IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A617/07

DATE: 26 FEBRUARY 2010

In the matter between:

S P SAMENTE Appellant

and

THE STATE Respondent

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JUDGMENT

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WRAGGE, AJ

The appellant, a seventeen year old minor, was found guilty of contempt of Court after a summarily enquiry held in terms of Section 170(2) of the Criminal Procedure Act 51 of 1977, as amended ("the Act"), and sentenced to a period of 90 days imprisonment without the option of a fine.

The events leading to the appellant's conviction began on 7 June 2006 when he appeared before a magistrate in the Wynberg Magistrate's Court charged with robbery. The appellant, as a minor, was assisted by Brilliance Semente, and represented by Ms Davids. The matter was remanded to 11

July 2006 for further investigation.

The appellant was released in to the care of his guardian in terms of Section 72 (1) and (b) of the Act. Both the appellant and his guardian were warned to appear on the postponed date. On 11 July 2006 the appellant appeared, this time assisted not by Brilliance Semente, but by his cousin, Zola Mbeni. The matter was once again postponed to 2 August 2006 for further investigation. Both the appellant and Mr Mbeni, as his guardian, were warned to appear. On 2 August 2006 neither the appellant nor his guardian appeared. Ms Fick, the appellant's legal representative was present, but advised that she had no instructions. Warrants were authorised for the arrest of both the appellant and Mr Mbeni as his guardian.

On 17 May 2007 the appellant was brought before the magistrate. On this occasion he was not assisted by Mr Mbeni, in respect of whom it appears that the warrant of arrest is yet to be executed, but by Mabubiso Babo. The record shows that the appellant was again represented by Ms Fick. There is no indication in the magistrate's bench notes, however, that Ms Fick played any part in the summarily enquiry proceedings before the magistrate.

It appears from the magistrate's bench notes that the appellant was advised that a summary enquiry regarding his failure to appear in Court would then be held. He was also advised, firstly, that the onus rested upon him to show on a balance of probabilities that his failure was not due to fault on his part, and/or the provisions of Section 67 A of the Act, and, secondly, in order to satisfy the onus he could testify under oath or call witnesses.

The appellant elected to make an unsworn declaration. He advised the magistrate that he had gone to school on that day. The magistrate nonetheless convicted the appellant of having contravened Section 170(1) of the Act.

In mitigation the appellant advised the Court that he was 18 years of age at that time, and was still at school. He advised further that he could not afford to pay a fine. The magistrate sentenced the appellant to imprisonment for a period of 90 days, being the maximum period of imprisonment provided for in Section 170(2) of the Act.

On 25 May 2007 the appellant applied for leave to appeal against both his conviction and sentence, which leave was granted. The appellant was granted bail in an amount of R500. The bail was paid and the appellant was released from custody

on 30 May 2007. The appellant had therefore spent 13 days in prison.

It was submitted on behalf of the appellant that for a variety of reasons the appellant's procedural rights had been violated. It was submitted further that in any event the magistrate should have accepted the appellant's explanation for his absence from Court.

It was conceded by the State that the appellant's basic procedural rights had indeed been violated, reference was made, in particular, to the judgment of Ngobo, J, as he then was, in S v Singo 2002(4) SA 858 (CC) in which the learned judge (who delivered the unanimous judgment of the Constitutional Court) considered Section 72(4) of the Act, which is worded in a manner similar to Section 170(2). He held (at para 13) that in order to comply with Section 35(3) of the Constitution:

> "The enquiry must be conducted in a fair and impartial manner. As part of the enquiry the presiding officer must establish from the accused whether he or she disputes the fact that he or she was duly warned, given the details of the warning as recorded and that he

> or she failed to comply with the warning. If the accused does not dispute the two basic facts the presiding officer must then establish from the accused the reason for his or her failure to appear in Court. Fairness requires the presiding officer to assist an undefended accused, to explain his or her failure to appear in Court by putting questions to the accused. By its very nature the enquiry envisaged in Section 72(4) appears to contemplate that the presiding officer will play an active role in such an enquiry by putting questions to the accused. The objective of such questions is to elicit the explanation, if any, for the failure to appear in Court. Provided that the questioning is conducted in a fair and impartial manner this will help an undefended accused to put forward the reason for his or her failure to appear in court."

The State agreed that the evidence of the guardian, Zola Mbeni, who was warned together with the appellant on 11 July 2006, was essential to the appellant's explanation of why he did not attend court. Without the evidence of the guardian it was impossible for the magistrate properly to have evaluated

the appellant's explanation. The guardian who accompanied the appellant at the enquiry was not involved in the enquiry in any way and it appeared that the applicant's legal representative played no part either.

It appears from the bench notes that the appellant could well be regarded as being unrepresented for the purposes of the summarily enquiry. It has also not been possible for the appellant and his legal representatives to obtain reasons from the magistrate as to why he convicted the appellant, because the magistrate in question was acting at the time, and presumably is not contactable.

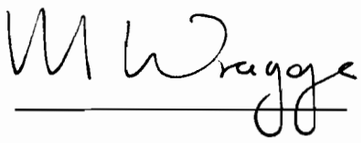
In my view the concessions very fairly made by the State in this matter were indeed rightly made. It is evident from the magistrate's bench notes that the explanation described by Ngobo, J in S v Singo (at para 11) was not given to the appellant in this instance. Although the learned judge's remarks referred to an undefended accused, as I have stated above, it would appear that in this case the appellant might well be regarded as undefended for the purposes of the summary enquiry as his legal representative played no part.

It is also not evident from the record that the enquiry was conducted in a fair and impartial manner. Without evidence or

an explanation from the appellant's guardian, who was present when the appellant was warned to appear on 11 July 2006 it was, in my view, impossible for the magistrate to have made a fair and impartial evaluation of the appellant's explanation for his failure to attend at court.

I point out further that for the reasons given by Ngobo, J in S v Singo *supra* it is unlikely that the reverse onus provision in Section 170(2) of the Act will pass constitutional muster.

In my view, therefore, the appeal should succeed and the appellant's conviction and sentence should be set aside.



WRAGGE, AJ

I agree, the APPEAL SUCCEEDS, CONVICTION AND SENTENCE ARE SET ASIDE.

MOOSA, J

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