

SOUTH AFRICA / JUDGMENT

Nobela v S (A573/2015) [2017] ZAGPPHC 768 (27 October 2017)

[2017] ZAGPPHC 768**COURT**

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen, MA Lukhaimane

CASE / FILE NUMBER

A573/2015

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****REPUBLIC****OF SOUTH AFRICA****Case****Number: A573/2015****DATE:**

27/10/2017

Not

reportable

Not

of interest to other judges

Revised.

21/10/2017

In

the matter between:

RHULANI

NOBELA Appellant

and

THE

STATE Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] In this matter, the appeal was upheld and the conviction and sentence set aside. The court indicated that the reasons for the order will follow. The reasons appear infra.

Reasons

- [2] The appellant was convicted of contravening the provisions of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Sexual Offences and Related Matters Amendment Act, 32 of 2007 and sentenced to 18 years imprisonment.
- [3] The appeal was against conviction and sentence.

Point-in-limine

- [4] Ms Masete, counsel for the appellant, raised the non-compliance with the provisions of section 162(1) of the Criminal Procedure Act, 51 of 1977 in respect of the evidence of the complainant, as a point-in-limine.
- [5] Section 162(1) reads as follows:
- "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 the superior court, by the presiding judge or the registrar of court, ..."*
- [6] The provisions of section 162 are peremptory and non-compliance renders the testimony in question inadmissible. [See: S v Matshivha 2014
- (1) SACR 29 SCA]
- [7] The aforesaid section is, however, subject to the provisions of section 163 and 164. In casu the provisions of section 164 is applicable.

- [8] Section 164(1) provides as follows:

"Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings, without taking the oath or making the affirmation. Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth."

- [9] In complying with the provisions of section 162(1), the following transpired in the court a quo:

"COURT: How old are you?

WITNESS: 17.

COURT: Do you know what it is to tell the truth?

WITNESS: Yes.

COURT: Do you know what it is to take an oath?

WITNESS: No."

[10] Having received the aforesaid answer, the provisions of section 164(1) became applicable and the court a quo erred in administering the oath.

[11] Notwithstanding the aforesaid, the court a quo proceeded as follows:

"COURT: If I tell you that you are going to tell the truth, the whole truth and nothing but the truth, if so raise up your right hand and say so help me God, will you have a problem with that?

WITNESS: No.

COURT: Do raise up your right hand and say so help me God.

WITNESS: So help me God. [African language]"

[12] The court a quo's conduct is a textbook example of how it should not be done.

[13] In *Commentary on the Criminal Procedure Act Du Toit et al*, 22-70, the authors with reference to the *S v Matshivha* matter *supra* explained the correct procedure to be followed in a case such as the present:

"It is very important for a court to identify clearly what aspect it is investigating in its inquiry - is it to establish the ability to distinguish between truth and falsity, which goes to whether the witness is competent in the first place, or is it to establish the witness' ability to understand the nature and import of the oath or affirmation, which goes to whether the witness should, instead of taking the oath, be admonished to speak the truth in terms of s 164(1). In *S v Matshivha* 2014

(1) SACR 29 (SCA) Zondi AJA examined the questions that the trial court had put to the child witness and concluded that it was not clear, from those questions, whether their purpose was to establish their competence as witnesses or their ability to understand the nature and purpose of the oath. The court has thus failed to comply with its duties under ss 162 and

164. And, since the thrust of the Constitutional Court's judgment in *Director of Public Prosecutions, Transvaal* (*supra*) was that reliability was the crucial question, it had to be concluded that no reliance could be placed on the evidence of the two children.

The court in *Matshivha* (*supra*) stressed, further, that if it is found that a witness does not understand the nature and import of the oath, it is essential for a court, before it admonishes the witness to tell the truth, to first establish, whether the witness is able to distinguish between truth and falsity - whether, that is, the witness is competent. Once it has established that a witness is competent, the next step is to ascertain whether or not he or she is able to understand the nature and import of the oath or affirmation. If not, the witness must be admonished to speak the truth

in terms of s 164(1) in order to be allowed to testify without taking the oath or making the affirmation, as the wording of section 164(1) is peremptory: S v Mbokazi (unreported, KZP case AR581/14, 17 July

2015) at [7] A failure to admonish the witness renders the evidence of the witness inadmissible."

[14] Ms Mnkuni, counsel for the State, submitted that it goes without saying that a 17 year old child knows the difference between the truth and falsity. This submission does not assist the State. Both section 162 and 164 is peremptory. Once it is established that a witness does not appreciate the nature and import of the oath, section 162 is no longer applicable.

[15] The discussion supra, makes it abundantly clear that the provisions of section 164 then come into play. The court a quo did not question the witness to determine her competency to testify nor did the court admonish the witness to tell the truth as envisaged in section 164(1).

[16] Consequently her evidence is inadmissible and the point-in-limine is upheld.

[17] Without the evidence of the complainant, the State did not establish a case beyond reasonable doubt and it followed that the appeal had to succeed.

N JANSE VAN NIEUWENHUIZEN J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree.

MA LUKHAIMANE AJ

APPEARANCES

Counsel for the Appellant: Advocate M. M. P. Masete

Instructed by: Pretoria Justice Centre

Counsel for the Respondent Advocate E.D. Mnguni

Instructed by: Director of Public Prosecutions

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