



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION
PIETERMARITZBURG**

Case No: AR 354/20

In the matter between:

SIYABONGA HLATSHWAYO

FIRST APPELLANT

SIBIBUSISO MDLOLO

SECOND APPELLANT

and

THE STATE

RESPONDENT

ORDER

The appellants' appeals are upheld and both their convictions and sentences are set aside.

JUDGMENT

Bezuidenhout AJ, with Ploos van Amstel J concurring:

[1] On 13 August 2020 the appellants were convicted in the Ezakheni Regional Court of one count of murder. They were sentenced to fifteen years' imprisonment

on 2 September 2020. On the same day, both appellants applied for, and were granted leave to appeal against conviction and sentence.

[2] Upon a perusal of the record of the proceedings, we deemed it appropriate to request the counsel involved to submit supplementary heads of argument to address the issue of whether the provisions of section 93*ter* of the Magistrate's Court Act 32 of 1944 were sufficiently explained to the appellants in the court *a quo*. Non-compliance with section 93*ter* would result in the court not being properly constituted.

[3] Both counsel have filed supplementary heads of argument for which we are indebted. The matter was due to be heard on 4 March 2022 but the parties agreed that the matter be dealt with in terms of section 19(a) of the Superior Courts Act 10 of 2013 and accordingly the hearing of oral argument was dispensed with.

[4] The record of the proceedings during the pre-trial stage, in other words before the appellants pleaded and the trial commenced, shows the following:

- (a) On 27 March 2018 the appellants appeared before a Magistrate, Mrs Louw, and a pre-trial hearing was held. A pro-forma document was completed and next to paragraph 1.14 of the document, it is indicated that both accused required assessors. The proceedings were not mechanically recorded.
- (b) On 22 May 2018 the appellants appeared before the Magistrate, Mrs De Lange, who ultimately presided over the trial. The record reflects that the matter was remanded for trial. Below the magistrate's signature a post-script appears which reads as follows: 'Both accused now indicate they do not require assessors in this case'.

The proceedings were not mechanically recorded and nothing further was recorded by the magistrate on the charge sheet.

[5] At the commencement of the trial on 5 July 2018, the issue of assessors was not dealt with at all.

[6] Section 93*ter* of the Magistrate's Court Act provides that if an accused is standing trial on a charge of murder:

'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.'

[7] In *Chala v DPP*,¹ Vahed J undertook a detailed analysis of the relevant case law when called upon to decide whether it was a fatal irregularity if a regional magistrate fails to invoke the provisions of section 93ter. The following was said at paragraph 28:

'I am of the view also that to overcome the problems as highlighted by these cases it should always appear from the record of proceedings in cases where s 93ter is required to be invoked, that a proper explanation is given by the magistrate to accused persons of the choice they have in the appointment of assessors, together with a brief exposition of the import of that choice and as to what is required of them. The record should also reflect, after having given such explanation and requesting such response from accused persons, in cases where they elect not to have assessors, that the magistrate nevertheless still considered whether such course was advisable in the particular case before him or her. All of this should appear on the record.'

The conviction and sentence were reviewed and set aside.

[8] In *S v Gayiya*² it was common cause that the accused was never afforded an opportunity by the regional magistrate to decide whether or not to request that the trial proceed without assessors. At paragraph 8 Mpati P held, with reference to section 93ter, that it

'ordains that the judicial officer presiding in a regional court before which an accused is charged with murder...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 two assessors, unless he (the accused) requests that the trial proceed without assessors.' (emphasis in original)

The court also approved of the approach in *Chala supra* and the conviction and sentence were set aside.

¹ *Chala and others v Director of Public Prosecutions, KwaZulu-Natal and another* 2015 (2) SACR 283 (KZP).

² *S v Gayiya* 2016 (2) SACR 165 (SCA).

[9] In *S v Langalitshoni*³ the magistrate in the court *a quo* enquired from the accused's legal representative as to whether he or she 'are going to use the services of the assessors'. The response was 'no'. Brooks J said the following with reference to section 93ter, referring to what was held in *Gayiya supra*:

'[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 direct manner by the magistrate addressing the accused person, who should be asked at that stage to indicate whether 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.' (footnotes omitted)

The conviction and sentence were set aside.

[10] In an unreported judgment by Lopes J in *SG Nxumalo v S*⁴ the record reflected that the legal representative of the accused informed the court that the 'defence' did not require assessors. At a subsequent pre-trial conference it was

³ *S v Langalitshoni* 2020 (2) SACR 65 (ECM).

⁴ *Nxumalo v The State* (KwaZulu-Natal Local Division, Durban) unreported case no AR263/2019 (10 February 2022)

recorded that the 'Defence does not need assessors'. At the commencement of the trial the magistrate asked the accused's legal representative to confirm that the defence did not require assessors, which he did. Lopes J said the following at paragraphs 9 – 10:

[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.'

The sentence and convictions were set aside.

[11] In returning to the present matter, it was submitted by counsel for the appellant, Ms. L Marais, in her supplementary heads of argument, that it is clear from the record of the proceedings that the magistrate did not give an explanation to the appellants regarding the provisions of section 93*ter*, or their rights in that regard. It was also submitted that there is furthermore no indication that the appellants' legal representatives explained the provisions of section 93*ter* to them.

[12] It was further submitted that section 93*ter* requires positive conduct on the part of the accused, namely a request to the effect that the trial may proceed without assessors. It was finally submitted that the endorsement by the magistrate to the effect that both accused indicate that they do not require assessors, does not satisfy the requirements of section 93*ter*. Reference was also made to both *Chala* and *Gayiya supra* and it was submitted that the convictions and sentences should be set aside.

[13] Counsel for the respondent, Mr. M Miza submitted that it is clear from the record that the appellants waived the right to a trial presided over by a regional magistrate and two assessors by requesting that the trial proceed without assessors and as such the court was properly constituted. It was also submitted that the

present matter is distinguishable from *Gayiya* because in that matter no request was made by the accused. It was accordingly submitted that the convictions and sentences should stand.

[14] In the present matter though, it is not clear from the record that the accused did in fact request that the matter proceed without assessors. They simply indicated that they did not require assessors. The wording of section 93*ter* suggest a positive action from the accused in the form of a request which must be apparent from the record.⁵

[15] There is furthermore no indication on the record that the magistrate informed the appellants that it was a requirement of the law that she must be assisted by two assessors, unless they request her to proceed without assessors. There is also no indication that the magistrate gave any explanation to the accused regarding the choice they had and the importance of that choice.

[16] In my view therefore the trial court was not properly constituted and the convictions cannot stand.

[17] The following order is accordingly made:

‘The appellants’ appeals are upheld and both their convictions and sentences are set aside.’

BEZUIDENHOUT AJ

I agree.

PLOOS VAN AMSTEL J

⁵ See *S v Khambule* 1999 (2) SACR 365 (O) at 367.

Date of Judgment: 28 March 2022.

APPEARANCES:

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