



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case No: 613/2016

In the matter between:

LUCKY VINCENT SHANGE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Shange v S* (613/2016) [2017] ZASCA 51 (2 May 2017).

Coram: Lewis, Petse and Mathopo JJA and Gorven and Mbatha AJJA

Heard: 2 May 2017

Delivered: 2 May 2017

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Magid J, sitting as court of appeal).

- (a) The appeal is upheld.
- (b) The convictions and sentences in respect of the appellant are set aside.
- (c) The appellant is to be released from custody with immediate effect.

JUDGMENT

Lewis J (Petse and Mathopo JJA and Gorven and Mbatha AJJA concurring):

[1] The appellant, Mr Lucky Vincent Shange, was convicted of murder, robbery with aggravating circumstances and possession of a firearm without a licence, in the Durban Regional Court on 8 February 2000. The convictions were referred to the KwaZulu-Natal High Court (Durban) for confirmation and sentencing in terms of the Criminal Law Amendment Act 105 of 1997. The high court (Hugo J) confirmed the convictions and sentenced the appellant to life imprisonment in respect of the murder charge; life imprisonment in respect of the charge of robbery with aggravating circumstances; and to two years' imprisonment in respect of the charge of possession of a firearm without a licence.

[2] The high court granted the appellant leave to appeal against the convictions to the KwaZulu-Natal High Court (Pietermaritzburg), but the appeal was dismissed by the full court (Magid J, Levisohn J and M Southwood AJ concurring) on 8 November 2001. He has been incarcerated for some 17 years post the convictions.

[3] The appellant applied to this court for special leave to appeal against the convictions in 2015, and this was granted on 8 September 2015. At the hearing of the appeal today, 2 May 2017, counsel for the appellant raised an issue that had not been presaged in heads of argument, but of which he had apprised counsel for the State the day before. Counsel for the State very properly conceded the point, and accepted that the convictions and sentences should be set aside and the appellant immediately released from prison.

[4] The issue raised at the hearing is that the regional magistrate had not sat with assessors, as required by s 93*ter*(1) of the Magistrates' Courts Act 32 of 1944, and that the appellant had not requested that she not sit with assessors, in terms of the proviso to the subsection. The subsection reads, in so far as relevant:

'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) ...

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 assessor or assessors: *Provided 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.*' (My emphasis.)

[5] In *S v Gayiya* 2016 (2) SACR 165 (SCA) this court, referring to *Chala v DPP, KwaZulu-Natal* 2015 (2) SACR 283 (KZP) and the authorities discussed there, considered that where the regional magistrate had not sat with assessors, and the accused had not requested that the trial not proceed with assessors, the court was not properly constituted and that the convictions and sentences had to be set aside.

[6] In this matter, the appellant was not legally represented throughout the trial. And there is nothing on the record to suggest that he was ever made aware of the requirement that the regional magistrate sit with assessors or of his right to choose whether assessors assist with the trial. The regional magistrate nowhere recorded that he had made such a request. The appellant's co-accused was legally represented but there is nothing to show that he was given any choice either. And the transcription of the trial and appearance pages state nowhere that she had sat with assessors. The State does not suggest that the section was not complied with. The requirement that a judicial officer sit with assessors is peremptory.

[7] Accordingly the court was not properly constituted and the convictions and sentences must be set aside as being incompetent within the meaning of s 324(a) of the Criminal Procedure Act 51 of 1977. In the result:

- (a) The appeal is upheld.
- (b) The convictions and sentences in respect of the appellant are set aside.
- (c) The appellant is to be released from custody with immediate effect.

C H Lewis
Judge of Appeal

APPEARANCES

For Appellant

L Barnard

Instructed by:

Ncama & Associates, Durban

Rampai Attorneys, Bloemfontein

For Respondent

S Sankar

Instructed by:

The Director of Public Prosecutions, Pietermaritzburg

The Director of Public Prosecutions, Bloemfontein