IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION: MTHATHA

CASE NO CA&R14/2023

In the matter between

MONGEZI DLEPHU **APPELLANT**

and

THE STATE **RESPONDENT**

APPEAL JUDGMENT

NORMAN J:

Introduction

[1] This is an appeal against both conviction and sentence imposed by the regional court magistrate, sitting in Sterkspruit on 24 January 2023. The appellant is before this court having been granted leave to appeal by the regional court.

[2] The appellant was arraigned on a charge of murder read with the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997. The state alleged that the appellant was guilty of premeditated murder in that on 22 December 2019 at or near Sterkspruit, he did unlawfully and intentionally kill one Thando Libazi , a male

person, by shooting him with a firearm. Appellant pleaded not guilty. Prior to the commencement of the trial the appellant, who was legally represented, indicated that he required the presence of assessors. Two assessors were indeed appointed and constituted the court with the regional court magistrate.

[3] During the proceedings and when the appellant was under cross – examination, one of the assessors recused herself . The appellant insisted on having two assessors and did not consent to the court proceeding with one assessor. The regional court magistrate decided that the trial would continue with one assessor and it did. I shall return to this issue later in this judgment.

[4] At the end of the trial the regional court magistrate was satisfied that the state had proved beyond reasonable doubt that the murder was premeditated and convicted the appellant accordingly. He sentenced the appellant to life imprisonment.

[5] Apart from attacking the conviction and sentence on several grounds, the appellant raised herein irregularities committed by the trial court. He contends that the irregularities were so gross that they vitiated the proceedings.

[6] Mr Jikwana appeared for the appellant and Mr Methuso for the respondent.

Grounds of appeal

[7] Mr Jikwana submitted that there were several irregularities in the proceedings which make it difficult for both the conviction and the sentence to stand. He submitted that those were , *inter alia*, the different names of assessors on record , failure of the regional court magistrate to have the assessors take an oath before the commencement of trial, the interaction between the prosecutor and one assessor outside court, and the regional court magistrate's decision to proceed with one assessor despite the appellant's insistence that he elected to have two assessors, after one of the assessors

was recused from the proceedings ; and the misstatement by the court that there was agreement between parties that the proceedings were to continue with one assessor.

[8] He further submitted that the trial court committed several misdirections which led to the wrong conclusion that the appellant was guilty of premeditated murder. The trial court erred in finding that the state proved its case beyond reasonable doubt ; that it received the evidence of the eye witness , Mr August , without administering the oath or affirmation; and failed to consider all the evidence in its totality prior to making a finding of guilt. Instead the trial court was of the view that the appellant had to convince it and thus placed an onus on the appellant to disprove the state's case. He submitted that the state did not put its case to the appellant. He relied on , *inter alia*,

***S v Molimi*[1] that:**

> *'[t]he right of the accused at all important stages to know the ambit of the case [she or he] has to meet goes to the heart of a fair trial.'*

[9] He criticized the findings of premeditation by the trial court on the basis that in ***S v PM***[2] that 'premeditated' was found to mean something done deliberately after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, or to evade detection or apprehension. 'Planned' was found to mean a reference to : '.. a scheme , , design or method of acting , doing,proceeding or making, which is developed in advance as a process, calculated to optimally achieve a goal. He also found that the trial court erred in sentencing the appellant to life imprisonment. He argued that having regard to the misdirections and the irregularities this court should interfere with the both the conviction and sentence.

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[1] S v Molimi [2008] ZACC 2 ; 2008 (3) SA 608 (CC) ; 2008 (5) BCLR 451 (CC) at para 54.

[2] S V PM 2014 (2) SACR 481 (GP) para 36 ; see also S Vv Jordaan and Others 2018 (1) SACR 522 (WCC) para 127.

[10] Mr Methuso , on the other hand , attributed the different names of assessors to transcription errors. He relied in this regard on ***Tuta v The State***[3] He conceded , correctly , in my view that , no steps were taken by the state to have those alleged errors corrected by the presiding officer. He also accepted that this court , on appeal, is enjoined to consider the record as it stands. He submitted that the appellant relied on both putative private defence and self- defence, interchangeably. He relied on **Steyn v S**[4] , as the leading authority on private defence, that when an accused raises a plea of private defence, the court's initial enquiry is to determine the lawfulness or otherwise of the accused's conduct and that, if found to be lawful, an acquittal should follow. He submitted that the fact that there were differences in the observations of the state witnesses does not mean that their evidence was untruthful or unreliable . In this regard he relied on ***S v Sithole***[5]**.**

[11] He complained that the grounds of appeal based on the irregularities about assessors were not raised in the notice of appeal and therefore they should not carry any weight. He submitted that the trial court was well within its rights to decide to proceed with one assessor because the presiding officer had a discretion and not the appellant. He submitted that because the trial was at an advanced stage it was in the interests of justice to continue with the trial instead of starting it *de novo.* In this regard he relied on

Jekev S[6]**.** He submitted that there is no legal requirement that an assessors' oath should be reflected on record because assessors are not witnesses but members of the court.

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[3] ***Tuta v The State*** (CCT 308/20) [2022] ZACC 19; 2023 (2) BCLR 179 (CC); 2024 (1) SACR 242 (CC) (31 May 2022).
[4] ***Steyn v S*** 2010 (1) SACR 411 (SCA) 411 (SCA) (27 November 2009).
[5] ***S v Sithole*** (54/06) [2006] ZASCA 173 (28 September 2006) at [8].
[6] ***Jeke v S*** 2012 JDR 1551 GSJ.

[12] He submitted that the state proved the guilt of the appellant beyond reasonable doubt. On sentence he relied on , *inter alia,* ***S v Vilakazi***[7]**,** that when the crime is deserving of a substantial period of imprisonment the questions of whether the accused is married or not , has children or not , are in themselves immaterial and may constitute flimsy grounds that Supreme Court of Appeal in ***Malgas*** said should be avoided.

Discussion

Irregularities regarding assessors

Identities of the assessors

[13] The trial court record reveals that on 6 September 2021, the trial commenced with two assessors, Ms Khobeni and Ms Kambasela. These names appear on the record. However, in the regional court magistrate's judgment the court referred to Ms Qcube and Ms Canga as having sat as assessors. It is not clear from the record as to what are the actual names of the assessors that constituted the court and the reason why the regional court magistrate referred to names that are different from those that appeared at the commencement of the trial.

Unsworn assessors

[14] This becomes even more concerning when one deals with the uncontroverted allegation that the assessors were not sworn in. Mr Jikwana submitted that the two assessors were not sworn in. He submitted that it is accepted that the assessors do not get sworn in court as they are not witnesses. However, he submitted that when the trial commenced the regional court magistrate was obliged to place on record the fact that the assessors had been sworn in. Mr Methuso submitted that because ordinarily the swearing in of assessors takes place in chambers , it was not necessary to place that on record.

[7] ***S v Vilakazi*** 2009 (1) SACR 552 (SCA).

[15] Section 93 *ter* of the Magistrate's Court Act 32 of 1944 provides:

> ***' 93 ter Magistrate may be assisted by assessors***
>
> *(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-*
>
> *(a) Before any evidence has been led; or*
>
> *(b) In considering a community – based punishment in respect of any person who has been convicted of any offence, Summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessors: Provided that if an accused is standing trial in any regional court on a charge of murder, whether together with other charges oraccused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded without assessors whereupon the judicial officer may in his discretion summon one or two assessors to assist him."*
>
> *(2) ...*
>
> *(3) Before the trial or the imposition of punishment, as the case may be, the said judicial officer shall administer an oath to the person or persons whom he has so called to his assistance that he or they will give a true verdict or a considered opinion, as the case may be,according to the evidence upon the issues to be tried or regarding the punishment, as the case may be, and thereupon he or they shall be a member or members of the court subject to the following provisions...'*

[16] The above quoted provisions make the administering of an oath peremptory. If the oath was not administered to the assessors it follows that they were not members of the court as envisaged in section 93 *ter* (3). The trial court is a court of record. Every step that is taken and sanctioned by law , such as the swearing in of assessors must be recorded otherwise how else will it be evident that such oath was administered? Those provisions enjoined the judicial officer, on the facts of this case, to administer the oath before the commencement of the trial.

[17] Once appointed, an assessor becomes a member of the court and before he or she hears any evidence, he or she has to take an oath or make affirmation, administered by the trial judge to give true verdict upon issues to be tried, on the evidence placed before him or her. It affirms the principle that an assessor who takes an oath or affirmation shall become a member of the court and thus participate in all decisions of the court.[8]

[8] ***R v Price*** 1955 (1) SA 219 (A); [1955] 1 All SA 332 (A).

[18] An inescapable conclusion is that a failure to administer an oath as provided , constitutes an irregularity that , in my view, is not capable of being remedied.

Interactions between the prosecutor and the assessors outside court

[19] On 21 June 2022 the prosecutor began by addressing the court as follows:

> *'This matter served before you, your Worship. We could not proceed with the matter due to the absence of the assessors. Ms Khambasela is not available and she said when I called her that Ms Qcube was unable to come because of the problem that she has with her child.*
> *Both assessors are present today. Now I have had a conversation with Ms Kambasela in my office and I have been able to establish that Ms Kambasela is still available to proceed. Ms. Qcube is unfortunately, no longer available to proceed with the matter. She is today here to bring an application for her recusal on two grounds. The first ground is that she is now looking after a one month old baby. She has been trying to get people to assist her with looking after the baby but because the child is one month old and……..[indistinct]. The second ground is that Ms Qcube had advised me that in between the postponement to today that somebody had …….[indistinct/audio corrupted] while they were having a conversation happened to speak about this matter. She was initially not aware that the person was talking about this case. And when she became aware of that , that unsettled her as she became privy to some information that she should not have been privy to. This is generally the same ground that is generally used by Magistrates or Judges, when they become aware of some information in the case which they are dealing with that they should not become aware of, then they have no other alternative but to recuse themselves from the case. She is therefore of the opinion that it is undesirable for her to continue in this matter. That is all, Your Worship.'*

[20] Both parties thereafter addressed the court in terms of section 147 of the Criminal Procedure Act . It is not apparent from the record why the parties employed that section when it governs a trial before assessors in the superior court instead of section 93 ter (11) (a) (v) of the Magistrates' Courts Act 32 of 1944. They both agreed that in the interests of justice Ms Qcube should be excused. It appears that the regional court magistrate was not concerned at all about the interaction that the prosecutor had with the assessors in his office. This interaction did not occur in open court. It took place in the absence of the appellant's legal representative. The conversation was directly related to the case. The prosecutor being an officer of the court ought to have known that meeting with assessors outside the court room was not only undesirable but was seriously prejudicial to the appellant. Surprisingly, the regional court magistrate did not frown upon such conduct. Such interaction was , without a doubt , not in the interests of justice and amounted to an irregularity.

Whether the trial court committed a fatal irregularity by continuing the trial before one assessor

[21] The regional court magistrate remained with one assessor after the recusal of the other assessor. The appellant through his attorney insisted that two assessors should be present. On 21 September 2022, the court directed that the trial shall proceed with the remaining assessor. There were no reasons given for the decision to ignore the submission made on behalf of the appellant . Most importantly , both parties were *ad idem* that the court had a discretion where the other assessor had been recused from the trial as was the case herein.

[22] Section 93*ter* (11) (a) (iv) of the Act[9] provides that:

> *'(11)(a) If an assessor –*
>
> *(i) dies ;*
>
> *(ii) in the opinion of the presiding officer becomes unable to act as an assessor;*
>
> *(iii) is for any reason absent; or*
>
> *(iv) has been ordered to recuse himself or herself or has recused himself or herself in terms of subsection 10, at any stage before the completion of the proceedings concerned, the presiding judicial officer may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor-*
>
> *(aa) direct that the proceedings continue before the remaining member or members of the court,*
>
> *(bb) direct that the proceedings start afresh;or*
>
> *(cc) in the circumstances contemplated in the subparagraph(iii), postpone the proceedings in order to obtain the assessor's presence:*
>
> *Provided that if the accused person has legal representation and the prosecutor and the accused consent thereto, the proceedings shall, in the circumstances contemplated in subparagraphs (i), (ii), or (iv), continue before the remaining member or members of the court".*

[23] This principle was confirmed by the Supreme Court of Appeal, in ***Mncwengi & others v The State*** [10] where the court stated that:

[9] Magistrates Court Act, 32 of 1944.

[10] ***Mncwengi & others v The State*** (395/2018) [2019] ZASCA 135 (1 October 2019) .

' Where it is impossible to obtain or secure the assessor's presence, the court may in the interests of justice direct that the proceedings to continue before the remaining member or members of the court or direct that the proceedings start afresh." See also ***Jeke v State*** [11]**.**

[24] The law is settled that an accused person is at all stages of the trial to be tried by the court as constituted when the trial commenced, subject to the exception authorized by section 147 of the CPA (Mncwengi supra). It is common cause that on 21 September 2021 the court was not properly constituted. The court had a discretion as mentioned in Jeke's case, *supra*, to first consider the submissions from both parties and whether it was in the interests of justice to start the trial afresh. The court directed that the trial should proceed with the remaining member despite the objection by the appellant. In addition, it is not clear what the court considered to justify that it was in the interests of justice to continue with trial with one assessor. There is no indication on record what factors were considered by the trial court : whether the trial was at an advanced stage, or whether it would be prejudicial to both the state and the appellant if the trial were to start de novo , or whether the trial court considered the status of the appellant? It seems to me that in the exercise of its discretion the court failed to apply its mind judicially and in particular to the fact that the appellant wished to have two assessors. I find that the court committed an irregularity by proceeding with one assessor despite an objection by the appellant.

The conviction and sentencing of a defence witness

[25] In exercising its inherent powers and in observing a glaring injustice from the record , this court directed the parties to submit supplementary heads of arguments in respect of the conviction and sentence of the defence witness by the regional court magistrate. They were requested to address the court whether such a conviction and sentence were in accordance with justice. The court was of the view that it would be prudent to

[11] ***Jeke v S*** 2012 JDR 1551 (GSJ).

deal with matters affecting Mr Sandile Dyani at the same time as it was dealing with the appeal.

[26] It appears from the record that the defence witness, Mr Dyani was not properly warned by court. On 24 March 2022, the matter was postponed to 20 June 2022, the record reads *"the accused as well as the witnesses are warned to appear at half past eight in the morning."* There is no mention of the names of the witnesses that were warned by court. On 20 June 2022, Mr Dyani delayed and Mr Mdleleni placed himself on record as his attorney and explained to the court that Mr. Dyani was attending to an urgent personal matter at the Traffic Department. The court was not satisfied with the explanation and issued a warrant for his immediate arrest and the matter was rolled over to the following day. It appears that the warrant was executed on that very same day.

[27] On 21 June 2022, the trial court proceeded with an enquiry in terms of section 170 of the CPA . Notwithstanding the explanation proffered by his attorney, which Mr. Dyani confirmed, to the effect that he had to rush to the traffic department in Zastron because his vehicle had been impounded by the traffic officers, the trial court found him guilty. Mr Dyani stated that he was directed to report at the traffic department with documentation to prove that he owned the vehicle. The trial court convicted Mr. Dyani for failure to appear before court on 20 June 2022.

[28] Although the court found that his non -appearance was not due to any wrongdoing on his part , it proceeded to convict him , purportedly, in terms of section 170 of the CPA. Section 170 of the CPA clearly finds application where the enquiry is directed at an accused person who failed to appear in court and not a witness. After convicting him , the court cautioned and discharged Mr Dyani. Both parties

submitted that both the conviction and sentence amounted to an irregularity and should be set aside. The court appreciated the assistance received from both Mr Jikwana and Mr Methuso in this regard as Mr Dyani's case was not part of the appeal proceedings.

[29] Section 170 of the Criminal Procedure Act 51 of 1977, provides that;

> *(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2) .*
>
> *(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when he is brought before court, in a summary manner enquire into his failure so to appear or so to remain in attendance and unless the accused satisfies the court that his failure was not due to fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding three months".*

[30] The court a quo erred by convicting the defence witness in terms of the above provisions. The explanation proffered by the witness appeared to have been reasonable and satisfactory. Infact the court found that his non – appearance was not due to any wrong doing on his part. It follows that the court erred by convicting Mr. Dyani.

[31] Consequently, the court is satisfied that both the conviction and sentence of Mr Dyani were unnecessary and resulted in an injustice. The conviction and sentence of Mr Dyani should be set aside.

Witness not sworn in

[32] The state called the first witness Athenkosi August, an eye witness. It appears from the record that the witness was not sworn in nor caused to make an affirmation. Mr Methuso criticized the transcriber that she did not state what explanation was given to

the witness. One thing is clear from the record and that is whenever other witnesses were sworn in, the transcriber recorded that in no uncertain terms. In relation to this witness she stated clearly that the witness was not sworn in and there was no affirmation. Such an omission constitutes an irregularity because the regional court magistrate considered the testimony of that witness and weighed it together with all the other evidence. Section 162 of the Criminal Procedure Act 51 of 1977 provides that:

> *'(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..'*

[33] In reality because the witness did not testify under oath , by admitting his evidence , the trial court erred, because his testimony lacked the status and character of evidence and was accordingly inadmissible[12].

[34] The above irregularities and misdirections are sufficient to warrant interference by this court with the convictions and sentences of both the appellant and Mr Dyani for all the reasons set out above. The irregularities are fatal and the only result would be to quash the proceedings[13]. There is accordingly no reason for this court to consider the merits.

[35] In the result the appeal must be upheld and both the conviction and sentence of the appellant must be set aside. Both the conviction and sentence of Mr Sandile Dyani must also be set aside.

ORDER

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[12] ***S v B*** 2003 (1) SACR 52 (SCA) at [14] ; S v Ndlela 1984 (1) SA 223 (N) at 225 G-H.

[13] ***S v Petersen & Another*** 1998 (2) SACR 311 (C) at 312 b-h; ***S v Gayiya*** [2016] ZASCA 65 ; 2016 (1) SACR 165 (SCA) para 6.

[36] The following Order is made :

1. **The appeal is upheld.**

2. **The conviction and sentence of the appellant are set aside.**

3. **The conviction and sentence of Mr Sandile Dyani are set aside.**

4. **The Registrar of this court is directed to send a copy of this Order to the clerk of the Regional Court , Sterkspruit who must ensure that this order is brought to the attention of Mr Sandile Dyani.**

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T.V.NORMAN

JUDGE OF THE HIGH COURT

I agree .

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F.MONAKALI

ACTING JUDGE OF THE HIGH COURT

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REF: 10/2/5/3-21/23

Matter heard on : 15 MAY 2024

Judgment delivered on: 17 MAY 2024