

SOUTH AFRICA / JUDGMENT

S v Nkettle (100/2015) [2015] ZAFSHC 128 (25 June 2015)

[2015] ZAFSHC 128

COURT

Free State High Court, Bloemfontein

BEFORE

A Williams, S Naidoo

CASE / FILE NUMBER

100/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Review

Number: 100/2015

In

the review of:

THE
STATE
and
MOKOENA LOURENS NKETLE

CORAM:

NAIDOO, J et WILLIAMS, AJ

JUDGMENT

BY: WILLIAMS, AJ

DELIVERED ON: 25 JUNE 2015

- [1] This is a special review under section 304(4) of Act 51 of 1977, as requested by the regional magistrate of Bethlehem, PJ Visser. The reasons for his request have been set out in a letter of the said magistrate addressed to the registrar of this high court dated 1 June 2015.
- [2] The accused has been charged with rape and the matter is currently part-heard in the regional court sitting at Senekal. On the 20th of May 2015 the accused pleaded not guilty to one count of rape, in contravention of section 3 of Act 32 of 2007. He pleaded that he in fact had consensual sex with the complainant. On the first day of trial the state called the doctor who confirmed that he did examine the complainant after a complaint had been made. After the doctor's evidence, the matter was postponed for further trial on 27 May 2015.
- [3] On 27 May 2015 the state led the evidence of the complainant's mother, Mrs AM M.. It was the evidence of this witness, and particularly the conduct of the defence attorney, Mr Heidtmann, that forms the basis for the special review and for the request that proceedings be set aside.
- [4] Mrs M. testified that she was the mother of the complainant and that after the alleged rape took place, a meeting was called between her family and the family of the accused. To the surprise and consternation of the learned magistrate, the witness testified that Mr Heidtmann had been involved and in fact played a central role in a subsequent meeting at his own offices. Both the accused and the complainant and their respective families had been present. The matter was discussed by all parties under the guidance of Mr Heidtmann as is apparent from the evidence of Mrs M.. I quote the following verbatim from page 20 and 21 of the record:

Prosecutor: "Now on the previous occasion, the complainant was not here. Do you confirm that you went to the attorney of the accused to tell him that the child cannot ... or the daughter cannot come the previous date? You informed the attorney about her unavailability? ...

Yes, I did inform my attorney.

Who is your attorney? ...

I see the witness is pointing directly to the attorney sitting next to Mr. Moseti.

Court: To defence attorney."

Thereafter on page 24 and further after cross-examination and re-examination, the magistrate questioned the witness as follows:

Court: "Ma-am, why did you during your evidence referred to Mr. Heikman as your attorney?...

Your Worship from previous time, this attorney who is present at Court had been helping us whenever we had legal problems.

Were you a client of his? ...

That is correct.

So did you ever go to Mr. Heidtmann's office? ...

Yes I did.

Was this specific incident with your daughter discussed with Mr. Heidtmann? ...

Yes, indeed.

When was that? ...

I forgot the date, but it was on Friday.

And who was present when you visited their offices? Who was present? Just yourself or who else? ... After the family meeting I requested the family to go along with me to that attorney's office.

So it was yourself and the family of the accused? ... It was myself, accused's sister, the accused and the complainant,

yes."

[5] During re-examination by Mr Heidtmann he put it to the witness that he had last acted for her during 2014. She could not recall as it had been a long time. He then attempted to persuade the witness that he had not played any role in the present matter. On page 27 of the record the following appears:

"Now let us come back to this matter. When you were in my office, can you recall what I told you? ... I do not recall. I am getting confused.

Let me refresh... Is it not so that I told you that I cannot help you. You must go and see the prosecutor or the police or the investigating officer? ... No, you help... No you helped me.

How did I helped you? ... I say you helped me, my things went well in the previous time, and even now also you helped me by

understanding the peace that is between the families at this present moment."

Thereafter, Mr Heidtmann withdrew as the defence attorney.

[6] For Mr Heidtmann as an attorney, to have a meeting with complainant and the accused together with respective families and thereafter

represent the accused in criminal proceedings in the regional court, amounts to gross misconduct and unethical behaviour. The learned

magistrate was extremely concerned when Mr Heidtmann's conduct was exposed and he immediately stopped the proceedings in order to have the high court review the matter.

[7] As such I would propose that the following orders be made:

1. The entire proceedings before regional court magistrate PJ Visser under case number SH49/2014 are set aside.
2. The trial must begin de novo before another regional magistrate.

A. WILLIAMS, AJ

I agree, it is so ordered:

S. NAIDOO, J

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