SACHS J ABRIDGED JUDGMENT (CONCURRING JUDGMENT, DISSENTING IN PART)

S v Mamabolo

[67] It is easy to guarantee freedom of speech when it is relatively innocuous. The time when it requires constitutional protection is precisely when it hurts. The justification for punishing mere speech, however unfair, inaccurate or offensive it may be, when it does not directly threaten to disrupt, pressurize or prejudice ongoing litigation, must be compelling indeed.

[68] Kriegler J's judgment in this matter [the judgment] states that in certain tightly circumscribed circumstances where language of a serious nature is used, the public interest in protecting the administration of justice and maintaining the rule of law justifies the survival of the offence 'more colourfully than definitively referred to as scandalising the court.' I agree in general terms with this broad proposition. I also accept that the facts in the present case fall far short of substantiating the commission of any such offence, with the result that this court was not obliged to delineate in any detail the full contours of the crime. Furthermore, I agree with the finding that the procedure used in this matter was constitutionally impermissible. The law cannot be above the law; if impartial adjudication is to be at the heart of the administration of justice, a judge should not ordinarily be a judge in his or her own cause.

[69] In a word, I concur in the judgment and order. Nevertheless, I feel it necessary to qualify my concurrence with the gloss that follows. The qualifications relate to two interconnected matters, one semantic, the other substantive. Both touch on the question of the constitutionality of imposing criminal sanctions for speech made outside of court and not directed at pending cases.

[70] My semantic concern lies not with the words 'tendency', 'likelihood' or 'calculated to', which were the subject of vigorous debate at the hearing. I agree that they are variants of a common theme which requires an objective evaluation of probable outcomes, and that it might not in all cases be necessary for the prosecution to prove actual impact upon or direct

prejudice to the administration of justice. My unease relates rather to the emphasis given to the words ‘scandalizing’ and ‘disrepute’. Taken in conjunction, they belong to an archaic vocabulary which fits most uncomfortably into contemporary constitutional analysis. They evoke another age with other values, when a strong measure of awe and respect for the status of the sovereign and his or her judges was considered essential to the maintenance of the public peace. Constitutionalism arose in combat with mystique, and does not easily become its bride. The problem is not simply that the nomenclature is quaint - something not uncommon in legal discourse - but that it can be misleading. As the judgment points out, the heart of the offence lies not in the outrage to the sensibilities of the judicial officers concerned, but in the impact the utterance is likely to have on the administration of justice. The purpose of invoking the criminal law is not essentially to provide a prophylaxis for the good name of the judiciary, as the term scandalizing suggests. It is to ensure that the rule of law in an open and democratic society envisaged by the Constitution is not imperilled. There might be a link between the repute of the judiciary and the maintenance of the rule of law. But it would be a mistake to regard them as synonymous. Indeed, bruising criticism could in many circumstances lead to improvement in the administration of justice. Conversely, the chilling effect of fear of prosecution for criticising the courts might be conducive to its deterioration.

[71] My second and more substantive qualification flows from the first. In an open and democratic society, freedom of speech and the right to expose all public institutions to criticism of the most robust and inconvenient kind, are vital. At the same time, the existence of a vigorous and independent bench capable of protecting all rights, including freedom of speech, is essential. The problem arises when speech is used in a manner calculated to undermine the very institution designed to protect all fundamental rights, including the right to free expression. What further complicates the matter in South Africa is that the very context of a newly developing democracy that requires the greatest openness of debate, necessitates the existence of a judiciary with the strongest capacity to defend that openness. It is in this complex situation that any possible tension between the right to free expression and the capacity of the courts to defend free expression, must be resolved. The interaction between these dual needs is eloquently dealt with in the judgment and requires no further comment from me. I do, however, feel it necessary to clarify my position on the question of justification for the retention of the crime described - unfortunately, in my view - as scandalizing the court.

[72] The Constitution makes it clear that freedom of speech is not absolute. There are express internal qualifiers which permit the prohibition in appropriate circumstances of propaganda for war and what is commonly referred to as hate speech. More generally, section 36 permits limitations which are reasonable and justifiable in an open and democratic society based on dignity, freedom and equality. As the judgment points out, contempt of court can be committed in many ways. Open and democratic societies permit restraints on speech, coupled with appropriate penalties, in the case of statements of a disruptive character made in court during proceedings, as well as of statements made outside of court calculated to pressurise adjudicators or prejudice the outcome of proceedings. Such societies also permit commital proceedings, including imprisonment, to be used to compel recalcitrant persons to comply with court orders. What all these species of contempt of court have in common is the objective of protecting the due administration of justice in actual proceedings. In one way or another they involve sanctions against perverting the course of justice in specific cases. The offence of scandalizing the courts is qualitatively different. It contemplates utterances made outside of court and not relating to ongoing proceedings. My qualification to the judgment relates only to this particular class of utterances, and not to the constitutionality of contempt of court proceedings in general. In my view, statements of such a kind which have no direct bearing on ongoing proceedings, should only attract criminal sanctions if they threaten the administration of justice in a manner analogous to the other forms of punishable contempt of court. To justify limits on freedom of speech, something more is required than simply proof of utterances likely to bring the judiciary into disrepute, whether for alleged ineffectiveness, incompetence, or lack of probity or impartiality. One can give any number of examples of cases where criticisms are made which are likely to diminish the general confidence which the public has in the way justice is being administered and yet, which, I believe, should not give rise to the possibility of prosecution.

[73] Thus, one of the most prominent lawyers of his time in England, Lord Goodman, went famously on record as saying that any client of his who engaged in litigation was a fool, since the processes of court were inordinately costly, debilitating, protracted and uncertain. It is not unheard of in this country for judicial officers to be lambasted by senior political figures for alleged lack of assiduity. Disappointed litigants often explode with angry comments on what they regard as lack of justice. At a more serious and systemic level, major debates, frequently of an acrimonious and wounding kind, take place about the transformation of the judiciary,

with demeaning and disempowering labels being freely thrown around. The press regularly refer to discrepancies in sentence as proof of racism on the bench, and to comments made in sexual violence cases as evidence of judicial sexism.

[74] These statements are sometimes unfair, often discourteous, frequently immoderate and occasionally even scurrilous. By their nature they are all disparaging in one way or another of the manner in which the judiciary functions. Objectively speaking, they are calculated to undermine public confidence in the capacity and moral authority of the courts. They all need to be taken seriously and in appropriate circumstances rebutted or even restrained. Yet, in my view, something more than damage to the repute of the courts is required before they can give rise to sanctions under the criminal law. As Cory JA in *R v Kopyto* said, it is important to note that:

"...there have been no convictions for this offence in England for the past 60 years. Furthermore, cases from the United Kingdom are replete with admonitions that the court's jurisdiction in contempt cases should be exercised with great restraint. These facts are particularly significant given that, like Australia and New Zealand, the United Kingdom does not have a constitutionally-protected guarantee of freedom of expression. For example, in *Attorney-General v Times Newspapers Ltd.,* [1973] 3 All E.R. 54, Lord Reid stated at p. 60: Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice."

[75] I would accordingly suggest that to meet the constitutional standards of reasonableness and justifiability, prosecutions should be based not simply on the expression of words likely to bring the administration of justice into disrepute, but on the additional ingredient of provoking real prejudice. In its context such expression must be likely to have an impact of a sufficiently serious and substantial nature as to pose a real and direct threat to the administration of justice. Thus, it could be part of a wider campaign to promote defiance of the law or to challenge the legitimacy of the constitutional state. Or, more specifically, it could be connected to attempts by persons such as warlords or druglords to achieve *de facto* immunity for themselves. Alternatively, there might be less dramatically confrontational examples where the speech in its context is likely in a direct and significant way to sap the capacity of the courts to function properly. If the speech targets a particular judicial officer, it

should be of such an unwarranted and substantial a character as seriously and unjustifiably to impede that judicial officer in being able to carry on with his or her judicial functions with appropriate dignity and respect. Thus, to call a judge a crook in circumstances where the public is likely to give credence to such allegation, is effectively to challenge and undermine the capacity of that judge to continue with the function of impartial adjudication. It seems appropriate that unwarranted allegations of that kind, if sufficiently serious in the circumstances, could give rise to prosecution, even if the administration of justice in general was not threatened. I agree with the judgment that in matters of this sort, context and impact are decisive. The test that I would propose would be more specific than that indicated in the judgment, though in practice the difference might be slight.

[76] I make the above observations not simply to manifest enthusiasm for the abstract virtues of freedom of speech. Experience in this country indicates that it is precisely when the judiciary lacks prestige that some of its members are most likely to be tempted to shore up its position by means of contempt of court proceedings against its critics. The Deputy President of this Court has pointed out that:

"The divisions and conflicts of our apartheid past have distorted the relationship between, on the one hand, institutions involved in the administration of justice, including the judiciary and, on the other, significant sections of the South African community. This has to be set right now in order to ensure and to maintain a healthy democracy, which fully espouses the values of the new constitutional dispensation . . . A process needs to take place, a process which will not only liberate those members of the judiciary who have felt the alienation, but which will also reassure the formerly oppressed about the judiciary's rededication to justice for all."

The Deputy President went on to state that:

"I have no doubt the role of the courts in the implementation of the pass laws contributed to a diminishing of the esteem which ordinary people might have had for institutions set up to administer justice . . . The role of the judicial system at this level was to put the stamp of legality on a legal framework structured to perpetuate disadvantage and inequality."

Yet when a newspaper with a largely black readership stated in an editorial, under the heading “Hose-Pipe Justice”, that a case involving two white farmers who had thrashed a black farm worker to death was a travesty of justice and that most “non-whites” have had too much experience of law courts both high and low, with or without juries, to be deceived by the falsehood that the fault lay in the jury system, it was successfully prosecuted. Academic research into the impact of race on capital punishment was effectively stifled for many years by the institution of contempt proceedings. In the words of Professor John Dugard, justice became a “cloistered virtue” and this “seriously interfered with the proper pursuit of legal scholarship.”[1] He went on to say that the judicial process in a racially stratified society and the role of the judiciary in an unjust legal order became taboo subjects on which academics wrote at their peril, most preferring the quiet waters of private and commercial law. I would add that the result was not to strengthen the manner in which the judiciary functioned nor to generate public support for the institutions of justice. On the contrary, the more the critics were suppressed, the greater the loss of prestige of the judiciary.

[77] The primary function of the judiciary today is happily to protect a just rather than an unjust legal order. Yet criticism, however robust and painful, is as necessary as ever. It is not just the public that has the right to scrutinize the judiciary, but the judiciary that has the right to have its activities subjected to the most rigorous critique. The health and strength of the judiciary, and its capacity to fulfil time-honoured functions in new and rapidly changing circumstances, demand no less. There are no intrinsically closed areas in an open and democratic society.

[78] It is particularly important that, as the ultimate guardian of free speech, the judiciary show the greatest tolerance to criticism of its own functioning. Its standing in the community can only be undermined if the public are led to draw the inference that in pursuance of the principle that an injury to one is an injury to all, the judicial establishment is closing ranks. In this respect I can do no better than quote and adopt the observations of Chief Justice Gajendragadkar of the Indian Supreme Court:

“We ought never to forget that the power to punish for contempt large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this

power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgements, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct."

If respect for the judiciary is to be regarded as integral to the maintenance of the rule of law, as I believe it should be, such respect will be spontaneous, enduring and real to the degree that it is earned, rather than to the extent that it is commanded.