IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(TRANSVAALSE PROVINSIALE AFDELING)

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SAAKNOMMER: CC 482/85 DELMAS

1986-05-21

DIE STAAT teen:	PATRICK MABUYA BALEKA EN 21 ANDER
VOOR:	SY EDELE REGTER VAN DIJKHORST EN ASSESSORE: MNR. W.F. KRUGEL PROF. W.A. JOUBERT
NAMENS DIE STAAT:	ADV. P.B. JACOBS ADV. P. FICK ADV. W. HANEKOM
NAMENS DIE VERDEDIGING:	ADV. A. CHASKALSON ADV. G. BIZOS ADV. K. TIP ADV. Z.M. YACOOB ADV. G.J. MARCUS
TOLK:	MNR. B.S.N. SKOSANA
KLAGTE:	(SIEN AKTE VAN BESKULDIGING)
PLEIT:	AL DIE BESKULDIGDES: ONSKULDIG

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KONTRAKTEURS: LUBBE OPNAMES

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COURT RESUMES 1986-05-21

OPEN COURT

COURT: Mr Kuny, I have read your notice of application for leave to appeal. I hold the view that in view of the discrepancy between the cases of the Natal Division and this Division, this is a matter which should go to the Appellate Division. I hold the further view that because it goes to the Appellate Division in any event, Jo-Anne Bekker's case may as well go along with it, hitch a ride. I would like to hear you on whether I should grant you leave to appeal on this sentence. (10)

MR KUNY ADDRESSES COURT IN APPLICATION FOR LEAVE TO APPEAL.

My Lord, in our submission there are certain considerations relating to the sentence which would justify the imposition of a much lower sentence than that was imposed. Your Lordship will see for example in MAKIWANE's case that various considerations were mentioned relating to the question of sentence in this type of matter. One of them is the extent to which the person responsible for the contempt has apologised for his contempt and in this case that was done. In addition the newspaper undertook to publish an apology and explanation and in fact did so. Further-(20) more the question is also to some extent, in our submission, mitigated by the fact that Your Lordship did not find that the editor had acted with dolus directus but that his liability arose because of Your Lordship's finding that it was strict liability and the evidence given before Your Lordship was that he was bona fide in believing that this portion of the article relating to Your Lordship's alleged notes, was in fact a publication of notes emanating from Your Lordship when this error had been induced, the error on the part of the attorney. So, My Lord, all those considerations in our submission would have a bearing on the (30) question of sentence and the sentence which Your Lordship imposed

is certainly/..

is certainly somewhat higher than those which ...

COURT: If you take into account the previous sentences where there was no sentence but the accused were made to pay the costs of the application, those costs would have been much higher than R750.

MR KUNY: Yes, that may be. In our submission R750 was in the circumstances of the matter or may be considered by the Appellate Division in the circumstances to have been an excessive sentence. Our submission is that once Your Lordship is granting leave then the question of sentence should also be dealt with by the Appellate Division. There is another aspect to this matter which is not in the notice of application for leave but which raises the interesting question, and that is the form or procedure in this type of matter. I know that there is authority that Your Lordship was entitled to approach the matter on the basis that you did. I am now dealing with contempt ex facie curia and the indication is that Your Lordship was entitled to do this, but it does raise the rather undesirable situation that Your Lordship in effect is in the first instance complainant, also in effect prosecutor and judge in the same cause and whilst this has been done in the past, and it does seem to be permissible, the Appellate Division may well find it necessary to comment on this type of procedure and to that extent it is also ..

COURT: You can always request them to comment on it. I would like to hear their views.

MR KUNY: Yes. Well, My Lord, I submit it is certainly raised squarely in this particular matter and one which we would like to deal with in the Appellate Division.

COURT: It is, of course, a procedure that has been followed in quite a number of cases.

MR KUNY: Yes, I am aware of it.

COURT: And apart from that it is the only practicle way in which these things can be dealt with.

MR KUNY: Well, certainly in facie curia, yes.

COURT: Ex facie as well because you have a publication and you have to deal with that only in a year's time in the normal procedure, you may as well leave it. But anyway, is there anything you want to add?

MR KUNY: Nothing more to add.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC 482/85

DELMAS

1986-05-21

BEFORE: THE HONOURABLE MR JUSTICE VAN DIJKHORST and
ASSESSORS: MR W.F. KRÜGEL (10)
PROF. W.A. JOUBERT

THE STATE versus PATRICK MABUYA BALEKA AND 21 OTHERS

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

VAN DIJKHORST, J.: Mr Kuny, on behalf of the applicants, Anton Paul Harber and Jo-Ann Bekker, applies for leave to appeal to the Appellate Division against the convictions and in the case of Mr Harber against the sentence which I imposed in this matter of the contempt of court.

The grounds are as follows: It is stated - (20)

"1. The Learned Judge erred in holding -

1.1 that the explanations tendered in evidence by the accused and as supported by the evidence of attorney David Dison were unsatisfactory with regard to the portions of the report headed 'A Judge's own notes on police activities';

1.2 that the passages in the article referred to by the Learned Judge in his judgment and to be found at page 8 columns 1 to 2 and page 9 column 5, constitute contempt of court; (30)

1.3 that the second accused, Jo-Ann Bekker, had the

necessary/...

necessary intention as required in law with regard to the writing and publication of these passages referred to in sub-paragraph 1.2 above on pages 8 to 9 of the publication.

2. Findings of law:

2.1 The Learned Judge erred in holding -

2.1.1 that the liability of the press with regard to contempt of court is strict liability and furthermore that mens rea did not constitute an element of the offence; (10)

2.1.2 alternatively that if mens rea constitutes an element of the offence that a more stringent standard applies with regard to the press and the newspaper editor such as the first accused than with regard to any other person.

2.2 The Learned Judge should have held -

2.2.1 that with regard to the portion entitled 'A Judge's own notes on police activities' (20) the accused, being the editor and journalist respectively, had published this portion of the article erroneously but in good faith believing them to have been the judge's notes which had been recorded on the record of the proceedings then before him and that they accordingly had no mens rea as required in law to commit contempt;

2.2.2 that with regard to the passages referred to in paragraph 1.2 above, namely those (30) appearing on page 8 columns 1 to 2 and page 9

column/..

column 5

(a) these passages had not constituted contempt;

(b) the accused had no intention in writing and publishing such passages to bring the proceedings into contempt by commenting upon or anticipating in any respect whatsoever the ultimate findings of the Court in the trial in question.

3. The sentence:

The sentence imposed upon the first accused, Anton Paul Harber, was in all the circumstances of the case excessive and induces a sense of shock."

As far as grounds 1.1 and 1.2 are concerned, which deal with the findings of fact, I hold that they are without substance. As far as ground 2.1.2 is concerned, what is stated there is factually incorrect. As far as ground 3 is concerned, that is the matter of sentence, in my view the sentence is lenient taking into account that the matter was seen objectively on the basis of strict liability, that being the test which I have applied. In my view to make a scoop out of fictitious judge's notes, is grossly contemptuous. This ground is without merit.

This brings me to ground 2.1.1. In view of the conflicting decisions in the different divisions of the Supreme Court I feel that this aspect, that is the aspect of absolute liability of the press, is clearly arguable and is a matter which should be argued in the Appellate Division. On this ground leave should be granted.

As far as paragraph 1.3 is concerned I would have hesitated to grant leave to Miss Jo-Ann Bekker, had I not granted leave to Anton Paul Harber, but I deem it desirable

that the whole spectrum of mens rea be placed before the Appellate Division and that this case should not be fettered by a limited leave to appeal and on that basis, therefore, I also grant leave to the second accused, Jo-Ann Bekker, to appeal to the Appellate Division.

It is clear from what I have said that I refuse leave to appeal on sentence.

In the result LEAVE TO APPEAL IS GRANTED TO THE APPELLATE DIVISION TO THE FIRST AND SECOND ACCUSED ON CONVICTION ONLY. LEAVE TO APPEAL AGAINST SENTENCE IN RESPECT OF THE FIRST ACCUSED IS REFUSED. (10)

DELMAS TREASON TRIAL 1985-1989

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