

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

Reportable	Yes No
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CASE NO: CA&R 19/2021

Review number: 217650

Date delivered: 23 February 2021

In the matter between:

THE STATE

and

MALIBONGWE PAPIYANA

ACCUSED NO.1

LUVU MBANA

ACCUSED NO.2

REVIEW JUDGMENT

NOTYESI AJ:

Introduction

[1] These are review proceedings in terms of section 304A of the Criminal Procedure Act, 51 of 1977, as amended ("the Act"). The Regional Court Magistrate of Lady Frere, Ms Ngcongolo has referred this matter to this court with a request for the setting aside of the conviction she had handed down in respect of the two accused persons (Malibongwe Papiyana and Luvo Mbana). The accused were convicted by her on a charge of murder.

Background

[2] The accused persons had appeared before the Magistrate, sitting at Lady Frere regional court facing the charge of murder. Both of them were legally represented. The magistrate advised them as she is obliged to do about their right to be tried in the presence of assessors. The accused persons exercised their right and elected for the presence of assessors in their trial. The assessors were not immediately available and the matter had to be postponed pending the appointment of assessors. When the

matter again came before the regional court for commencement of the trial, only one assessor became available. It appears that the court manager had failed to secure the presence of two assessors as required in terms of the statute. The record suggests that the department has a limited number of persons available to act as assessors. This too, is the reason the magistrate put forward for proceeding in the absence of the second assessor as is the case here. The regional 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.

[3] After the leading of evidence, closing of the cases for both parties and hearing arguments, the regional magistrate convicted the two accused on a charge of murder. However, before commencing with the sentencing, the Magistrate became concerned that the proceedings may not have been conducted according to justice. Her attention having been drawn to the provisions of section 93 *ter* of the Magistrates' Court Act 32 of 1944. On that basis the Magistrate referred the matter to this court with a request for the setting aside of the conviction of the two accused persons. I proceed to consider the request and whether the proceedings were according to justice.

Discussions

[4] In order to answer the question whether the proceedings were conducted according to justice, reference has to be made to the Magistrates' Court Act 32 of 1944. The section lays the foundation for the presence of assessors in a trial, rights of accused persons and the powers of the court. Subsection (1) of s 93 *ter* of the Magistrates' Court Act reads:

"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) in considering a community-based punishment in respect of any person who has been convicted of any offence,

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 any regional court 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.”

[5] In this case, prior to the commencement of the proceedings the magistrate, correctly so, asked whether the accused persons seek for the presence of Assessors in the trial. Both accused persons confirmed their desire for the presence of Assessors. With the accused persons opting for the presence of Assessors, the constitution of the court was then settled. Section 93 *ter* (1) deals with the proper constitution of the regional court:

“Provided that if an accused is standing in 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.”

[6] The Magistrate appears in terms of this section not to hold any discretion if the accused elect to have assessors. On the one hand, the accused persons retain freedom to dispense with the requirement of assessors. The question presented in this case is whether the magistrate was correct in proceeding with one assessor when the accused had opted for presence of assessors. Put differently, can a Magistrate proceed with the trial sitting only with one assessor in circumstances, where the accused has elected for the presence of assessors.

[7] In *S v Gayiya*¹, Mpati P conclusively answered the question.

“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 two assessors, unless he (the accused) requests that the trial proceed without assessors.”

¹ *S v Gayiya* 2016 (2) SACR 165 (SCA).

[8] In *R v Price*² after analysis of evidence and the legal challenge arising with regard to the presence of assessors the court held:

“It was rightly not contended on behalf of the Crown that the appellant was precluded in any way, because of the request made on his behalf at the trial, from contending in this Court that the Court which had convicted him was not a properly constituted Court. If in fact the Court was not properly constituted then its verdict, and consequently also its sentence, are irregularities that cannot be waived by an accused person.”

[9] In *S v Malinga*³ the court reflected as follows:

“Finally, the significance of *Van Willigh v Die Staat* (case No 296/85 - delivered on 30 May 1986), in which the appeal was allowed on account of the irregularity under discussion, lies therein that this Court (*per* Jansen JA) held that the requirements of s 145(2) are peremptory: unless in the opinion of the trial Judge concerned the possibility of a death sentence can be discounted, he is obliged to appoint two assessors. The enquiry on appeal, the learned Judge said, is ‘wat die Verhoorregter se oordeel was oor die moontlikheid van ‘n doodvonnis by die aanvang van die verhoor’ (p 4 of the judgment). It was further held that such an irregularity, when proved to have been committed, is of such an order as to amount *per se* to a failure of justice vitiating the proceedings.”

[10] The above cases of which this court has referred to confirm that the provisions of section 93 *ter* are peremptory. The consequence of non-compliance is fatal to the proceedings. Once the accused indicate that they seek the presence of assessors in their trial, the Magistrate is bound by that election and is obliged to ensure the presence of those assessors. The section prescribes the number of the required assessors for the proper constitution of the court. The magistrate cannot constitute the court contrary to the expressed provisions of section 93 *ter* (1) of the Act. It is a gross irregularity to do so.

[11] Reasons relating to the lack of human resources cannot be a justification for non-compliance with this section. The comment by the learned regional Magistrate about lack of human resources is of great concern to this court. The failure by the court manager to timeously arrange for the presence of assessors must be seen and viewed in the light of failing systems. That becomes more compelling, if it is to be inferred that the reasons for the failure to properly comply with section 93 *ter* (1) of the Magistrates

² 1955 (1) SA 219 (A).

³ 1987 (3) SA 490(A) at pages 495 – 496.

Court Act may be attributed to the failure on the part of the Department of Justice and Constitutional Development to provide such resources, it follows that the proper functioning of the courts and the efficient administration of justice, stand at a risk of being compromised. A copy of this judgment must be forwarded to the Office of the Minister of Justice to investigate the position and take appropriate remedial action, if so required. It cannot be correct that the administration of justice and the functioning of courts is not fully supported for the efficient delivery of justice. Section 165(4) of the Constitution of the Republic of South Africa⁴ read:

“Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”

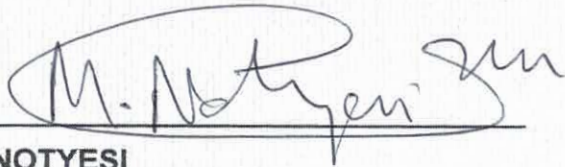
[12] I am satisfied that the regional Magistrate committed a gross irregularity when she proceeded with the trial in the absence of the second assessor. The accused persons had elected for the presence of the assessors. The Magistrate had no discretion in terms of section 93 *ter* to order that the trial proceeds only with one assessor. The court was accordingly not properly constituted. That defect affects the conviction of the accused and as such the conviction stands to be set aside.

Order

[13] I accordingly make the following order:

1. The proceedings in which the accused persons were convicted by the regional Magistrate are declared not to be in accordance with justice, and the conviction of both accused is set aside.
2. The registrar is to make a copy of this judgment available to the Minister of Justice and Constitutional Development for appropriate remedial actions, if any in the circumstances dealt with in para [11] of this judgment.

⁴ Act 108 of 1996


M NOTYESI
ACTING JUDGE OF THE HIGH COURT

I agree


T MALUSI
JUDGE OF THE HIGH COURT