

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION: MTHATHA**

CASE NO. CA&R30/17

REPORTABLE

SIZWE LANGALITSHONI

Appellant

and

THE STATE

Respondent

JUDGMENT

BROOKS J

[1] On 26 September 2016 the appellant appeared in the Regional Court for the Eastern Cape Region held at Mt. Frere on charges of murder, robbery and rape. On 23 November 2016 the appellant pleaded guilty to the charges of murder and rape and not guilty to the charge of robbery.

[2] The appellant was represented in the court *a quo*. After the charges had been put to the appellant and before he pleaded thereto, the magistrate informed the

appellant of the applicability of the provisions of the Criminal Law Amendment Act 105 of 1997 which, in the circumstances of the matter, prescribed minimum sentences in respect of each of the charges. He was correct in doing so and the appellant confirmed that he was aware of the fact that upon conviction, minimum sentences would be imposed upon him unless substantial and compelling circumstances could be identified which would entitle the magistrate to impose lesser sentences.

[3] The magistrate also warned the appellant of the possibility that should the evidence before the magistrate not prove all the elements of the offences of murder, robbery or rape, the appellant may be convicted of lesser offences. The appellant confirmed that he understood this.

[4] The magistrate then addressed the legal representative of the appellant in the following manner:

“Yes [name], as I said there is no pre-trial conference, according to the charge sheet yes, among the counts there is a murder count, where the assessors are supposed to be there, are you going to use the services of the assessors?”

The response was:

“No, your worship.”

[5] The magistrate then invited the appellant to plead to the charges.

[6] There can be no doubt that in referring to assessors in the context of a charge of murder the magistrate had in mind the provisions of s 93 (*ter*) (1) of the Magistrates' Courts Act 32 of 1944 (the Act) which read, insofar as may be relevant, as follows:

“The judicial officer presiding at any trial may, if he deems in 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 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 a court of 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.”

[7] The interpretation to be attached to these provisions has received the attention of this court¹ and the Supreme Court of Appeal². The provisions are peremptory and ordain that where a regional magistrate is presiding in a regional court in which an accused person is charged with murder, the regional magistrate shall be assisted by two assessors at the trial, unless the accused person requests that the trial proceed without assessors. “It is only where the accused makes such request that the judicial officer becomes clothed with the 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.”³

[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

¹ M PHAKATHI v STATE; B MLONYENI v STATE AND S LINYANA v STATE, unreported judgment ECHCM, 29 June 2017, Case Nos CA&R03/17; CA&R71/16 and CA&R76/14.

² GAYIYA v STATE 2016 (2) SACR 165 (SCA); LUCKY VINCENT SHANGE v STATE (613/2016) [2017] ZASCA (2 May 2017) *para* [5]-[7]

³ GAYIYA v STATE (*supra*) *para* [8].

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 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.⁴ That this is so should be checked with the accused person and the legal representative.

[10] It follows that where a regional magistrate is presiding over a court in which an unrepresented accused person faces a charge of murder, the obligation placed upon him or her to explain the effect of the peremptory provisions upon the proper constitution of the court and the choice which the accused person has to make in the circumstances must be discharged with diligence and clarity. To enable the accused person to make an informed choice where he or she does not have the benefit of legal representation may require the regional magistrate to engage in a process of

⁴ DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL v VILJOEN 2005 (1) SACR 505 (SCA) *par* [43].

explanation to the accused person. Ultimately, the regional magistrate must be satisfied that an unrepresented accused person is making an informed choice, particularly when electing to permit the matter to proceed without assessors.

[11] In this matter, the manner in which the magistrate approached the peremptory provisions of s 93 (*ter*) (1) of the Act comes under scrutiny. Although in the preamble to this question he says “there is a murder count, where the assessors are supposed to be there”, which at first blush appears to address the relevant provisions of the Act, the actual question posed to the appellant’s legal representative is misleading. In asking “are you going to use the services of the assessors”, the magistrate is not conveying to the appellant that the proper constitution of the court requires that the magistrate ordinarily sits with two assessors. The question posed suggests that the court is constituted ordinarily by the regional magistrate sitting alone. It conveys the suggestion that the appellant’s legal representative has a right to request the participation of assessors as an additional “service”. In the circumstances, the question asks whether the appellant’s legal representative wishes to invoke an additional right, whereas it should have been clear that what is required is an indication of whether or not the appellant elected to waive an existing right. One cannot simply assume that because of the preamble contained in the magistrate’s questioning one can accept that both the magistrate and the legal representative knew that the right created thereby could be waived by the appellant and that the legal representative of the appellant was indeed unequivocally waiving the right created by the section. It is also of concern that the appellant was not addressed personally by the magistrate and that the correctness of his or her answer was not thereafter confirmed by the legal representative.

[12] In my view, the magistrate’s question and the legal representative’s answer do not indicate that, with full knowledge thereof, the appellant waived the right to a trial presided over by a properly constituted court consisting of a regional magistrate and two assessors. That being so, the proceedings were a nullity.

[13] There was some debate before this court about the timing of the magistrate's question posed to the appellant's legal representative. In *Gaiya*⁵ the Supreme Court of Appeal directed only that the magistrate inform the accused person of the legal requirements for the proper constitution of the court "before commencement of trial". In practical terms, when is the commencement of the trial?

[14] In terms of the provisions of s 76 of the Criminal Procedure Act 51 of 1977 as read with the provisions of s 120 thereof, unless an accused person has been summoned to appear before the court, proceedings at a summary trial in the lower court shall be commenced with the lodgement of a charge sheet with the clerk of the court. Given that the injunction in *Gaiya* is upon the presiding regional magistrate to inform the accused person of the legal position, clearly it was not intended by the Supreme Court of Appeal that "the commencement of the trial" should be understood as being at the commencement of proceedings as defined by the Criminal Procedure Act. Be that as it may, in my view there can be no harm in adopting a practice whereby the impact of the provisions of s 93 (*ter*) (1) of the Act, and the nature of the election which an accused person has to waive the right to the proper constitution of the court, are set out clearly in the charge sheet. This would be a salutary practice which would ensure that a timeous reminder is communicated to the prosecutor and the regional magistrate that the provisions of s93 (*ter*) (1) of the Act must be dealt with at the commencement of the trial.

[15] Given that the provisions of ss 93 (*ter*) (1) (a) of the Act refers to "before any evidence has been led", and the fact that assessors play no role in the adjudication of proceedings until after an accused person has pleaded, even where a plea of guilty is tendered in accordance with the provisions of s 112 of the Criminal Procedure Act,⁶ it seems to me that it would be competent for a regional magistrate to address the provisions of s 93 (*ter*) (1) of the Act with the accused person at any stage prior to evidence being led. That said, in my view it is preferable that the regional magistrate address the accused person on the subject before he or she is invited to plead to the charge of murder. This is so because the nature of the information and the election to which it gives rise may well be factors which affect the

⁵ *GAIYA v STATE* (*supra*) *para* [8].

⁶ Section 93(*ter*)(3) of the Magistrates' Court Act 32 of 1944

manner in which an accused person considers his or her approach to the imminent court proceedings, including the manner in which he or she intends to plead to the charge in question. It is at this stage which, for the same reason, the applicability of the provisions of the Criminal Law Amendment Act 105 of 1997 is raised by the regional magistrate.

[16] Moreover, where a regional magistrate is presiding over a trial in which the accused person is unrepresented, the most convenient time for the regional magistrate to address the unrepresented accused person on all issues pertaining to the conduct of the proceedings, and thereby to ensure that the accused person receives a fair trial, is after the charges have been put and before the unrepresented accused person is invited to plead thereto.

[17] In my view, the proceedings in this matter in the court *a quo* were a nullity and the appeal against conviction and sentence must succeed.

[18] The following order will issue:

“1. The appeal succeeds.

2. The convictions and sentences imposed upon the appellant in the Regional Court for the Eastern Cape Region held at Mt. Frere under case number RCMF 129/16 are set aside.

RWN BROOKS

JUDGE OF THE HIGH COURT

GRIFFITHS J:

I agree.

RE GRIFFITHS

JUDGE OF THE HIGH COURT

Appearances:

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MTHATHA

For the respondent: ADV JKM JOUBERT
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Date heard: 09 March 2018

Date delivered: 07 June 2018