IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION: DURBAN

Case No: AR263/2019

Case No: RC51/2013

In the matter between:

Sandile Goodman Nxumalo

Appellant

and

The State

Respondent

Judgment

Lopes J

[1] The appellant in this matter, Sandile Goodman Nxumalo, was charged in the Pongola Regional Court on the 31st March 2014 with one count of murdering Sibusiso Sibiya. On the 26th January 2015, Mr Nxumalo was convicted as charged and sentenced to undergo 15 years' imprisonment.

[2] Although the presiding officer during the trial was Mr Nhleko, the application for leave to appeal, which was only against the sentence imposed, was heard by Ms Barnard, who granted Mr Nxumalo leave to appeal against his sentence.

[3] In supplementary heads of argument delivered by Mr Z Fareed on behalf of Mr Nxumalo, the point was raised for the first time that the leaned magistrate had failed properly to invoke the provisions of the proviso to s 93*ter*(1) of the Magistrate's Court Act, 1944. That being so, the court was not properly constituted, and the conviction and sentence fell to be set aside. Accordingly, it

is necessary for this court to decide the matter on review. The power to do so is reflected in both s 304(4).

See: S v Moyo 2018 (1) SACR 658 (GSJ).

(4) The record reveals that:

(a) on the 26th September 2013, Mr Zulu was appointed as the new attorney for both Mr Nxumalo and Mr Mdluli. The typed version of the record states that:

'Mr Zulu informed the court that the defence does not require the assessors.';

(b) on the 9th December 2013, a pre-trial conference was held, and opposite the word 'Assessors' appears the manuscript recordal that 'Defence does not need assessors'. There is no indication that the pre-trial meeting was held in the presence of either the learned magistrate or Mr Nxumalo; and

(c) When the trial commenced on the 31st March 2014, the following was recorded:

'COURT Advocate Zulu, maybe if you could just confirm this – that the defence does not require the assessors. I know that is what transpired during pre-trial conference. Is that still the position, they do not require?

MR ZULU Yes, that is correct, that is still the position.'

[5] Nothing further was said on that subject, and Mr Nxumalo was not asked to confirm what his attorney had said, nor whether he wished to add anything. The authorities make it clear that the proviso to s 93*ter*(1) sets out the manner in which the court is normally to be constituted – the magistrate and two assessors,

and unless an accused person requests the court not to sit with assessors, the court will not be properly constituted without assessors.

[6] In *S v Du Plessis* 2012 (2) SACR 247 (GSJ), the court set out the importance of assessors, and found that the failure to consider to appoint assessors rendered the trial a failure of justice. The court, however, indicated that it would be sufficient to determine whether the need for assessors would be waived, if the presiding officer were to enter into discussions with the accused or his legal representative.

[7] The meaning and effect of s 93*ter*(1), and the cases dealing with it were fully canvassed in *Chala and others v Director of Public Prosecutions, KwaZulu-Natal and another* 2015 (2) SACR 283 (KZP). The court held that a proper explanation of the proviso must be given to an accused person. This judgment was approved of in *S v Gayiya* 2016 (2) SACR 165 (SCA). At paragraph 8, Mpati J, stated:

'In my view the issue in the appeal is the proper constitution of the court before which the accused stood trial. The section is peremptory. It ordains that the judicial officer presiding in a regional court before which an accused is charged with murder (as in this case) *shall* be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. It is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor. The starting point, therefore, is for the regional magistrate to inform the accused, before the commencement of the trial, that it is a requirement of the law that he or she must be assisted by assessors, unless he (the accused) requests that the trial proceed without assessors.'

[8] The approach in *S v Langalitshoni* 2020 (2) SACR 65 (ECM) expanded on the approaches previously adopted. The learned magistrate had addressed the appellant's legal representative, drawing attention to the fact that one of the counts which the appellant faced was murder and stated:

'. . . where the assessors are supposed to be there, are you going to use the services of the assessors?'

The legal representative replied in the negative, and the charges were put to the appellant. The court referred to the peremptory nature of s 93*ter*(1), and found that the starting point was for the regional court magistrate to have informed the accused before the commencement of the trial, that he or she must be assisted by assessors unless the accused requests that the trial proceed without assessors. At paragraphs 8, 9 and11 the court stated:

'[8] The statement of the legal principle quoted in the preceding paragraph has the effect of creating an obligation on the part of a regional magistrate presiding over a trial involving a charge of murder. There are two essential elements to the obligation. The first is to inform the accused person before the commencement of the proceedings what the peremptory provisions of the law require to ensure the proper constitution of the regional court. The second element is to inform the accused person that he or she may elect to proceed with the trial without assessors.

[9] In my view, it is a relatively simple matter for a regional magistrate to discharge both elements of the obligation. What is required is a repetition of the legal principle quoted elsewhere in this judgment. Ideally, communication of the legal principle should be made in a direct manner by the magistrate addressing the accused person, who should be asked at that stage to indicate whether or not he or she has been made aware of the peremptory provisions. The legal representative of the accused person may then be asked by the magistrate to confirm the correctness of the answer given by the accused person. It is then necessary for the magistrate to ask specifically whether the accused person wishes to permit the trial to proceed without assessors. At this point a magistrate would not be criticised for giving a brief outline of the role played by assessors in a criminal trial. The magistrate ought to be satisfied that the answer given by the accused person demonstrates an appreciation of the nature of the question and

reflects a reliable response in the circumstances. The accused person has a right to be tried in a fully constituted court. An election to proceed without assessors amounts to a waiver of such right. A waiver of a right cannot be achieved without knowledge thereof. That this is so should be checked with the accused person and the legal representative.

. . .

[11]. . . In asking "are you going to use the services of the assessors", the magistrate is not conveying to the appellant that the proper constitution of the court requires that the magistrate ordinarily sit with two assessors. The question posed suggests that the court is constituted ordinarily by the regional magistrate sitting alone. It conveys the suggestion that the appellant's legal representative has a right to request the participation of assessors as an additional 'service'. . . what is required is an indication of whether or not the appellant elected to waive an existing right. One cannot simply assume that, because of the preamble contained in the magistrate's questioning, one can accept that both the magistrate and the legal representative knew that the right created thereby could be waived by the appellant and that the legal representative of the appellant was indeed unequivocally waiving the right created by the section. It is also of concern that the appellant was not addressed personally by the magistrate and that the correctness of his or her answer was not thereafter confirmed by the legal representative.'

[9] The crisp issue which arises in this matter is whether the communications with regard to the appointment of assessors between the prosecutor and Mr Zulu (in the pre-trial hearing), or the exchange in court between the learned magistrate and Mr Zulu were sufficient. Mr Nxumalo himself, was not involved in these discussions, save for being present when the learned magistrate spoke to Mr Zulu.

[10] The proviso was never explained to Mr Nxumalo, and he never made a request not to sit with assessors. Whether his legal representative explained the proviso to him, is also not reflected on the record. Had that been the case, the

learned magistrate could have engaged Mr Nxumalo so that he could have confirmed his understanding of the section, and his request not to have assessors.

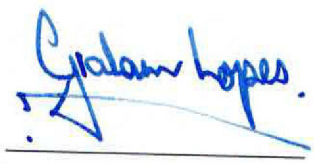
[11] In *S v Khambule* 1999 (2) SACR 365 (O) at 367, Hancke J dealt with the proviso as follows:

'Verder vereis die artikel positiewe optrede van 'n beskuldige, naamlik 'n 'versoek' te dien effekte alvorens die verhoor sónder assessore voortgesit kan word. Hierdie aspek raak die saamestelling van die hof, wat 'n wesenlike invloed ten opsigte van die verhoor kan hê. Dit is dus noodsaaklik dat die bepalings van hierdie artikel onder die aandag van die verdediging gebring moet word, welke feite insluitende sy 'versoek' uit die saakrekord moet blyk indien 'n streeklandros sonder assessore in 'n moordverhoor sou sit. Na my mening is nie-voldoening aan die bepalings van die artikel nie alleen onreëlmatig nie, maar stel dit ook 'n regskending daar in die omstandighede.'

This approach seems to have foreshadowed some of the later judgments on this issue.

[12] Accordingly, the conviction and sentence imposed upon Mr Nxumalo fall to be set aside. As there was no appeal against conviction before us, we make the following order:

'In terms of s 304(4) of the Criminal Procedure Act, 1977, the conviction and sentence imposed upon Mr Nxumalo are set aside.'



Lopes J

Ploos van Amstel J

Date of judgment:	10th February 2022.
For the appellant:	Ms Z Fareed (instructed by Legal Aid South Africa).
For the respondent:	Mr T Buthelezi (for the State Attorney).
Note:	This matter was heard in terms of s 19(a) of the Superior Courts Act, 2013 (with the consent of both parties), and this judgment is handed down by electronic transmission to the parties, and by placing it in the court file.