

**Case summary written by Dean Scher and checked by Sean Buskin**

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**Background**

This is a review application brought in terms of Section 304A of the Criminal Procedure Act, 51 of 1977 (the “CPA”). The two accused persons, Malibongwe Papiyana and Luvo Mbana, were convicted by the Regional Court Magistrate of Lady Frere (the “**Magistrate**”), on a charge of murder. The magistrate referred the matter to the High Court, with a request to set aside the convictions, that she handed down, in respect of the two accused.

When the accused appeared before the Magistrate, in the Regional Court, they were both legally represented. The Magistrate advised the accused that it was their right to be tried in the presence of assessors. The accused exercised this right and elected to be tried in the presence of assessors. At first, the assessors were unavailable, and the trial was postponed. When the matter came before the Court again, only one assessor was available, to sit in judgement. The Magistrate decided to proceed with the trial in the absence of the second assessor. The Court was thus constituted by the Magistrate and one assessor.

Evidence was lead, and both parties closed their cases. At the conclusion of the trial, the accused were convicted on a charge of murder. Before commencing with sentencing the Magistrate became concerned that the proceedings were not conducted judicially, as the provisions of section 93 (1) *ter* of the Magistrates Court Act, 32 of 1944 (the “MCA”), were applicable in this instance. She therefore referred the matter for review by the High Court, requesting that the convictions be set aside.

**Held**

Section 93 (1) *ter* of the MCA, lays the foundation for the presence of assessors in a trial, the rights of the accused person/(s) and the powers of the Court in this regard. In assessing the confines of this section of the MCA, the Court held that the Magistrate correctly asked prior to the commencement of the case, whether the accused persons desired the presence of assessors. When both accused elected for assessors to be present, the constitution of the Court became settled. When a charge of murder is proffered against the accused, section 93 (1) *ter*, provides that the

judicial officer **shall** be assisted by two assessors unless the accused requests that the trial be proceeded with, without the presence of assessors. If this is the case the judicial officer may, in his discretion, summon one or two assessors to assist him.

The court relying on various precedents<sup>[1]</sup> held that the provisions of section 93 (1) *ter* are peremptory. The Court held that the consequence of non-compliance with the provisions of section 93 (1) *ter* are fatal to the proceedings. Once the accused has indicated that they seek the presence of assessors in the trial, the Magistrate is bound by the election of the accused and the Magistrate is obliged to ensure the presence of those assessors. The Court held that Section 93 (1) *ter*, further, prescribes the required number of assessors for the proper constitution of the Court. This means that the Magistrate cannot act contrary to the express provisions of section 93 (1) *ter*, if the Magistrate acts contrary to the provisions of the section a gross irregularity will occur.

The Court harshly criticized the Department of Justice and Constitutional Development, stating that the department must provide adequate resources for the conduct of proper justice, the proper functioning of the Courts and the efficient administration of justice. The Court ordered that a copy of the judgment be forwarded to the Department of Justice so that it could investigate and remedy any personnel issues, that threaten to derail the fair administration of justice.

The Court held that the Magistrate had committed a gross irregularity by proceeding with the trial in the absence of the second assessor. The accused had elected for assessors to be present, accordingly, the Magistrate had no discretion, in terms of section 93 (1) *ter*, to order that the trial proceeds with only one assessor. The trial court was therefore held to be improperly constituted. The defect was held to affect the conviction of the accused and the conviction was accordingly set aside.

## Value

This case reinforces the position that when an accused elects to have assessors present at a criminal trial, to be held in the Magistrates Court, the court is bound by the election of the accused to have assessors constitute the Court. If the Court proceeds to disregard the election of the accused, a gross irregularity is committed, and the conviction of the accused may be set aside.

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[1] S v Gayiya 2016 (2) SACR 165 (SCA), R v Price 1955 (1) SA 219 (A), S v Malinga 1987 (3) SA 490(A) at pages 495 – 496

S v Papiyana and Another (CA&R 19 2021) 2021 ZAECMHC 8 (23 February 2021)[Download](#)