1915. *March* 1. WESSELS, CURLEWIS and GREGOROWSKI, JJ.

Magistrate's Court.—Contempt by prisoner.—Punishment.—Sec. 48, Proc. 21 of 1902.

A native accused during his trial asked the interpreter to tell the magistrate that if he were a white man the Court would have allowed a certain question that he had asked, but because he was a black man the Court refused to allow it:
Held, that this constituted an insult to the magistrate, for which he was entitled to punish the accused for contempt of Court under sec. 48 of Proclamation 21 of 1902.
R. v. *Swartz* (1868, Buch. 13) not followed.

Argument on review.

The accused was charged with housebreaking and theft before a magistrate at Roodepoort. In the course of the proceedings the accused through an interpreter sought to ask a question which the magistrate refused to allow. The accused then said to the interpreter: "Tell the magistrate that if I had been a white man he would have allowed the question, but as I am a black man he refused to allow it." The magistrate thereupon sentenced the accused to a fine of £2 10s. for contempt of court under sec. 48 of the Magistrate's Court Proclamation. The question was whether the magistrate was entitled to do this.

J. J. Claassens (at the request of the Court), for the accused: Section 48 does not apply to an accused person. The corresponding section at the Cape is sec. 54 of Act 20 of 1856. On this section see *R.* v. *Swartz* (1868, Buch. 13) where it was held that the section applied only to persons other than a prisoner undergoing trial. See also *R.* v. *Sarah Peters* (5 E.D.C. 187).

The words used do not amount to contempt of court as they were either true or the accused was labouring under a delusion. The contempt must be wilful. There was no direct insult to the Court.

I. P. van Heerden, for the Crown: Sec. 48, Proc. 21 of 1902 was taken from sec. 113, 9 and 10 Vict., Ch. 95 (The English County Court Act). This Act only applied to civil cases and, therefore, no provision was made for a person in custody. But our Act says "any person," which would include an accused person.

Moreover the Court has inherent jurisdiction to punish for contempt.

The words constitute a deliberate insult to the magistrate. He is accused of partiality.

Claassens replied.

WESSELS, J.: In this case the accused was being tried before the assistant resident magistrate, Roodepoort, and during the trial he asked the interpreter to tell the magistrate that if he were a white man the Court would allow a certain question that he had asked, but because he was a black man the Court refused to allow it. That, of course, is an insult. It is equivalent to saying to the magistrate: "You are not conducting the case fairly; you are making a distinction, in the conduct of the case, between myself and a white man, and you are treating me far more severely than you would treat a white man under similar circumstances." Now whether in every case of that kind in a magistrate's court the magistrate ought or ought not to take notice of the matter, depends very much on the circumstances of the case, and that is a matter which must be left very largely to the discretion of the magistrate. However, the magistrate, on the strength of sec. 48 of Proc. 21 of 1902, convicted the accused of contempt of court and fined him £2 or seven days' imprisonment.

The papers came before the Judge in Chambers, my brother CURLEWIS, and he, finding the Cape cases were against such a conviction, thought it advisable that the matter should be argued before the full Court. Now it appears, from what Mr. *Claassens* has said, that there are two cases in point at the Cape. There is the case of *R.* v. *Swartz* (1868, Buch., p. 13). The judgment is by Mr. Justice CONNOR, and *R.* v. *Sarah Peters* (5 E.D.C. 187). In the first case the learned Judge came to the conclusion that sec. 54 of the Cape Act (20 of 1856) did not apply to prisoners, but only applied to witnesses, and, apparently, this view has been taken in the Cape ever since that decision was given. The authority for the decision is a high authority, and, therefore, it is with hesitation that I question its correctness. But it seems to me that sec. 48 is sufficiently wide to cover a prisoner as well as a witness, and would lead me to the conclusion that the legislature must have intended a witness or any person present in the Court, as there is no other provision in our law by which the magistrate would have the right to punish a prisoner in a case where he insults the Court, and surely every court of record must have that power. Every magistrate, and every judge, must have the power to compel decency of behaviour on the part of the prisoner, and to see that there is proper respect shown to the Bench, because if the magistrate or judge did not possess that power the Court would very

soon develop into a bear-garden. I cannot conceive, therefore, that the legislature deliberately intended that prisoners should be able to insult magistrates to the full of their bent. The words of sec. 48 are very clear. They are: "If any person shall wilfully insult the resident magistrate during his sitting in any such court, or any clerk or messenger or other officer of any such court during his attendance therein, or shall wilfully interrupt the proceedings of such court, or otherwise misbehave in such court, it shall be lawful for any constable or private person by order of the said court to take such offender into custody and to detain him until the rising of the court, and the resident magistrate shall be empowered, if he shall think fit, by warrant under his hand to commit any person so offending to prison for any period not exceeding seven days, or to impose upon such person a fine not exceeding £5 for every such offence, and in default of payment thereof to commit the offender to prison for any time not exceeding seven days . . . ."

Apparently in *R.* v. *Swartz* the Judge came to the conclusion that because section 54 provided that a person who insulted the magistrate could be detained until the rising of the Court, it could not affect the prisoner, because the prisoner was in custody already, therefore he could not be detained until the rising of the Court. Now, I may say, I cannot understand that argument. First, there is nothing to prevent a prisoner who is being tried from being acquitted, and if the prisoner has been acquitted then he may still be detained until the rising of the Court. But it appears to me that section 48 aims at two different things. It first aims at the small trifling insult, and then it aims at the greater. For a trifling insult it is lawful for the magistrate, if he thinks fit, to detain the person who insults the court until the end of the sitting; but if he thinks that the insult is of a graver nature, then he is entitled to issue a warrant and detain the person for a period of seven days if he so chooses, or to fine him. Now that being the case, it seems to me that it is rather interpreting section 48 too narrowly to confine the operation of the section entirely to witnesses or to a member of the audience. It seems to me that it was intended by the legislature to apply to all persons in the court, whether such person be a prisoner or a witness, or an ordinary member of the audience. That being the case, I think that the magistrate was entitled to convict for contempt of court, and he was entitled to impose the fine that he did. The proceedings are, therefore, confirmed.

CURLEWIS, J.: When this matter came before me in Chambers I decided to refer it for argument to this Court, not because I had any doubt as to whether the words used by the accused amounted to a wilful insult to the magistrate, but on account of the two Cape decisions—*R.* v. *Swartz* (1868, Buch., p. 13) and *R.* v. *Sarah Peters* (5 E.D.C. 187). I was not inclined to agree with those decisions, but as a matter of respect for them I thought it better to refer the case to this Court. I must say I cannot understand the reasoning of the decision in the first case: *R.* v. *Swartz*. The fact that the prisoner happens to be in custody and is standing his trial does not seem to me to debar the magistrate from adopting either one of the two courses open to him under sec. 48 of Proc. 21 of 1902. In the case of a prisoner in custody in a preparatory examination like this he would not adopt the course of committing him to custody until the rising of the Court, but could adopt the other course of imposing upon him a fine as fixed under the statute. It is quite possible that the magistrate might find no case against the accused and discharge him at the conclusion of the preparatory examination in which event he could still detain him until the rising of the Court. In my opinion, if the person who insults the magistrate is in custody, that does not debar the magistrate from fining him as provided for under section 48.

GREGOROWSKI, J.: I am of the same opinion.

[A. D.]

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*CUNNINGHAM v. INCORPORATED LAW SOCIETY.

1915. *March* 2. WESSELS, CURLEWIS and GREGOROWSKI, JJ.

Attorney.—Convicted of theft.—Name removed from roll.—Reinstatement after seven years.—Evidence of good conduct.

An attorney, who had been convicted of theft and removed from the roll, applied seven years afterwards for reinstatement, *Held*, that as he had led a decent life during the seven years, the application should be granted.
Lambert v. *Incorporated Law Society* (1912, T.P.D. 688) followed.

Application for reinstatement as an attorney.

Applicant's name had been removed from the roll on October 26, 1908, in consequence of a conviction by a magistrate of theft by

* *Cf. De Jongh* v. *Incorporated Law Society* (1914, T.P.D., 80).—ED.