IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Appeal No: AR 119/22

In the matter between:

LINDELANI PATRICK MNCWABE **APPELLANT**

and

THE STATE **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be on 5th JUNE 2023 at 10:00

ORDER

The following order is issued:

1. The appeal against conviction is dismissed.

APPEAL JUDGMENT

Hiralall AJ (Chetty J concurring)

Introduction

[1] The appellant herein was convicted, together with his co-accused, Mvuselelo Mqapheli Chonco, in the Regional Court, Pinetown, of Murder read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 (Count 1), and assault with intent to

intent to do grievous bodily harm (Count 2). They were sentenced to ten years imprisonment each on Count 1, and twelve months imprisonment each on Count 2, with the sentence on Count 2 to run concurrently with the sentence on Count 1. The effective sentence for each of them was ten years imprisonment. On the date of his sentence, the appellant successfully applied for leave to appeal against his conviction on both counts. This is an appeal against his convictions. There was no appeal against sentence.

[2] A point *in limine* was raised in the appellant's heads of argument in respect of the murder charge, in which the appellant contends that the magistrate in the court *a quo* erred in terms of compliance with the provisions of sub-section (1) of s 93*ter* of the Magistrates Court Act.

[3] In view of the fact that the respondent filed its heads of argument without having sight of the appellant's heads of argument and did not address the issue of whether there was compliance with the provisions of s *93ter*, an email was sent to both representatives requesting that they furnish the court with comprehensive supplementary heads on the point, having regard to the specific facts of this case and the legislative requirements. However, no further heads of argument were filed by the time the matter was heard.

Background

[4] This case relates to the murder of the deceased, Siyabusa Makhathini between 29 and 30 May 2019, and the alleged assault, with intent to do grievous bodily harm, of Thabiso Dlamini on 29 May 2019. That the deceased died of blunt force head injury is not in dispute.

[5] According to the state witness, Thabiso Dlamini, he and the deceased had gone to the Boxer Store in Clermont, KwaZulu Natal, on 29 May 2019 to purchase yeast for his grandmother. They had made the purchase and were leaving the store when they were stopped at the exit by two security guards, who he identified as the two accused before the court *a quo*. The security guards grabbed them and took them to a room where they accused them of stealing from the store and began to hit them. Dlamini's mother, Nomusa Dlamini, arrived on the scene and asked why they

were being assaulted. When the security guards searched Dlamini, they found the yeast together with the till slip. They found two chocolates on the deceased and said that Dlamini must have been assisting the deceased to steal. They continued hitting both of them, slapping them and banging them against the wall; and the appellant produced a knife during the assault saying that he would stab them. They tied the deceased with his hands behind him so that he was unable to defend himself, and they continued hitting him with sticks and 'planks'. They then told Dlamini to leave. He left because he was told not to wait outside. Dlamini sustained an injury to his right eye. He was approached by the deceased's mother the next day. She wanted to know where the deceased was and he informed her that the deceased had been arrested because he stole a chocolate. He learnt around June 2019 that the deceased had passed away.

[6] Nomusa Dlamini, the mother of Thabiso Dlamini, testified that she was at the Boxer Store to do her own shopping when she learnt that her son and the deceased were being assaulted. She went to the scene in the store room and saw that they were both being assaulted. She asked the security guards, one of whom she identified as the appellant's co-accused in the court *a quo*, why they did not just arrest them instead of assaulting them. According to her there were three security guards present. She did not identify herself to them. She was told by the manager to keep quiet. She left a little while later and met up with Thabiso Dlamini outside. He told her that the deceased was going to be arrested.

[7] The appellant and his co-accused pleaded not guilty in the court *a quo*. They said that there had been no incident of theft in the store that day and they had no knowledge of any assault on Thabiso Dlamini and the deceased. They had heard a noise outside earlier and when they did their patrols later, they found the body of the deceased lying at the staff gate.

Evaluation

Point in limine

[8] Mr Madondo, counsel for the appellant, submitted in his heads of argument that the provisions of s 93*ter* are peremptory in that the choice to be made as to the constitution of the court is that of the accused and not that of his legal representative;

that if the court is not properly constituted, it has no power to hear the matter and the proceedings must be set aside as irregular. He submitted that the court is in the same position as a court which lacks jurisdiction.

[9] The record of the proceedings on the issue of assessors reads as follows:

a) During the pre-trial stage on 30 September 2020:

'Mr Thukuthane: We will admit everything. Your Worship.
Court: Assessors?
Mr Thukuthane: We do not require assessors'

b) During further pre-trial proceedings on 3 May 2021:

'Court: You confirm the pre-arranged dates of 22, 23 and 24 June is suitable to both parties?
Prosecutor: Date is suitable, Your Worship. [Indistinct] ...the issue of assessors, murder matter.
Court: Yes
Ms Naidoo: Your Worship, may I please approach the accused? I did not discuss that with them.
Court: Yes, but in respect of the trial dates, 22nd, 23rd, 24th, you confirm that that's suitable?
Ms Naidoo: Yes those are in order, Your Worship. May I approach the accused?
Court: Yes, you may.
Ms Naidoo: May I use the services of the interpreter, please, Your Worship?
Court: Yes certainly. Ms Gumede, please assist.
Ms Naidoo: Thank you, Your Worship, no assessors will be required.
Court: Thank you. The matter is adjourned ...'

c) At the commencement of the trial, prior to taking the plea:

'Court: Ms Naidoo, I see on record on the previous appearance you said the assessors will not be required, is that still the position?
Ms Naidoo: Your Worship, I confirm that for accused 1 and accused 2 we will dispense with assessors.'

[10] The proviso to sub-section (1) of s 93*ter* of the Magistrate's Court Act provides that:

' ... if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.'

[11] It was submitted by Counsel for the respondent, Ms Ramkilawon, that the exchanges between the magistrate and the defence attorney, Ms Naidoo, on no less than three occasions, were in the presence of the accused and that they complied with the provisions of s 93*ter*.

[12] The issue of compliance with the provisions of s 93*ter* has been the subject of a long line of cases where convictions have been set aside for non-compliance with the section.

[13] In *Gayiya v S*[1], the Supreme Court of Appeal found that the provisions of *s93ter* are peremptory and stated as follows:

'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.'

[14] There followed the judgment in S*v Langalitshoni*[2], where, referring to *Gayiya* and the peremptory nature of section 93*ter,* the court stated as follows:

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[1] 2016 (2) SACR 165 (SCA)

"[8] The statement of the legal principle .... 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.

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

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[2] 2020 (2) SACR 65 (ECM)

by the magistrate and that the correctness of his or her answer was not thereafter confirmed by the legal representative.'

[15] The accused in *Langalitshoni* was legally represented at the trial. The conviction and sentence were set aside on appeal.

[16] In *Ngomane v S*[3], however, making a departure from the reasoning in *Langalitshoni,* the court stated that there is no need where an accused is legally represented for the regional magistrate to 'in minute detail explain to the accused what the act provides in respect of assessors, and what his rights in that regard are'.

[17] Commenting on Gayiya, the court stated as follows:

'15. What, however, must be kept in mind, is of material importance, is that this matter differs materially from the facts of *Ginyana (sic),* in the following respects:
(i) In *Ginyana (sic)* the court had to deal with an unrepresented accused, whilst in this matter the appellants were at all relevant times represented by legal practitioners.
(ii) In *Ginyana (sic)* the issue of assessors was not at all addressed by the magistrate at any stage before the trial commenced: In this matter the issue was addressed by the magistrate on **two** occasions before the trial proceeded …'

[18] The court went on to state:

'18. It seems that what is expected of a magistrate in the circumstances, as submitted by both counsel before this court, is that the legal representative of an accused should be bypassed by the magistrate in order to explain the accused's constitutional rights. The question then arising is where does it start and where does it stop, and, what is the duties of the magistrate. The answer is clear, only when it comes to the attention of the magistrate that some or other procedural issue, or relevant law implication has not been properly explained to the accused by their legal representatives, or at all, should the magistrate attend to it. This happened in this case when the magistrate established that it was not explained to the accused that they could be convicted of murder even when somebody is killed after the robbery during the pursuit of the suspects. (Record p12).

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[3] 2021 (2) SACR 654 (GP) (24 March 2021)

19. Accordingly, when the accused is legally represented, there is no overriding duty on the presiding magistrate to explain to the accused in any detail each and every single one of his numerous constitutional rights.

20. It is obvious in this case, that the legal representatives of the appellants were also fully alert to the issue of assessors, which was attended to and disposed of when the appointment of assessors was addressed by the magistrate and waived on behalf of the appellants. The section provides that only the accused, obviously as advised by his legal representative, and through his legal representative, may waive the appointment of without assessors.

21. I will never be persuaded that any legal representative appearing before a regional court in a murder case, would not be aware of the provisions of the said section. There is no reason why it could be inferred that the legal representatives did not explain to the appellants what the issue of assessors entailed.

22. It is a constitutional right of any accused to appoint a legal representative, and it is a long standing and incontestable issue that once the accused has placed his case in the hands of the representative, the representative has full control over the case. That includes the duty to ensure that the accused's constitutional rights are not violated, and that the accused has a fair trial in accordance with all procedural aspects and relevant legislation. ... '

[19] In this division, the court in *Charles Green v S*[4], relied on the judgment in *S v Gumede and Others*[5], where the court held that legal representatives are officers of the court and are assumed to be competent unless proven otherwise; and that judicial officers can and must act on what is presented to the court by them unless and until adequate reason not to do so emerges. The court accepted the defence attorney's confirmation that no assessors were required, that this rendered the continuation of the appellant's trial to be within the prescripts of 93*ter,* and that it

[4] Unreported judgment of the KwaZulu Natal Division, Case No. AR 176/2021, dated 29 July 2022

[5] 2020 (1) SACR 644 (KZP)

might be assumed that the appellant made his election with the benefit of advice. Referring further to Ngomane, the court stated as follows at paragraph 23 of the judgment:

'[23] I am in respectful agreement with the sentiment expressed in *Ngomane* (para 23) that there is no need, when an accused is represented, for the regional magistrate to explain "what the Act provides in respect of assessors, and what his rights in that regard are." It is safe to assume that a lawyer who on record asks that the magistrate should sit alone has in fact conveyed to the accused that if the request is not made the magistrate will sit with two assessors. The "detail" which underlies a decision as to whether that request should be made is a matter for advice and consideration by the legal representative and the accused person. In my view, and for the reasons stated in the main judgment and in *Ngomane*, a magistrate is bound to assume that an accused's lawyer has competently explained the options to the accused person unless, as may happen exceptionally, something emerges which suggests otherwise.

...

Whilst this statement of the duties of a magistrate is labelled the "starting point", the court said nothing about anything else a magistrate has to do to satisfy the requirements of s 93*ter*. In *Ngomane* (para 15) it was pointed out that in *Gayiya* the court was dealing with an unrepresented accused in a case where nothing at all was said by the magistrate concerning assessors. In my view it would not be correct to interpret *Gayiya* to convey that in a case where the accused is represented, the magistrate is duty-bound to go through the motions, and describe the choice which is clearly already within the knowledge of the lawyer, and accordingly at least presumptively known to her or his client. To do so would impermissibly elevate form above substance.'

[20] In the present case, the issue of assessors was addressed on three occasions. The appellant's first attorney simply informed the magistrate that assessors were not required. The appellant's next attorney requested an opportunity to consult with the accused on the issue of assessors. She also requested use of the services of the interpreter and then reverted to the magistrate with the response that no assessors would be required. The same attorney confirmed on the third occasion that assessors were not required.

[21] I am inclined to follow the reasoning in *Ngomane* and *Charles Green*. I have no reason to doubt from the record that the appellant was informed of his rights to have assessors sit with the magistrate, and that he made a decision thereon with the benefit of advice.

[22] Not that this is a factor in interpreting the provisions of s 93*ter*, but it is a consideration that many convictions correctly decided in the regional court have been set aside with the alternate approach. As Olsen J puts it in Green:

'[26] Finally, I believe it is appropriate to express concern about the implications of the number of cases in which it has been found that courts were not correctly constituted in the light of the provisions of s 93*ter* of the **Magistrates' Courts Act. The** result of such a finding is that the proceedings themselves are set aside, as well as, obviously, the resultant conviction and sentence, despite the fact that in some if not many of the cases it may otherwise appear clear that the decision of the regional magistrate sitting alone was correct. This involves an unacceptable waste of judicial resources. Furthermore, in some cases a retrial may be either impossible or impractical. (The present matter may be such a case. The trial took four days over a period of about three months. One of the principal witnesses had to be placed in witness protection. Whether it would be feasible to do that again, given what transpired in the original trial, is doubtful.) Elevating the requirements for the establishment on record of the proper constitution of a court presided over by a magistrate sitting alone, above what the statute actually requires (i.e. a request that the magistrate should sit alone), would increase the risk of wasting judicial and associated resources. The case of *S v Titus* **2005 (2) SACR 204** (NC) affords an example of what can go wrong if the magistrate is required to do any more than solicit and record the accused's choice.'

[23] In the circumstances, the point *in limine* is dismissed.

Appeal against conviction

[24] It is trite that an appeal court will only interfere with a trial court's factual findings if there is a material misdirection on the part of the trial court, and in the absence of such a misdirection, if it is satisfied that they are clearly wrong. In *Mokoena v S*[6], the court stated as follows:

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[6] (106/2016) [2016] ZAFSHC 15

'[8] If an appeal is directed against a court a quo's findings of fact, the court of appeal must be mindful that the court a quo was in a better placed position than itself to form a judgment. When inferences from proven facts are in issue, the court a quo may also be in a better placed position than the court of appeal, because it is better able to judge what is probable in the light of its observation of witnesses who have testified before it. Therefore, where there have been no misdirections of fact a court of appeal must assume that the court a quo's findings are correct and will accept these findings, unless it is convinced that they are wrong. (See R v Dlumayo and Another 1948 (2) SA 677 (AD) at 705-6).'

[25] It was contended by the appellant that the magistrate erred in convicting him in that insufficient consideration was given to the version presented by himself and that of his co-accused, which versions were reasonably possibly true; and that the state relied on circumstantial evidence to convict them on the main count as there was no direct evidence adduced that the deceased died at their hands. It was submitted in the appellant's heads of arguments that if the version of the accused is reasonably possibly true, the accused must be acquitted, and that the court does not need to believe every detail of the accused's account but where he can be subjectively believed he has to be acquitted.

[26] It was submitted by the respondent that for the evidence of the appellant to be reasonably possibly true the evidence of the state witnesses must be found to be false and rejected as a whole. The court is then required to speculate on why the witnesses would fabricate a version implicating the security guards. It was submitted further that there are sufficient differences between the versions of the state witnesses to exclude the possibility of the witnesses conniving to ensure that the appellant and his co-accused were guilty of murdering the deceased

[27] The magistrate found that the two state witnesses were good, reliable and trustworthy witnesses who corroborated each other on all material aspects and had no reason to falsely implicate the appellant and his co-accused. I find no reason to interfere with these credibility findings.

[28] As to the defence' contention that Nomusa Dlamini did not say that the deceased was handcuffed, that she said that she saw him blocking blows that were

delivered to him, and that she said that there were three security guards and could not identify the people who were assaulting the deceased, the magistrate pointed out correctly that there were three stages to the incident. There was the period prior to her arrival on the scene, the period when she was present and witnessed what took place, and the period after she had left the scene. The magistrate found that the fact that she did not identify all the people who were hitting the deceased and her son was an indication that she was a truthful witness because if she was not being truthful it would have been easy for her to say that the assault was perpetrated by the two accused. Her evidence was that she could remember the appellant's co-accused because he was wearing a uniform and on her arrival she saw him hitting the deceased and her son. She could not say anything about the appellant. The magistrate found that she again exhibited her truthfulness when she said that the security guards were hitting them with their open hands whereas she could have easily said that they were using weapons. The magistrate noted that she spoke of three security guards whilst her son Thabiso spoke of two security guards. It was noted that she may have arrived when a staff member had joined in the assault as it was also part of Thabiso's evidence that at one stage staff members joined in and hit them. The magistrate found that the deceased could have been handcuffed after her departure.

[29] As to the defence' contention that there was no direct evidence implicating them in the murder, the magistrate found correctly that although there was a lacuna from the last time that the deceased was seen alive to the discovery of his body at 19h00, there was direct evidence that at 14h30 the deceased was beaten up by the appellant and his co-accused at the Clermont Boxer store; that when Thabiso and his mother left the store, the appellant and his co-accused were still assaulting the deceased; and that at about 19h00 the body of the deceased was found dead outside the main gate at Clermont Boxer store. The magistrate recorded that it was the appellant's co-accused who had been in possession of the knife but Thabiso testified that the appellant who was lighter in complexion was carrying the knife and threatened him with it. However, nothing turns on this fact.

[30] The magistrate found correctly that the appellant and his co-accused pretended to have no knowledge of the assault upon Thabiso and the deceased, that no

incident took place at the store on the day in question, and that they did not see Thabiso and his mother at the store.

[31] According to the appellant and his co-accused, there was a noise outside the store and that must have been when the community members killed the deceased. However, the appellant, who was a security guard, did not see fit to investigate although the noise came from the vicinity of the gate of the store premises. According to his co-accused, the noise was heard after 19h00 when the staff were being searched as they left for home. Not only is this a significant contradiction in their evidence insofar as the time they purportedly heard the noise is concerned, but there was also no evidence of any staff member witnessing such an incident as they left the premises. Not long afterwards, when the appellant and his co-accused found the deceased on their final patrol for the day there was nobody else on the scene.

[32] The magistrate referred to *R v Mlambo*[7] where the court stated that it is not incumbent on the State to close every avenue of escape which may be said to be open to an accused; it is sufficient for the State to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must be morally certain of the guilt of the accused.

[33] The magistrate found that the appellant and his co-accused did not give any plausible explanation of what happened to the deceased after they assaulted him, instead they opted to make a bare denial, and the only reasonable inference to be drawn was that it was the appellant and his co-accused that had killed the deceased. I agree with this reasoning. The magistrate correctly found the appellant and his co-accused guilty of murder and of assault with intent to do grievous bodily harm. The magistrate's finding cannot be faulted.

[34] There was no appeal against sentence and I find no reason to interfere with the sentences imposed.

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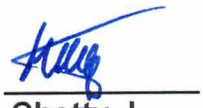
[7] 1957 (4) SA 727 at page 738

Order

[35] Accordingly I propose the following order:

The appeal against both convictions is dismissed.

Hiralall AJ



Chetty J

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Hearing date:	10 March 2023
Date of delivery:	5 June 2023

Judgment is electronically delivered to all parties