

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 10/2014

In the matter between:

NKOKETSENG ELLIOT PILANE

Appellant

and

THE STATE

Respondent

CRIMINAL APPEAL

HENDRICKS J; DJAJE AJ

DATE OF HEARING

20 FEBRUARY 2015

DATE OF JUDGMENT

05 MARCH 2015

COUNSEL FOR THE APPELLANT

ADV ENGELBRECHT SC

With ADV GROENEWALD

COUNSEL FOR THE RESPONDENT

ADVJACOBS

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JUDGMENT

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## HENDRICKS' J

[1] The Appellant was arraigned and stood trial in the Regional Court, held at Rustenburg on a charge of rape. He was convicted and sentenced to undergo an effective term of imprisonment for ten (10) years. Leave to appeal was granted against the conviction; hence the present appeal.

[2] The present appeal centres around two issues, namely:-

(a) whether the oath was properly administered upon the witnesses and the effect thereof;

and

(b) whether the guilt of the Appellant was proved beyond a reasonable doubt.

[3] In the notes in terms of Practice Directive 13 issued in this Court, the issue of the administering of the oath is pertinently raised on behalf of the Appellant. In reply the Respondent also identified this as one of the issues that need to be considered and adjudicated by this Court. In the summary the Respondent states:-

*"There are basically only two aspects in contention, firstly whether the oath was administered according to the law upon*

*the witnesses and secondly whether the sexual act was with or without consent."*

- [4] The following appears from the record when the complainant and the two state witnesses were called to testify:-

COURT: *Full names and surname?*

WITNESS: *Girlie Kagiso Phule Your Worship.*

COURT: *Let her take the oath.*

INTERPRETER: *Sworn in Your Worship.*

EVIDENCE FOR THE STATE

GIRLIE KAGISO PHULE d.u.o. (Through Interpreter).

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COURT: *Full names and surname?*

WITNESS: *Baby Girl Matsogonola Malukane Your Worship.*

COURT: *Please administer the oath.*

INTERPRETER: *Witness sworn in Your Worship*

BABY GIRL MATSOGONOLA MALUKANE d.u.o. (Through Interpreter).

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COURT: *Full names and surname?*

WITNESS: *Cyphus Lekweni.*

COURT: *Administer the oath please.*

INTERPRETER: *Sworn in Your Worship.*

CYPHUS LEKWENI d.u.o. (Through Interpreter)."

All three state witnesses were therefore sworn in by the interpreter and not by the presiding officer. The question arises as to whether this is proper.

- [5] The Appellant contends that the manner in which the oath was administered constitutes an irregularity that vitiates the proceedings. Section 162 of the Criminal Procedure Act 51 of 1977, as amended, provides:-

*"(1) Subject to the provisions of sections 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."*

It was submitted on behalf of the Appellant that the provisions of  
aforementioned section 162 is peremptory.

See:- **S v Mashava** 1994 (1) SACR 224 (T).

- [6] Furthermore, the oath must be administered by a judicial officer and  
not the interpreter. In the event that the oath is not administered by  
the judicial officer as prescribed by section 162, the witnesses were  
not properly sworn in and their evidence is therefore inadmissible.
- [7] With reference to S v Orphanou and Others 1990 (2) SACR 427  
(W) it was contended on behalf of the Respondent that non-  
compliance with the provisions of section 162 does not render the  
evidence of these witnesses inadmissible. In this case Leveson J  
remarks as follows:-

*"I then put it to him that this postulated that he had throughout  
been conscious of the fact that, in permitting the oath to be  
administered by the orderly, I had failed to comply with the  
requirements of s 162 (1) from the outset and pointed out that  
he had done nothing to draw my attention to the irregularity.  
Instead he had proceeded to cross-examine each individual  
witness at length ... I have asked him to confirm these facts  
because the question had been presented itself to my mind that  
by his conduct he had waived his right to rely upon the  
irregularities."*

*"The conclusion then is that in this Division there is a general  
practice for the oath to be administered by these various  
persons but mainly by Judges' clerks. This practice raises the*

question which is dealt with by Steyn Uitleg van Wette *sth* ed at 157 under the maxim *subsecuta observatio in contemporaneu exposition*. The essence of what Steyn says is that we must look to the usual practice of the persons who use the statute in order to see how the statute is interpreted. On that basis it could be said that the Judges of this Division regard their clerks as comprising the persons who are Registrars of the Court and, in their absence, any of the other available Courtroom officials appointed to fulfil their duties *pro tern*. From that it follows that in this Division the Judges interpret the section as referring to clerks and consider the phrase 'Registrar of the Court' as sufficiently wide to include any Court official whose duties are not so exacting that they cannot be appointed by the Judges for the limited purpose of administering the oath to witnesses from time to time. On that basis the appointment of Constable Leadbiter to act as my clerk in a part-time and temporary capacity and to administer the oath to witnesses under my direction and supervision would not appear to be in breach of the section. But when application is made for a special entry it is not for me to refuse it merely because I consider that there has been no irregularity. Consequently I shall return to this point later."

I respectfully disagree with the contention by the Respondent that the provisions of section 162 is not peremptory. The use of the word "shall" by the legislature is a clear indication that it was intended to be peremptory.

**See:- S v Raghubar 2013 (1) SACR 398 SCA**

[8] In *Matshivha v The State* (656/12) [2013] ZASCA 124 (23 September 2013) the Supreme Court of Appeal stated the following:-

*"{10] The reading of section 162 (1) makes it clear that, with the exception of certain categories of witnesses either falling under s 163 or 164, it is peremptory for all witnesses in criminal trials to be examined under oath. And the testimony of a witness who has not been placed under oath properly, has not made a proper: affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible."*

(my underlining.)

I am in full agreement with this finding. Based on the principle of *stare decisis* this Court is also bound to follow the decisions in the *Raghubar* and *Matshivha* cases.

[9] The effect is also clear. If an oath was not properly administered in terms of the prescripts of section 162 then what was said by the witness lacks the status and character of evidence. In other words, whatever was said by the witness is not evidence and is inadmissible. That being the case, there is therefore no evidence before this Court in the present appeal to adjudicate upon. The irregularity committed by the Regional Magistrate vitiates the entire proceedings. It is therefore not necessary to consider the "evidence" that was tendered during the trial in order to establish whether or not the State

succeeded in proving the guilt of the Appellant beyond reasonable doubt.

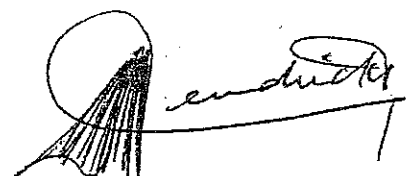
In my view, the appeal must succeed and the conviction and sentence should be set aside.

**Order:-**

[10] Consequently, the following order is made:-

[i] The appeal is upheld.

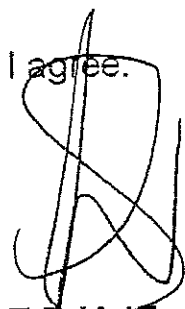
[ii] The conviction and sentence is set aside.



**R D HENDRICKS**

**JUDGE OF THE HIGH COURT**

I agree.



**T DJAJE**

**ACTING JUDGE OF THE HIGH COURT**