



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

Case no: AR77/2022

In the matter between:

MFANAFUTHI MABASO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Mlaba J et Nkosi J concurring:

[1] On 14 December 2012, the appellant, together with his co-accused, was convicted on a charge of murder (read with the provisions of section 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997), read with the provisions of section 257, 258 of the Criminal Procedure Act No 51 of 1977. They were sentenced to 21 years' imprisonment. They applied for leave to appeal which was refused. The appellant petitioned this Honourable Court and the court granted leave to appeal against his conviction.

[2] The appellant raised a point *in limine* and submitted that the court *a quo* failed to comply with the section 93ter (1). On 25 January 2010, when the appellant appeared before the court *a quo* for an adjournment, the defence indicated that... “the accused are dispensing with assessors”.

[3] The matter was adjourned on several occasions prior to the trial proceeding on 14 October 2011.

[4] The record reflects that the accused was present in court on the 25th January 2010. It does not reflect however that the presiding officer explained to the accused the provisions of section 93ter nor that she did confirm with the accused that the accused understood the proviso and that he indeed had elected to dispense with the use of assessors.

[5] The record reflects that when the trial started on the 14th of October 2011, before a different presiding officer, no explanation of the proviso was made by the presiding officer. In fact, nothing was mentioned about the use of assessors and the appellant’s rights in terms of section 93ter. The appellant was legally represented throughout the trial by the same legal representative who had indicated to the court that the use of assessors would be dispensed with.

[6] The issue to be determined in this appeal is whether the court was properly constituted and whether an indication to a different presiding officer by the legal representative during an adjournment was so sufficient that it amounted to a waiver by the appellant of the use of assessors.

[7] Section 93ter of the Magistrates’ 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.”

[8] In *Chala v DPP*¹ where the conviction and sentence were set aside, Vahed J stated that... “the record of the proceedings in cases where section 93ter is required to be invoked, must reflect that a proper explanation is given by the magistrate to accused persons of the choice they have in the appointment of assessors, together with the 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”.

[9] In *S v Langalitshoni*² 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 stated as follows:

“[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 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 judgement. 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

¹ 2015 (2) SACR 283(KZP)

² 2020 (2) SACR65 (ECM)

of 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". In this matter the conviction and sentence were set aside.

[10] In this matter, the record reflects that the proviso was never explained to the accused and that the accused never made a request for the presiding officer to dispense with the use of assessors. The accused was present in court on the 25th of January 2010 when his legal representative indicated that the use of assessors would be dispensed with, the magistrate could have ascertained from the accused that he understood the proviso and that the indication by the legal representative was in line with his instructions. None of that was done by the presiding officer who adjourned the matter.

[11] The record reflects that the presiding officer who conducted the trial did not even engage the accused on the matter at all. There is no valid reason for him not to have at least enquired from the legal representative and confirmed with the accused as to whether what had been indicated by the legal representative on 25 January 2020 was still the case on 14 October 2011 when the trial proceeded.

[12] The proviso is peremptory and judicial officers are required to comply with the proviso. This honourable court is experiencing an increased number of appeals that have to succeed purely on this technical ground and, this is a serious concern as unfortunately such an irregularity has an effect of vitiating the whole proceedings, something that could easily be avoided with the application of due diligence in the performance of functions by the judicial officers.

[13] In this matter the accused's legal representative simply indicated that they did not require assessors. The wording of section 93ter however suggests a positive action

from the accused in the form of a request which must be apparent from the record. It is clear from the record that of the proceedings that the accused was not afforded an opportunity by the magistrate to decide whether to request that the trial proceed with or without assessors before he was asked to plead. The appellant did not waive his right to such an appointment and there was therefore no compliance with the proviso.

[14] The respondent correctly conceded that this is a fatal misdirection which vitiates the proceedings.

[15] It is our view therefore that the trial court was not properly constituted and the conviction cannot stand.

Order

[16] Accordingly, I propose the following order:

- a) The appeal against conviction is upheld.
- b) The conviction and sentence is set aside.

MLABA J

I agree, and it so ordered.

NKOSI J

Appearances

Date of Hearing: 03 February 2023

Date of Judgment: 03 February 2023

Counsel for the appellant: P. Andrews

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Counsel for the respondent: G. Mkhize

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