issue of Mmegi newspaper dated 3rd–10th December 1998, published an article referring to the case. The article bore in bold letters, the title “Murder case to make legal history”.

The writer of the article was one Caitlin Davies. The article contained several quotations of statements alleged to have been made by “Attorney Maame Awuah”, the appellant before us. The learned trial Judge took the view that the article contained material which was contemptuous of his court.

By summons issued on 9th December 1998, the Appellant, Caitlin Davies and the Editor of Mmegi, one Sechele Sechele, were commanded to appear before Justice Aboagye on 11th December 1998 “to show cause why [they] should not be held in contempt for a newspaper article that appeared in the Mmegi [The Reporter] page 5 Vol. No. 48 dated 4th–10th December 1998 headed “Murder case to make legal history” which is related to the case of The State vs. Seponono Harvey CT 50/90 which is on going”. We have no record of what happened on 11th December, but we are informed by Counsel for the Appellant that on that day, only the Appellant appeared in answer to the summons and she asked for an adjournment which was duly granted. All the persons summoned were ordered to appear on 23rd February 1999 to answer the charge in the summons.

On the appointed day when the three persons appeared, Mrs. Davies was represented by Counsel and the other two appeared in person. Their attention was drawn by the Learned Judge to the article and they were asked whether each of them accepted responsibility for the appearance of the article. Mr. Sechele admitted that the article appeared in the paper he edited; Mrs. Caitlin Davies

admitted to being the writer of the article although, as her Counsel explained to the Court, she was not the author of its headline; and the Appellant admitted responsibility for the statements attributed to her in the article. Thereafter, the Learned Judge proceeded by question and answer directed to each of the persons summoned, as he saw fit, to establish their guilt with respect to the contempt charge. Counsel for Mrs. Davies from time to time protested the innocence of his client. Mr. Sechele in turn made the following statement at one point when a question was directed to him:

"I pray that this matter be adjourned because I came here, not knowing that I was accused of contempt. I was not presented with any papers before you. I was not aware that I was standing here as an accused. I pray that I be allowed to seek legal advice on this matter".

Thereafter, the Learned Judge's questions were directed to the Appellant.

One difficulty with this case is that the specific particulars of the contempt charged were never clearly stated in the course of the exchanges between the Judge and the persons charged. That fact is borne out by the plea of Mr. Sechele quoted above. And before Mr. Sechele's statement, the Learned Judge had said to Mrs. Davies:

"Court: Mrs Davies I consider the whole article contemptuous in the sense that it is telling the public what is not true about the case which is before this Court".

A reading of the article, however, does not appear to me to yield to that conclusion. There were large portions of it which could not be described as contemptuous of the Court. It, however, appears from time to time in the record

that the Learned Judge's complaint about the article was that it pre-empted the right of the Court to decide the facts of the case which were in dispute. If that were the charge, the case of contempt of Court would if proved, no doubt, be made against the person or persons responsible for its publication. It would, in that instance, be a case of interference with the proper administration of justice. Even then, I would expect the specific parts of the article which produced the offensive result to be drawn to the attention of the alleged contemnors before they were called upon to show cause. As far back as 1868, their Lordships of Her Majesty's Privy Council in Britain had said in RE POLLARD [1868] L.R. 2 P.C. 106 at page 120, that:

".....no person shall be punished for contempt of court, which is a criminal case, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him."

The Appellant's case was that in giving the interview which Mrs. Davies used in the article, she had no intention to prejudice the Judge's finding of the facts of the case. She merely wanted to highlight an aspect of the proposed defence of Seponono Harvey which was a matter of public interest. It is at this stage relevant to point out that the Appellant is a lawyer who at the material time was working with Metlhaetsile Women's Information Centre, an organisation based in Mochudi which championed the causes of distressed women. It was through that organisation that she got to know Seponono Harvey, the woman accused of murdering her husband. Counsel for the accused at the murder trial had been provided by the organisation.

The Appellant's answer was found unsatisfactory by the learned Judge. Immediately after questioning the three defendants to the contempt summons, the Judge proceeded to give his decision. The judgment is short, and for the sake of clarity I reproduce it in whole. It is as follows:

"Court: Having heard Mrs. Davies and the explanation given by Mr. Anderson I find that Mrs. Davies, a lay person has no intention to prejudice the proceedings at this trial in any way when she interviewed Ms. Baffour Awuah and sent her report to the Mmegi newspaper. She had good reason to believe that she was talking to the right person as Ms. Baffour Awuah's firm was engaged in the defence of the accused and to believe that the facts given to her by Ms. Awuah were the true facts of the case. I accordingly find her not guilty of contempt and discharge her.

Ms. Awuah has admitted having given the published facts to Davies as an attorney who knew that the trial was in progress. She knew that the facts were in dispute and that their publication will be prejudicial in the proceedings. She was not the attorney defending the accused and she had no justification in telling the press her own evidence of the facts in the case as no facts have been found by the Court. I find her very grossly responsible and her half hearted apology. She is to go to prison for 7 days. The case for Mr. Sechele is adjourned to 25th February 1999".

Mr. Sechele obtained the adjournment which he had prayed for because he said he did not know he had come before the Court as an accused, and he had no particulars of the charge against him before hand. He needed legal advice. That was a layman's plea that the particulars of the charge should have been given him in advance. Mrs. Davies was acquitted because she was a lay person who did not

intend to commit a contempt. That must mean that in the opinion of the Judge mens rea was an essential element of the offence charged. The Appellant, on the other hand, was convicted because she was a lawyer who knew that the facts she gave were facts in dispute and that their publication would be prejudicial to the proceedings. In saying that the Appellant was not the attorney defending the accused and she had no justification in telling the press her own evidence, the Learned Judge gave the impression that had she been the lawyer representing the Appellant, what she told Mrs. Davies would have been justified. That gives rise to the question whether what she had said would not have amounted to an act prejudicing the Court's proceedings if it had been said by defence Counsel. That question and the acquittal of Mrs. Davies on the ground that she had not intended to commit contempt of the Court raise questions as to whether intention is a necessary ingredient of the offence; and as to the test to be applied to the act constituting the offence.

From her conviction and sentence, the Appellant has now appealed to this Court. Before dealing with the law on the subject I should refer to the contents of the article which is the subject matter of the charge. Although the learned judge did not identify the specific part or parts of the article which he considered to be offensive, it seems to me that the parts of the article which were attributed by the writer to the Appellant would at least be relevant. The article is set in context by its opening. It said:

"The trial of a woman who suffered 10 years of abuse at the hands of her common law husband, whom she allegedly murdered in 1996, is set to make legal history in Botswana.

Seponono Harvey will be the first person to claim that she was a victim of battered woman syndrome, and should therefore, not be held criminally responsible for her acts.

Metlhaetsile Women's Information Centre in Mochudi will raise the defence of battered women syndrome when they defend Harvey before Lobatse High Court judge, Justice Aboagye.

Harvey was charged with murdering Lameck Moyo, the father of her four children, in September 1996.

Attorney Maame Awuah says that prior to the incident, the couple had lived as husband and wife for 10 years, during which Harvey suffered 'unparalleled abuse at the hands of her partner.'"

The article then went on to state the facts of what, no doubt, was the defence version of what happened. I need not reproduce the details of that. It also stated that Metlhaetsile heard about the case a year later through a social worker who works with prisoners and immediately applied for and secured bail for the accused woman. The article then ended as follows:

"It now remains for Metlhaetsile to convince the court that evidence of the past abuse Harvey suffered from her husband is relevant to the case as a defence to justify her acts.

'Battered woman syndrome is a scientific term to describe an illness of the mind,' Awuah told Mmegi. 'It is induced by continuous abuse and differs from person to person. If a woman does something under the influence of this syndrome, then she is not criminally responsible. Some women just strike back without thinking, the mind of the victim is defective.'

The syndrome has been recognised by judicial systems in the United Kingdom, Canada and USA, among others, but not in Southern Africa so far. Metlhaetsile will present their defence on December 11 and 14."

As stated earlier, the learned Judge convicted the Appellant because in his opinion this article pre-empted his right as the trial judge to find the facts which were in dispute in the murder case.

The offence of contempt of court is not prescribed or defined by statute in Botswana. But the Constitution acknowledges the offence and the punishment for it as a derogation of the protection of the right to personal liberty. Section 5[1][b] of the Constitution provides that:

“No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that it to say –

[b] in execution of the order of a court of record punishing him for contempt of that or another court;”

And although Section 10[8] of the Constitution provides that:

“No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law”

that subsection makes exception specifically of the offence of contempt of Court, in its proviso as follows:

“Provided that nothing in this subsection shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed.”

Our Courts, therefore, have to rely on the common law and judicial precedent to determine the nature and ingredients of the offence of contempt of Court. No doubt there must be an actus reus of the offence. As noticed from the citation above, the Constitution in the proviso to section 10[8], speaks of an “act

or omission constituting the contempt.” That must be a reference to the actus reus. Dicta from our Court and from the Courts of other jurisdictions have also made mens rea a requisite of the offence. Thus in THEMBA JOINA V. THE STATE [Criminal Appeal No. 40 of 1996, judgment given on 17 January 1997, unreported], Steyn J.A. speaking for this Court said, “That mens rea in the form of the intention aforesaid is a requisite element of the offence is clear from a long line of cases in the Courts in Southern Africa.” For this statement Steyn J.A. relied particularly on STEPHEN RUGWARO V. STATE [Criminal Appeal No. 4 of 1996, unreported] and MUSHONGA V. STATE 1994[1] Z.L.R. 296. In the STEPHEN RUGWARO case, a case of summary conviction of a lawyer of contempt, Aguda J.A. speaking for the Court said:

“To amount to contempt punishable summarily, the act of counsel must be calculated or intended to cause an interference with or an obstruction to the smooth administration of justice or of intentionally violating the dignity of the Court.”

In MUSHONGA V. STATE, Gubbay C.J., also dealing with an act of discourtesy of a lawyer to a Court in Zimbabwe, said:

“Non-appearance [or late appearance] of a lawyer in a case may go beyond mere discourtesy and amount to a criminal contempt of court provided that there was an intention to interfere with the process of the Court and the administration of justice.”

The absence of statutory definition of the ingredients of the offence has meant that the test which makes any act or omission liable to punishment for contempt has been variously stated by the judges who have had to deal with the offence. Such statements have sometimes been cast in some general form, as was

done by Aguda J.A. in STEPHEN RUGWARO V. STATE, where he spoke of an act which must be "calculated or intended to cause an interference with or an obstruction to the smooth administration of justice or of intentionally violating the dignity of the Court." But other statements have been more restrictively formulated, confining the definition to the immediate purposes of the particular case, such as in the Zimbabwe case of MUSHONGA V. STATE, where Gubbay C.J. spoke of "an intention to interfere with the process of the court and the administration of justice."

Lest the wrong impression is given, it must be pointed out that the law of contempt is not confined to discourtesy or other improper conduct of lawyers towards Courts. A number of cases deal with statements made, and publications issued, by individuals, newspapers or other media which adversely impinge upon the processes of Courts in the administration of justice.

With regard to such statements, the South African case of S V. VAN NIEKERK 1972[3] S.A. 711[A] had laid down the test that the statement or publication should have the tendency to prejudice or interfere with the administration of justice. Ogilvie Thompson C.J. at page 724, after a review in that case of the authorities, stated:

"Accordingly, and bearing in mind the rationale of the type of contempt of Court presently under consideration, I am of opinion that the principle adopted, over a considerable period of time, by the above-cited cases is a salutary one which should be maintained. I accordingly hold that the test to be applied is whether the statement or document in issue tends to prejudice or interfere with the administration of justice in a pending proceeding."

By the “tendency” test laid down in that case, a statement or document may amount to a contempt although it is assumed that there is no actual risk of prejudice. The English case of ATTORNEY GENERAL V. TIMES NEWSPAPERS By the “tendency” test laid down in that case, a statement or document may LTD. [1973] 3 All ER 54, on the other hand, shows that the English Courts, as a general rule, apply a “real risk of prejudice” test. In a most useful analysis of the speeches of the Law Lords who dealt with that case by Van Heerden J.A. to which I am indebted, that point comes out clearly. As he stated in the South African case of S. V. HARBER AND ANOTHER 1988 [3] S.A. 396[A] at page 420 in this regard:

“It would appear that they were all of the view that apart from a prejudgment of issues, conduct does not constitute the form of contempt under consideration unless it presents a real risk of interference with the administration of justice. Lord Reid [at 63] required a real risk as opposed to a remote possibility, and said that this was an application of the ordinary de minimis principle. In his view there was therefore no contempt if the possibility of influence was remote. Lord Morris of Borth-Y-Gest [at 76] stated that a Court will only find contempt if the risk of prejudice is serious or real or substantial, but did not indicate that he disagreed with Lord Reid’s views. Lord Diplock said [at 75] that he agreed with Lord Reid that, given conduct which presents a real risk as opposed to a mere possibility of interference with the due administration of justice, it is at the very least a technical contempt. Lord Cross of Chelsea [at 84] commented that it is easy to see that any publication which prejudices an issue in pending proceedings ought to be forbidden if there is any real risk that it may influence the tribunal or a prospective witness, while Lord Simon of Glaisdale [at 76] expressed concurrence with Lord Diplock’s elucidation of the basis of the law of contempt of Court and his analysis of its concepts.”

The case, in sum, decides that the test should as a general rule be the real risk of prejudice to the pending proceedings, a test which has been described as less strict for contempt of court than was previously the case. After the above analysis of the speeches in the British House of Lords, Van Heerden J.A. pointed out that:

"It should also be observed that the 'real risk' test was not the only one considered in the TIMES NEWSPAPERS case. It is indeed clear that at least the majority of the Law Lords were of the view that the prejudging of issues in pending proceedings constitutes contempt of court even in the absence of any risk of prejudice to those proceedings. Thus, Lord Reid [at 65] considered that the law would be clearer and easier to apply in practice if it was made a general rule that it is not permissible to prejudge such issues, whilst Lord Cross of Chelsea [at 84] said that an absolute rule against prejudgment is necessary in order to prevent a gradual slide towards trial by newspaper or television. And Lord Diplock [at 72] concluded that conduct which is calculated to prejudice the requirement that once a dispute has been submitted to a court of law there should be no usurpation of the function of the court to decide the dispute, is contempt of court."

Van Heerden J.A. however, concluded that whether the 'tendency' test in South African law or the 'real risk' and 'prejudgment' tests of the English law is applied, in the majority of cases the same result would follow. He put the point this way:

"In my view the application of the 'tendency' test in South African Law and that of the 'real risk' and 'prejudgment' tests in English law would in by far the majority of cases lead to the same result. Indeed, it is difficult to conceive of a case where a prejudgment of a factual issue would not also tend to interfere with the administration of justice in the proceedings concerned. Conversely, in most cases in which the 'tendency' test is satisfied the conduct in question will 'tend to interfere' precisely because it expressly or implicitly constitutes a prejudgment of an issue. Hence I do not think that in the result there is a substantial difference between the single test

adopted in VAN NIEKERK's case and the dual test favoured in the TIMES NEWSPAPERS' case."

With this analysis I do agree. But as impliedly conceded by Van Heerden J.A. there may be some marginal cases, where the application of one test or the other may yield a different result. The dual tests approach adopted in the TIMES NEWSPAPERS' case makes the real risk of prejudice the main rule. This, in cases decided by a judge alone, may, in my view, impose a heavier burden to prove the contempt than the "tendency" test. The English test may also in some cases where prejudgment is not the issue, be inconsistent with a requirement of some form of mens rea. In the particular instances where the act or omission complained of amounts to a prejudgment of the issues before the Court, however, the Law Lords called for an express ban, whatever the intention. Because of the nature of the act and its effect on the administration of justice, an intention to prejudice the proceedings is conclusively presumed. The merit of this exception is obvious, and I can see why that distinction should be made. I have a concern that in so far as the 'tendency' test corresponds more directly to the "prejudgment" test the distinction which their Lordships sought to draw in the TIMES NEWSPAPERS' case would in cases other than those of prejudgment, otherwise, be lost. An exceptional situation meant to deal with the prejudgment of issues would then become the general rule. I would, on that account, if pressed for a choice canvass the adoption by our Courts of the statement of the law in the TIMES NEWSPAPERS' case in preference to the 'tendency' test.

I do not, however, feel obliged to make that choice in this case. Whether the dual tests of 'prejudgment of issues' and 'real risk' or the 'tendency' test is applied in the case before us, the result should be the same because the learned judge, in complaining that the conduct of the appellant pre-empted his right to find the facts in dispute, seems to me to have been charging the appellant with the prejudgment of the issues in the murder case then in progress before him. In this case, therefore, whether the article is taken as a prejudgment of the issues or as having a tendency to interfere with the judicial process, the result would be that the Appellant would be held guilty of contempt of court. The question that I think we should consider, therefore, is to take one test and ask whether by that test the Appellant has committed the offence. As my preference is for the prejudgment test the question which I think I should answer is whether the article did indeed prejudice the issues in the murder case.

Before I turn to that question, I would like to say a word about mens rea within the context of the above analysis. As stated earlier when referring to this Court's decisions in the THEMBA JOINA and STEPHEN RUGWARO cases, we have held that mens rea is a requisite element of the offence of contempt of court. Both cases involved the conduct of lawyers. In such cases, where the same act, such as a lawyer's failure to appear or his lateness in appearing in Court, could be taken either as contemptuous of, or be justified or explained by circumstances showing that the person charged did not intend any discourtesy to, the Court, an intention not to treat the Court with contempt would provide a defence to the alleged contemnor. On the other hand, an act done with the intention of

scandalising or showing contempt to the Court, or interfering with the administration of justice would be held to be a contempt, whatever its nature. But where the act consists of a statement or document which is held to be a prejudgment of issues before the Court or one having a tendency to interfere with the administration of justice, I find it difficult to see how an intention not to prejudice the Court proceedings can absolve the person charged from blame. The question of intention in such cases may be considered in connection with the fact of publication, i.e. whether or not the statement or document was intentionally put in the public domain. But once the determination is made that the statement or document is intentionally published, whether or not the alleged contemnor intended to prejudice the issues or the material published is intended not to have the character of an act tending to interfere with the administration of justice is, to my mind, irrelevant and should not avail him as a defence.

Two paragraphs in the article attributed to the Appellant seem to me to be important in determining the question whether the article constituted a prejudgment of issues before the Court a quo. It will be recalled that from the outset, the article made it clear that “Seponono Harvey [the accused in the case] will be the first person to claim that she was a victim of battered woman syndrome, and should therefore not be held criminally responsible for her acts” At the end of the article appears the statement “It now remains for Metlhaetsile [the organisation defending the accused woman, of which the Appellant was at the time a member] to convince the Court that evidence of the past abuse Harvey suffered from her husband is relevant to the case as a defence to justify her acts. Battered woman’s

syndrome has been recognised by judicial systems in the United Kingdom, Canada and USA, among others, but not in southern Africa so far.” From this, it seems to me quite clear that what the article sought to do was not to prejudge the issues but to state what the defence of the woman to the murder charge was going to be. A statement of one side of an argument to be put to a judge for decision cannot be said to prejudge the argument, especially when it is made clear that it would be the task of the side stating that argument to convince the judge of its validity. The learned judge in his brief judgment in the case made the point that the appellant “was not the attorney defending the accused and had no justification in telling the press her own evidence of the facts as no facts have been found by the court.” This seems to suggest, as pointed out above, that in the learned judge’s view, had the same statements attributed to the appellant been made by the Counsel representing the accused, such statements would not have been offensive. They would not have amounted to a prejudgment of the issues. I do not think, with due respect, that whether she was the attorney of the accused or not makes any difference to the question. If the attorney had made statements which purported to show, not that this was the case of his client, but was the case as found by the trial judge when the judge had not so found, the attorney would equally be guilty.

The article, looked at in its proper context, to me states the facts which the accused person and her Counsel proposed to prove in support of the supposed defence of battered woman’s syndrome. One paragraph of the article, however, appears on the face of it, to be on the border line of prejudgment. That is the statement which says:

“Attorney Maame Awuah says that prior to the incident, the couple had lived as husband and wife for 10 years, during which Harvey suffered ‘unparalleled abuse at the hands of her partner.’”

This paragraph taken in isolation would seem to support a case of prejudgment of the issue whether or not the accused woman had suffered abuse of the nature described. But it could also support the view that this was part of the facts to be put forward in support of the legal proposition for the learned Judge’s consideration. And taken within the context of the whole article, the latter interpretation appears not to be inconsistent with the latter view.

Considering the matter as a whole, I am of the opinion that a case of contempt of Court was not made out against the appellant.

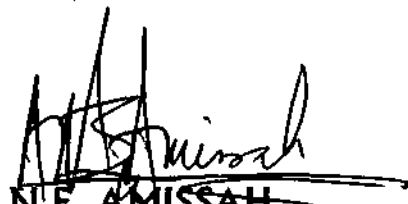
I should add that the summary manner in which the case was taken gives ample and unequivocal support for the warning often issued by appellate Courts against incautious summary committals for contempt of Court. Though the power conferred upon courts to commit summarily for contempt is a salutary one, because of its draconian nature, it ought to be exercised sparingly and with great caution. [see STEPHEN RUGWARO’s case, THEMBA JOINA’s case, both cited above; and IZUORA V. R [1953] 1 All ER 827]. In my view, its use is best justified when exercised in cases where the contempt is committed in facie curiae. That is before, or within the precincts of, the Court. Where, as in this case, the alleged contempt is not in the face of the Court, its use could be oppressive.

In this case, the Appellant and others were brought before the Court without their knowing what the charge against them was. Indeed, the Editor of Mmegi had

to be granted an adjournment to obtain legal advice and brief Counsel at the end of the very judgment which convicted the Appellant. The procedure adopted by the Judge was one of question and answer long after the event, to determine the person or persons actually culpable and to verify what explanation she or they might have for the charge made known to them for the first time when they appeared together in Court, and which as I have pointed out, in any case, lacked particularity from the outset. Counsel representing the State has conceded that the learned trial judge was in error when he proceeded after pronouncing the guilt of the Appellant to sentence the appellant to 7 days imprisonment without asking her whether she had anything to say why sentence, which in this case was of a custodial nature, should not be passed on her. She also conceded that the sentence imposed in the circumstances of the case was unduly severe. It seems to me that the imposition of the sentence without affording the appellant an opportunity to mitigate and its undue severity are all part and parcel of a procedure adopted by the Court a quo which was unsuitable for the case in hand. It clearly demonstrated the weaknesses in summary proceedings for contempt when incautiously used.

I allow the appeal, and quash the conviction and sentence of the Appellant.

DELIVERED IN OPEN COURT AT LOBATSE THIS 23rd DAY OF JULY, 1999.


A.N.E. AMISSAH
[PRESIDENT]

LORD W.I.S. ALLANBRIDGE, I agree

W. I. S. Allanbridge
LORD W.I.S. ALLANBRIDGE
[JUDGE OF APPEAL]

G. FRIEDMAN, I agree

G. Friedman
G. FRIEDMAN
[JUDGE OF APPEAL]