

SOUTH AFRICA / JUDGMENT

Bakos v S (5/5376/07) [2009] ZAGPJHC 69; 2010 (1) SACR 523 (GSJ) (1 December 2009)

[2009] ZAGPJHC 69

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mokgoatlheng, Mabesela

CASE / FILE NUMBER

5/5376/07

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Reportable

Magistrate Serial Number: 03/2008

Case Number: 5/5376/07

Reference Number JHS 2008/0041

In the

matter between: TREVOR
 BAKOS
 and
 THE
 STATE

JUDGMENT

MOKGOATLHENG J

- (1) This matter came to me by way of review in terms of section 304(2) of the Criminal Procedure Act 51 of 1977. The accused legally unrepresented, was arraigned and convicted on a charge of assault in the Johannesburg Magistrate Court. He was sentenced to a fine of R2 000.00 or 4 months imprisonment, wholly suspended for a period of 5 years on certain conditions.

- (2) After the closure of the state's case, the Magistrate, in apprising the accused of his procedural rights, advised him that he had a choice to either testify under the prescribed oath, call witnesses, or close his case if he so desired. The Magistrate in asking the accused if he wanted to testify under oath, engaged him in the following discourse. The accused: "I cannot take the oath because it is against my religious beliefs but I can only speak honestly and truthfully out of my mouth...." The Magistrate: "do you want to testify under oath or you do not". The accused: "No your Honour." The Magistrate : "You are satisfied so it is your case." The accused "I have got nothing more to add,....." The Magistrate: "do you understand what I am saying, you understand the explanation I gave you? The accused: "I understand your honour".
- (3) The Magistrate again explained to the accused that he may adduce evidence under oath, or call witnesses to testify in his defence. The accused: "If I call a witness can he stand next to me....unless he (the accused's witness) does not object to taking the oath himself." The Magistrate: "Let us try to understand one another. Do you want to give evidence or you do not". The accused: "I cannot take the oath myself your honour but if he (the accused's witness) has got no objection, well that is his side not my own side." The Magistrate: "So you do not want to testify. The accused: "No I cannot your honour."
- (4) The accused, after emphatically stating that he was not prepared to take the prescribed oath and testify thereunder, called a witness who testified under oath in his defence. After the conclusion of the witness' evidence the accused closed his case.
- (5) In his judgment, the Magistrate stated: "it was clear and evident that the accused was so afraid....to go into the witness box because he was going to concede certain aspects during cross examination by the prosecutor." Notionally or conceptually, from the interaction between the accused and the Magistrate, there appears to be no factual basis or justification this conclusion.
- (6) It is patent that the Magistrate laboured under the misapprehension that because the accused refused to take the prescribed oath, and had stated that he cannot testify under the prescribed oath, the accused had elected not to testify in his defence by exercising his right to remain silent, as envisaged in section 35(3)(h) of The Constitution of the Republic of South Africa Act 108 of 1996.
- (7) The Magistrate, in enquiring whether the accused desired to testify under the prescribed oath, was by implication invoking the provisions of section 162 of the Criminal Procedure Act 51 of 1977.
1977. For purposes of elucidation, the two sections applicable in addressing the principles governing witnesses testifying in criminal proceedings are encapsulated in sections 162, 163 and 164 of Act 51 of 1977 which are fully quoted hereunder, except section 164 which is irrelevant for purposes of this review.

Section 162 provides:

Witnesses to be examined under oath

“(1) Subject to the provisions of section 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:

‘I swear that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.’

- (2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.”

and

Section 163 provides:

“Affirmation in lieu of oath

Any person who is or may be required to take the oath and–

who objects to taking the oath;

who objects to taking the oath in the prescribed form;

who does not consider the oath in the prescribed form, binding on his conscience; or

who informs the presiding judge or, as the case may be, the presiding judicial officer, that he has no religious belief or that

the taking of the oath is contrary to his religious belief,

shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in

the case of a superior court, the presiding judge or the registrar of the court:–

‘I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth.’

- (2) Such affirmation shall have the same legal force and effect as if the person making it had taken the oath.
- (3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.”
- (8) In *S v Gallant* 2008 (1) SACR 196 at 199 (ECD) para 4 –para 6 Revelas J, in interpreting sections 162, 163 and 164 of Act 51 of 1977 stated: “[4] The provision in section 162(1) of the Act, that witnesses must be examined under oath in criminal proceedings, is peremptory, and can only be departed from in the circumstances set out in sections 163 and 164 of the Act. Non-compliance results in the inadmissibility of the testimony in question. (Vide *S v Ndlela* 1984

(1) SA 223 (N) at 225G-H; S v Mashava 1994 (1) SACR 224 (T) at 228f-g; S v N 1996 (2) SACR 225 (C) at 227a-c; S v B 2003 (1) SACR 52 (SCA) in para 14.)

[5] Section 163(1) of the Act relates to a witness who is required to take the oath, but who objects to taking the oath, or to its prescribed form, or advises the court that the oath (in any form) does not bind his or her conscience, or objects to it on the basis of his or her religious beliefs or lack thereof. Such a witness must then make an affirmation, also in accordance with a prescribed formula.

[6] Section 164 applies to the ignorant witness who is unable to appreciate the nature and import of the oath or affirmation, because

of youth, defective education or another cause. In such cases the oath or affirmation may be substituted with an admonition by the judge or judicial officer, to speak the truth, the whole truth, and nothing but the truth. This section presupposes a finding as to the extent of the ignorance and the reason for it. No express enquiry or finding is necessary (S v B supra at 63b-c)."

(9) The Magistrate's conduct incontrovertibly shows that he did not fully appreciate the distinction between the accused's

election not to testify under the prescribed oath because of his religious beliefs, and the accused's election not to testify,

purely as an exercise of his section 35(3)(h) constitutional right to remain silent as a choice made pursuant to his defence.

(10) It is patent that the accused in his interaction with the Magistrate desired to testify in his defence but not under the prescribed oath. The accused's intention to testify, but not to do so under the prescribed oath, is gleaned from the manner in which he enunciated and qualified his refusal. "I cannot take the oath because it is against my religious beliefs but I can only speak honestly and truthfully out of my mouth."

(11) The accused on being asked if he did not want to testify under the prescribed oath answered in the double negative: "No I cannot your honour" The accused did not pertinently state that he did not want to testify. It is quite evident that the Magistrate incorrectly interpreted the accused's refusal to testify under the prescribed oath because of his religious beliefs as a refusal to testify in his defence. Because of the Magistrate's lack of understanding and appreciation of the accused's nuanced refusal to testify under the prescribed oath, he failed to invoke the provisions of section 163 of the Criminal Procedure Act 51 of 1977 as enjoined under the prevailing circumstances.

(12) The accused's refusal to testify under the prescribed oath because of his religious beliefs, obliged the Magistrate to enquire and establish the reasons which precluded the accused from so testifying. The Magistrate's failure to conduct such an enquiry constituted a procedural misdirection which compounded into a procedural irregularity in that the accused was denied his constitutional right to testify in his defence.

- (13) The accused's reason for refusing to testify was predicated on the fact that he was not prepared and did not desire to testify under the prescribed oath as envisaged in section 162 of Criminal Procedure Act 51/1977>. The accused's refusal to testify was not premised on the exercise of his constitutional right to remain silent in terms of section 35(3)(h) of the Constitution of the Republic of South Africa Act 108 of 1996 in the sense that he appreciated, understood and knew that he could have testified in his defence if he so elected under affirmation in lieu of oath in terms of section 163 of Act 51 of 1977 at the Magistrate's direction.
- (14) The Magistrate, by his failure to invoke the provisions of section 163 of Act 51 of 1977 which would then entitle the accused to testify under affirmation in lieu of oath, committed a gross irregularity which vitiated the proceedings. The Magistrate's conduct clearly resulted in the accused not being afforded a fair trial as envisaged in section 35(3) of the Constitution, consequently, the accused's conviction and sentence fall to be set aside in that there has been in a failure of justice.
- (15) In the premises, the following order is made:
- (a) the conviction and sentence are set aside.

Signed at Johannesburg on the 1st December 2009.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

I, agree

MABESELE AJ

ACTING JUDGE OF THE HIGH COURT

THE CHIEF MAGISTRATE

JOHANNESBURG MAGISTRATE'S COURT

THE DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

JOHANNESBURG

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