

FOR ATTENTION: ALL REGIONAL COURT MAGISTRATES



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/~~NO~~

(2) INTERSET TO OTHER JUDGES: YES/~~NO~~

(3) REVISED

30/10/2017

DATE

M. P. M. M.

SIGNATURE

CASE NO: REV 91/2017

In the matter between:

THE STATE

APPLICANT

and

MMANGWAILE LIPSON MASHABELA

RESPONDENT

JUDGMENT: REVIEW

Summary:

Criminal procedure: Special review – When trial court sitting as court of a regional division – Section 93 ter Act 51 of 1977 – Court to be assisted by two assessors except accused requests otherwise judicial officer has a discretion to summon one or two assessors - Section 93(2) to be considered when applying discretion –

Issue: Whether trial court obliged to proceed with trial absent the “remaining” member and whether the Court was properly constituted. –

the principle in *S v Gayiya* followed and applied

Principle: Where one assessor defaulted in the course of trial the interests of justice may require that the trial proceeds before remaining member or members of the court-

Section 93(II)(ii)(a)(aa),(bb) applicable – In *casu*, the remaining member defaulting in middle of trial .

Held: a judicial officer of court of regional division is required to sit with two assessors to conclusion of trial, unless accused after being properly apprised of his/her rights, dispense his/her rights – the proceedings of the court *a quo* reviewed and set aside , matter to start *de novo*.

M.G PHATUDI J

- [1] The accused in this matter has been charged with one count of Murder read with Section 51(2) of the Criminal Law Amendment Act, 1997,¹ and also two counts of Attempted Murder.
- [2] When the matter was called on 10 March 2016 and before the accused was asked to plead to the charges, the issue of the assessors came to the fore. This had arisen on account of the fact the accused whose trial was in the Regional Court, faced a Murder charge which on conviction could attract prescribed minimum sentence, unless substantial and compelling circumstances were established which could possibly actuate the court to impose a lesser penalty than the one prescribed.

¹ Act 105 of 1997, as amended

- [3] The accused was legally represented at the trial.
- [4] Where an accused person has been charged with murder as indicated, and appears in a Regional Court, his trial is governed *inter alia* by the provisions of Section 93 *ter*(1) (a) and (b) of the Magistrate's Court Act, 1944("the Act")² which provides that:

Section 93 *ter*:

" The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice –

(a).....

(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 the other

² Act 32 of 1944, as amended.

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] Because of the gravity of the murder charge, Section 93 *ter* imposes an obligation upon a Magistrate of a Regional Division trying the matter to summon the assistance of two assessors at the trial proceedings. This requirement is a necessary imperative unless the accused person pertinently requests that the trial be proceeded with without assessors.

[6] If the accused, makes a request contrary to the obligation imposed on the regional court magistrate before whom the matter is to proceed, the court, however, retains a discretion whether or not to summon the assistance of two assessors to assist him /her in the trial regardless of the accused's wishes that the matter proceeds on trial without the two assessors. The court's discretion, which must be exercised judicially even though unfettered, derives from the provisions of Section 93ter(2) of the Act.

In essence, Section 93 *ter*(2) provides that in considering whether summoning assessors under subsection (1) of the Act would be

expedient for the administration of justice, the judicial officer as in the present case, was required to take into account *inter alia* the cultural and social environment from which the accused originates, his academic background, the gravity of the offence preferred against him, the extent or probable extent of sentence to which he/she might be exposed on conviction, and of course, the knowledge and general experience of the candidate assessors which might be employed in assisting the court.

- [7] In the present instance, undoubtedly, the presiding officer, applying his discretion and correctly so in my view, postponed the matter to a later date so as to accommodate the accused's wishes. The matter was accordingly remanded to 07 April 2016 for the two assessors to sit during trial.
- [8] On 07 April 2016, the matter indeed proceeded in the presence of the two assessors assisting the presiding officer. The accused pleaded not guilty to the charges and the prosecution led evidence on behalf of the state. The matter was adjourned to 24 May 2016 and 26 May 2016, respectively, for further evidence.

[9] On 24 May 2016, however, one of the assessors Mr. Moleke Mamogoane ("Mamogane") was absent from the trial and the matter was remanded to 26 May 2016, where upon the state led further evidence with one witness and the matter was, once again, remanded to 26 July 2016 for further evidence.

[10]. On 26 July 2016, Mamogane had again defaulted. It was alleged by the public prosecutor in the matter that it appears Mamogane had lost interest in his role as an assessor in the matter due to dissatisfaction with the stipend he received.

The court having heard submissions made by both the state prosecutor and the defence regarding the desirability or otherwise of proceeding with further trial in the absence of Mamogane one of the appointed assessors, the court decided to proceed with the trial in the absence of the assessor.

(It is not clear as to why the defaulting assessor was at times referred to on the record as "Maluleke")

Record, Pp 144-145

[11] Be that as it may, one of the assessors clearly was absent on 26 July 2016. It then called for consideration whether the court was entitled to proceed with the trial in the absence of the defaulting assessor.

[12] In this regard, the court relying on the provisions of Section 93ter(II)(a) of the Act, ruled that the court “proceed with the matter with one assessor.”

Section 93ter(II)(a) provides:-

“ If an assessor –

(i).....

(ii) in the opinion of the presiding officer becomes unable to act as an assessor; or

(iii) for any reason absent; or

(iv);

at any stage before completion of the proceedings concerned, the presiding judicial officer may, in the interests of justice and after due consideration of the arguments put forward-

(aa) direct that the proceedings continue before the remaining member or members of the court;

(bb) direct that the proceedings start afresh”

(cc).....

[13] A closer scrutiny of subsection 11 of Section 93ter confers on a presiding officer, a discretion, whether to proceed with the trial in the absence of one of the appointed assessor or simply to direct that the proceedings start *de novo*.

[14] Pursuant to this ruling, the trial proceeded on 18 April 2017 after a few remands, with the accused testifying in his own defence. Prior to that, the state had closed its case on previous occasion. The accused then testified on 18 April 2017 and at the conclusion of his testimony, the defence sought to call further witnesses to testify. The matter had to be adjourned further and was further remanded to 09 May 2017.

- [15] It was on this day (09 May 2017) that the state prosecutor sprang a surprise and placed on record that on previous occasion (18 April 2017) when the accused took a stand, once again, the last of the remaining assessor, Mr. Mosotho ("Mosotho") was in default, and so he was on 09 May 2017.
- [16] Confronted with this predicament, the presiding officer had to make a ruling, as it did in terms of the provisions of Section 93 ter, whether to proceed with the balance of the trial in the absence of the second defaulting assessor.
- [17] As it appears from the trial record, Mosotho had at all material times been present when the state led evidence against the accused. He, however, defaulted when on 18 April 2017, the accused testified. On 09 May 2017, he was again absent from court.
- [18] This then raised the question, in the light of these developments, whether the court was entitled to proceed with the trial in the absence of the second assessor whose continued role was ordained by Section

93ter(11) (a)(ii) and (iii), regard being had to the matter was correctly before the “remaining” member or members of the Court.³

- [19] The court below, mindful of the provisions of Section 93 ter, in particular, Section 93ter(1) and given the magnitude of the murder charge, was obliged to have heard the matter throughout the trial assisted by or in the presence of the assessors, notwithstanding the provisions of Section 93ter(11)(a)(i),(iii)(“aa”) of the Act.
- [20] In the premises, the issue that arises is whether the trial court was since 18 April 2017 or even probably before (19 January 2017) properly constituted including the last day of 09 May 2017, when its attention was drawn to this anomaly. This question requires a closer examination.
- [21] In this instance, it is common cause that the accused who faced a murder charge which was justiciable in the Regional Court, was entitled to have his trial constituted by two assessors, unless he requested that the trial be proceeded with without assessors. In that event, the presiding officer may, in his discretion, summon one or two assessors to assist him.

³ Section 93(11) (ii), (iii) ('aa') of the Act.

[22] It is furthermore common cause that the judicial officer having granted accused's request, commenced with a fully constituted court, until one of the assessors lost interest in the course of trial. The presiding officer, who later remained with one assessor, correctly proceeded with trial after having heard submissions by both the state prosecutor and the defence attorney.

Matters came to a head when later, and inadvertently to the court, the remaining assessor also defaulted for reasons inexplicable to the court.

[23] It was against this backdrop that the presiding officer halted the proceedings and referred the matter to this court for a special review. The Director of Public Prosecution's ("DPP") comments were also invited following the written statement set forth by the court below as to why a special review of the matter was sought.

[24] Both the presiding officer and the DPP referred to **S v Gayiya**⁴ for guidance in their submissions. In Gayiya's case, the issue of non-appraisal by the presiding officer to the accused of his right to be heard by a court sitting with assessors was characterised by Bertelsmann J, when he considered accused's application for leave to appeal as a "

⁴ 2016 (2) SACR 165 (SCA)

fundamental problem” which had arisen in the matter.⁵ It was for that reason that the learned judge granted leave to appeal both against conviction and sentence.

[25] In Gaiya's case above, the issue in the appeal was whether the court a quo (Regional Court) before which the accused stood trial, was properly constituted. Section 93ter(1) was held to be peremptory. It was held at page 168h-j that:

“ It ordains 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.”

⁵ Gaiya's case supra, P168 h-j.

[26] In this review, however, it is plain from the onset of the trial that the judicial officer has followed the principle enunciated in the Gayiya's case, until in the middle of the trial, the two assessors detached themselves from the proceedings.

This is precisely what actuated the presiding officer and, correctly so in my view, to have halted the proceedings before conviction and sentence by referring the matter on a special review. For that reason, and having halted the proceedings with the referral, there could not have been a panacea for the supervening irregularity that ensued.

[27] The principle in Gayiya's case above, that it is imperative for a judicial officer (Regional Magistrate) to sit with assessors was reiterated, applied and followed in Shange v S⁶. It is now settled, that a judicial officer is required to sit with two assessors during trial unless the accused person after being properly apprised of his/her right, dispenses of that right to be tried with assessors in a court of regional division, where serious offences (e.g. murder) are to be tried.

[28] In the result, I deem the following Order appropriate:

⁶ Case No (613/2016)[2017] ZASCA 51 delivered 02 May 2017- per Lewis JA.

- (a). The trial proceedings in the Court *a quo* are reviewed and set aside.
- (b). The trial is to start ***de novo*** before another Regional Court Magistrate.



M.G PHATUDI
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION

I agree.



E.M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT
LIMPOPO DIVISION