

[2] The accused was charged with assault with the intention to do grievous bodily harm and assault through threats. The court was of the opinion that *“the accused might suffer from a mental illness or defect”* and ordered that he be dealt with in terms of section 77, 78 and 79 respectively on 4 January 2011. I would refrain from commenting on the procedure adopted in respect hereof as the matter was referred on special review in terms of s108(2) of the Magistrates' Courts Act 32 1944.

[3] The court was informed by the prosecutor that there was no space at the institution for the accused and the matter was postponed several times. On 5 April 2011 the accused was still not detained in an institution for observation. The State applied for a postponement to 5 May 2011. The accused informed the court that he will not leave the *“box”* (dock) before the court grants him bail. The court explained to the accused that he was referred for observation and that the court cannot consider the issue of bail. The accused persisted that he will not leave the *“box”* unless he was granted bail. The following interaction between the magistrate and the accused ensued hereafter:

“Court: Is it a condition that the court must grant you bail else you will not leave the box?”

Accused: I will not leave.

Court: You do that by force or you are forcing the court to grant you bail?

Accused: I need the court to grant me bail.

Court: Are you mentally well?

Accused: Yes
Court: Do you realize you are holding hostage of this court?
Accused: All I want is bail.
Court: I order you for the last time to leave the dock else I will hold you in contempt.
Accused: I will not leave till bail is granted.
Court: I find you guilty of contempt of court. You are sentenced to 3 months imprisonment. You are once more ordered to step down.
Accused: I will not leave
Court: I again find you guilty for contempt of court. You are sentenced to 3 months imprisonment.
Accused: I will not move out of the box till you grant me bail.
Court: I again find you guilty of contempt of court.
Accused: I will not leave this place till you grant me bail.
Court: You are sentenced to 3 months imprisonment."

[4] Section 108(2) of the Magistrates' Courts Act 32 of 1944 prescribes that whenever an accused has been convicted of an offence of contempt of court, the magistrate should without delay transmit a statement, containing the grounds and reasons of his/her proceedings, to the Registrar of the High Court. Furthermore, that the statement has to be certified by him/her to be true and correct and the magistrate is also required to furnish the accused with a copy of the statement. (See *S v PAAIE 2006 (1) NR 250 (HC)*)

[5] The magistrate furnished the Registrar with a certified copy of the applicable part of the record reflecting what transpired in court at the time the accused was convicted of contempt of court. No statement however accompanied the copy of the record. Although the accused was informed

that the proceedings would be sent for review, there was no indication that he was furnished with a copy of the magistrate's statement. The only conclusion was that no such statement was prepared. In this instance it would have assisted the Court if the magistrate had given a statement setting out the grounds for the procedure he adopted when convicting and sentencing the accused in the manner he did.

[6] Although the accused indicated that he was mentally well, the court already concluded that he should be referred for observation. It is not clear why the court proceeded to convict and sentence the accused when there was a real risk that the accused may not have been able to understand the proceedings so as to make a proper defense. The accused may have been charged with the offence but, given the fact that the accused had already been referred for observation, it was irregular to proceed with conviction and sentence without establishing whether he is indeed able to understand the proceedings. In *S v SHIKESHO* 2007 (2) NR 625 (HC) at page 628, C-E, Shilungwe AJ stated the following:

"It is a basic premise of our law that the accused should be able to understand the proceedings against him or her (to instruct a legal representative) as well as to make a proper defence. Consequently, when an accused appears before a presiding magistrate while his or her faculties are impaired by alcohol or drugs, it stands to reason that such person would not be in a position to meaningfully comprehend the proceedings against him or her. In the circumstances, the magistrate should stand down the case to enable the accused to sober

up. It is a gross irregularity to simply convict such accused, to ask for mitigation or to impose a sentence, whilst he or she is under the influence of alcohol or drugs.”

[7] The accused was furthermore not given the opportunity to mitigate or address the court on sentence. Given the irregularities that occurred during the proceedings, it is inevitable that both conviction and sentence for all three counts of contempt of court should be set aside.

[8] In the premises the conviction and sentence imposed by the court on all three counts of contempt of court are set aside.

TOMMASI J

I concur

LIEBENBERG J