



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

Case no: AR 319/2021

In the matter between:

BUSANI RICHARD ZULU

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Ixopo Regional Court (sitting as court of first instance)

- (a) The appeal is upheld.
 - (b) The conviction and sentence are set aside.
 - (c) The matter is remitted to the regional court to commence proceedings *de novo* before a different magistrate, at the discretion of the Director of Public Prosecutions.
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JUDGMENT

Khallil AJ (Chili J concurring)

Introduction

[1] The appellant, a 31-year-old male, Mr Busani Richard Zulu, who was legally represented, stood accused before the Regional Court sitting at Ixopo of one count of

murder, read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (CLAA).¹ The matter serves before us as an appeal against conviction and sentence with the leave of the court *a quo*. Before turning to the issue on appeal it is apposite to comment briefly on two aspects.

The applicability of the minimum sentence.

[2] It was common course at the trial that the offence charged, viz, murder, attracted imposition of a mandatory sentence prescribed by law. The charge sheet reflects that the appellant was facing a charge of murder, read with the provisions of s51 (2) of the Criminal Law Amendment Act 105 of 1997 (hereinafter "CLAA"). S51 (2) of the CLAA provides:

"(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in (a) Part ii of Schedule 2, in the case of -

- (i) a first offender, to imprisonment for a period not less than 15 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years;
- and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;"

[3] It is now settled that the interests of justice demand that an accused person be advised, promptly, of the applicability of a minimum sentence in a given case. That did not happen in the present appeal. Instead, the learned magistrate tersely stated: "...The Minimum Sentence Act (sic) 105 of 1997 is also applicable here, in terms of which certain sentences are compulsory unless there are substantial circumstances (sic) not to impose it". Nothing more². Although the appellant was legally represented, it was not confirmed, at the least, if these provisions were explained to the appellant by his legal representative. The ultimate responsibility however remains that of the court.

¹ See Annexure "A" to the charge sheet wherein the charge is substantively framed.

² See the record, page 1, lines 16-20; 5 v Langa 2010 (2) SACR 289 (KZP).

[4] I might just add that although competent verdicts were made reference to in general terms, the specific competent verdicts on a charge of murder were not brought to the attention of the appellant nor was it confirmed with his legal representative if these were indeed explained to the appellant.³

Application for condonation and for leave to appeal

[5] With leave of the court *a quo*, albeit before another magistrate and not the trial magistrate, leave to appeal against both the conviction and sentence was granted.⁴

[6] It bears mentioning that section 309B(1)(b)(i) of the Criminal Procedure Act 51 of 1977 (CPA) makes it obligatory that the application for leave to appeal be 'made within 14 days after the passing of sentence or order following on the conviction'. The appellant was sentenced on 13 June 2018 and the application for leave to appeal bears the clerk of the criminal court stamp of 2 July 2021, ie the date when the application for leave to appeal was heard. The appellant was 3 years out of time in bringing the application.⁵

[7] Section 309B(1)(b)(ii) of the CPA provides for an extension of the time period of 14 days which 'the court may on application and for good cause shown, allow'. However, no application for condonation was made on the papers and the record reflects that the learned magistrate, despite the mandatory prescription in this section stated as follows:⁶

'so I am not going to require that he launch (sic) an application for condonation at this stage, that would just be trying to use the law to prevent somebody to have justice done. For that reason, I am not going to require. . . '.

[8] The learned magistrate simply had no authority to dispense with the application for condonation when it is prescribed by law. Although well intentioned, in acting as he did, he purported to exercise a discretion he does not have and in effect changed the peremptory requirement which the law prescribes in this sub-section.

³ See the record, page 1, lines 22 – 25.

⁴ See the record at page 100, lines 1-3 and page 101, lines 13-14

⁵ Bundle of appeal record at page 58 (notice of motion) and page 92 of the record.

⁶ See the record at page 101, lines 8 – 11.

[9] Section 309B(2)(a) of the CPA provides, as a starting point, that the application for leave to appeal must be heard by the magistrate 'whose conviction, sentence or order is the subject of the prospective appeal (hereinafter referred to as the trial magistrate) or, if the trial magistrate is not available, by any other magistrate of the court concerned. . .'. Unfortunately, the transcribed record of proceedings does not reflect that the trial magistrate was unavailable.⁷ The jurisdictional requirement for the second magistrate to have dealt with the application for leave to appeal has accordingly not been satisfied. The non-availability of the trial magistrate cannot be assumed and should have been placed on record, if indeed he was unavailable.

[10] Section 309B(2)(b) of the CPA provides that where the application for leave to appeal is to be heard by a magistrate other than the trial magistrate and where the accused was legally represented, the clerk of the court must submit a copy of the judgment of the trial magistrate, including the reasons for the conviction, to the magistrate hearing the leave to appeal application, unless such magistrate deems it necessary, in order to decide the application, that the full record of the proceedings before the trial magistrate, be placed before him or her.⁸ What is clear from the record is that the learned magistrate dealt with the application for leave to appeal 'orally.' I understand this to be the procedure provided for in terms of section 309B(3)(b) of the CPA where immediately after the passing of sentence, the accused may orally apply for leave to appeal. This is borne by the following remarks of the magistrate in the record:⁹

'the fact that the application was only filed today hence I am dealing with it in more of an oral fashion so that I can make a decision here and now rather than bring you back another day and bring the accused back another day when we have these Covid protocols, so all I am trying to do is get work done.'

[11] It is also not clear from the record whether the learned magistrate was in possession of the judgment of the trial magistrate, which he was at the very least, obliged to consider in deciding the application for leave to appeal. Reference to dealing

⁷ See the record at page 92 and bundle of documents at page 57.

⁸ Section 309B(2)(c) of the Criminal Procedure Act 51 of 1977.

⁹ See the record at page 98.

with the application in an 'oral fashion' in the context of section 309B(3)(b) by the learned magistrate was misplaced as what the legislature has clearly envisaged by the wording of this section is the situation where, immediately after sentencing an accused, the application for leave to appeal is made orally to the trial magistrate.

[12] There were no reasons given by the learned magistrate for granting the application for leave to appeal. In his ruling,¹⁰ there is only a single sentence alluding to the merits wherein the learned magistrate concludes, without furnishing any reasons, as follows:

'On the merits of the matter, I am satisfied that perhaps another court acting carefully, there is (sic) a reasonable possibility that such court may arrive at a different conclusion to that which the trial court arrived at.'

[13] The learned magistrate was obliged to furnish reasons to explain how and why he arrived at the particular decision in the light of the grounds of appeal advanced by the appellant.¹¹ This is in line with the salutary principles of open justice, transparency, responsiveness and accountability. In addition, the furnishing of reasons demonstrates that a judicial officer has applied his or her mind to the issues which were placed before the court and therefore the judgment or ruling was not arbitrary.

[14] Notwithstanding the above irregularities pertaining to how the application for leave to appeal was dealt with, we think the interests of justice would be better served if the appeal is considered on the basis that it is properly before the appeal court.

I now turn to deal with the issue on appeal.

Right of appellant to have court constituted with assessors

¹⁰ See the record at page 100, lines 6 – 9.

¹¹ A Kruger *Hiemstra's Criminal Procedure* (Service Issue 15 – February 2022) at 30-62; *S v Smith* [2011] ZASCA 15, 2012 (1) SACR 567 (SCA) para 7; *S v Kruger* [2013] ZASCA 198, 2014 (1) SACR 647 (SCA) para 2. See also *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1, 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC) para 12, quoted in *S v Molawa*; *S v Mpengesi* 2011 (1) SACR 350 (GSJ) para 18ffg.

[15] The charge of murder preferred against the appellant required that section 93*ter* of the Magistrate's Court Act 32 of 1944 (MCA) be applied. Counsel for the State raised this issue in paragraph 2 of his written heads of argument and submitted that the provisions of section 93*ter* of the MCA were not explained to the appellant, and consequently no election was made by him. In the result, the State itself contends that the trial court was not properly constituted.¹² The appellant although not having raised this issue, was given an opportunity to make submissions thereon during the hearing of the appeal and similar sentiments to that of the State, were expressed.

[16] Section 93*ter* of the MCA provides that if an accused is standing trial on a charge of murder in the regional court: ' . . . 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.'

[17] This section is clearly couched in peremptory terms and the starting point therefore, is for the regional magistrate to inform the accused before commencement of the trial about the provisions of this section.¹³

[18] Upon a perusal of the record of the proceedings, the following is apparent:

(a) When the case was transferred from the district to the regional court on 28 March 2017, the 'supplementary information on the final remand to regional court' form which was signed by the district magistrate and which caters for the choice of whether or not the accused requires assessors, is unfortunately left blank.¹⁴

(b) On 10 May 2017, the minutes of the pre-trial conference conducted in the regional court also makes provision for the choice of assessors but unfortunately it is marked 'N/A' (not applicable).¹⁵ It is unclear why the matter was certified as trial ready by the learned magistrate on this day under signature of the prosecutor, defence counsel and

¹² *S v Gayiya* [2016] ZASCA 65, 2016 (2) SACR 165 (SCA).

¹³ *Van Staden v S* [2018] ZANWHC 82.

¹⁴ See pages 3 – 5 of the record of proceedings in the district court.

¹⁵ See pages 21 – 22 of the record of proceedings in the regional court.

magistrate himself, and the matter scheduled for trial when the issue of assessors regarding the constitution of the trial court was not canvassed at all.

(c) When the trial eventually began on 26 January 2018, the learned magistrate dealt with the issue of assessors but only after the appellant had formally pleaded and in the form of a single - line enquiry directed to defence counsel which reads as follows:

'Court: You also confirm that no assessors are required?'

Mr Ismail: *Correct, no assessors.*¹⁶

[19] In *S v Langaletshoni*¹⁷ the magistrate in the court *a quo* enquired from the accused's legal representative (not dissimilar to this case) whether or not the accused 'are going to use the services of the assessors.' Brooks J opined that this amounted to no explanation at all and gave a useful step-by-step guide with reference to the practical application of section 93*ter*.

'[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

¹⁶ See the record at page 4, lines 5 – 6.

¹⁷ *S v Langaletshoni* 2020 (2) SACR 65 (ECM).

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. (my emphasis, footnotes omitted)

The convictions and sentences were set aside.

[20] The main issue in the present matter is whether the one-line communication in court between the learned magistrate and defence counsel on the question of assessors, which excluded the appellant, was sufficient.¹⁸

[21] It is clear, from the record, that the provisions of section 93ter were never explained to the appellant, and he never made a request not to sit with assessors. Moreover, the record does not reflect that the constitution of the court was ever explained by defence counsel to the appellant.

[22] Nor did the appellant's legal representative in the court *a quo* request that the matter proceeds without assessors. He simply responded to the learned magistrate's one-line question by stating 'Correct, no assessors,' without any involvement of the appellant.¹⁹

[23] It is most unfortunate that there was no explanation given to the appellant by the magistrate on such a crucial issue that affects him directly. The record reflects that once each in the district court, regional court pre-trial conference, and after the appellant had pleaded before the trial court, he was excluded in the process on fundamental an issue as to the constitution of the court dealing with his fate. The fact that this happened on three separate and distinct occasions in the matter, exacerbates the irregularity.

[24] In *S v Naicker*,²⁰ it was held that although non-compliance with the peremptory terms of section 93ter(1) amounts to an irregularity, it does not necessarily follow that

¹⁸ See the record at page 4, lines 5 – 6.

¹⁹ *Hlatshwayo and another v The State* [2022] ZAKZPHC 8.

²⁰ *S v Naicker* 2008 (2) SACR 54 (N).

it amounts to a failure of justice and an assessment is nevertheless required to discover the impact of the irregularity on the integrity of the proceedings. Some 4 years later, *S v Du Plessis*²¹ critically analysed a number of cases dealing with section 93ter, including the *Naicker* decision, and concluded that *Naicker* was wrongly decided. It was held that the irregularity was so fundamentally fatal that it constituted a failure of justice vitiating the entire proceedings.

[25] About a year later, *Naicker* was referred to and considered in *Chala and others v Director of Public Prosecutions, Kwazulu-Natal and another*,²² Vahed J (with Ndamase AJ concurring), undertook extensive research on the subject, and having also referred to a number of decisions concluded that non-compliance with the peremptory provisions of section 93ter was a fatal irregularity and the court set-aside the conviction and sentences in that case.

[26] The court in *Chala* was ordinarily bound by the earlier *Naicker* decision, unless it concluded, as it did, that the decision in *Naicker* was clearly wrong, and a new precedent was thus created. Three years later in 2016, the Supreme Court of Appeal in *S v Gayiya*,²³ with reference to section 93ter, held that:

'The starting point, therefore, is for the regional magistrate to inform the accused, before 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 proceeds without assessors.'

[27] The Supreme Court of Appeal made reference to and endorsed the approach of Vahed J in *Chala* and set aside the conviction and sentence in that matter. More recently, a similar approach was, yet again, adopted in *Nxumalo v The State*²⁴ as well as in *Hlatshwayo and another v The State*,²⁵ a judgment delivered a month later.

[28] Given the circumstances alluded to above, it is most unfortunate that much time and resources are spent to prosecute accused persons in serious offences only for

²¹ *S v Du Plessis* 2012 (2) SACR 247 (GSJ).

²² *Chala and others v Director of Public Prosecutions and another* [2014] ZAKZPHC 62, SACR 283 (KZP).

²³ *S v Gayiya* 2016 (2) SACR 165 (SCA) para 8.

²⁴ *Nxumalo v The State* (KwaZulu-Natal Local Division of the High Court) unreported case no AR 263/2019 (10 February 2022). Lopes J with Ploos van Amstel J concurring.

²⁵ *Hlatshwayo and another v The State* [2022] ZAKZPHC 8.

those entrusted with the onerous responsibility to prosecute and adjudicate appear not to comply with the basic tenets of what is expected. A reading of the substantive charge preferred against the appellant and adherence to section 93*ter* would have prevented an injustice to all affected.

[29] I am satisfied that the irregularities alluded to above are fatal so as to vitiate the entire proceedings.

[30] The non-compliance with section 93*ter* on fundamental an issue as the constitution of the trial court adjudicating the fate of the appellant, coupled with what appears to be the appellant's deliberate exclusion in that process on at least three occasions, by itself, has resulted in a failure of justice as envisaged in section 322(1) of the CPA. In the circumstances we do not think it necessary to consider the merits of appeal.

Conclusion

[31] On the issue of whether the matter ought to be remitted to the regional court for trial *de novo*, section 322(1)(c) of the CPA empowers the appeal court to make an order as would serve the interests of justice

[32] In *casu*, counsel for the appellant and State, have agreed, during the hearing of the appeal, that the interests of justice would be best served if the matter was to be referred back to the court *a quo* to commence proceedings *de novo*, before a different magistrate. We agree.

[33] In the light of the irregularities alluded to, including that the trial court was not properly constituted, it is clear that the appellant's rights to a fair trial were violated in multiple respects. In our view the conviction and resultant sentence can accordingly not stand.

[34] In the result, the following orders are made:

Order

- (a) The appeal is upheld.
- (b) The conviction and sentence are set aside.
- (c) The matter is remitted to the regional court to commence proceedings *de novo* before a different magistrate, at the discretion of the Director of Public Prosecutions.



KHALLIL AJ

I agree



CHILI J

Appearances:

For Appellant	:	Hulley
Instructed by	:	Justice Centre Pietermaritzburg
For Respondent	:	C N Ngubane
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Date of Appeal	:	6 May 2022
Date of Judgment	:	13 May 2022