



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: A307/2023

(1)	REPORTABLE: YES/NO	(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO		
SIGNATURE		DATE	

21/10/2024

In the matter between:

TATE NTULI

APPELLANT

V

THE STATE

RESPONDENT

JUDGMENT

MOSOPA, J

[1] This is an appeal against sentence. The appellant pleaded guilty in the Tsakane Regional Court, and a statement in terms of section 112(2) was handed in,¹ in which the appellant set out the facts he admits and pleaded guilty to one count of murder, read with the provision of section 51(2) of the Criminal Law Amendment Act.² The appellant was convicted on the strength of his guilty plea.

[2] Following the conviction, the appellant was sentenced to twelve years' imprisonment. Leave to appeal against sentence was granted by the court *a quo* on the 28 August 2023.

Point in limine

[3] For the first time in his heads of argument, the appellant raised a *point in limine*, arguing that the trial court was not properly constituted and placed reliance on section 93ter (1) of the Magistrates Court Act³, which makes the following provision:

"[93ter 1] 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)

Summon to his or her assistance any one or two persons who, in his or her 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 or her as assessor or assessors:

Provided that 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

¹ Criminal Procedure Act 51 of 1977.

² 105 of 1997.

³ 32 of 1944.

proceeded with without assessors, whereupon the judicial officer may in his discretion, summon one or two assessors to assist him.”

[4] Ex facie the record, it is clear that the trial court did not inform the appellant about the use of assessors and whether or not he waived his right to the use of assessors.

[5] This section is preemptory; it ordains that the judicial officer presiding in a Regional Court before which an accused is charged with murder (like in this case) shall be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors.⁴ The mere fact that the accused person is legally represented, does not absolve the judicial officer of the obligation to inform the accused about the use or non-use of assessors.

[6] It is based on the non-compliance with the above provision that the above proceedings should be declared a nullity. This approach has been adopted by many courts and in *S v Gayiya*,⁵ it was stated that in the event that the court is not properly constituted, the proceedings are a nullity.

[7] It is common cause that the point raised by the appellant, raises a question of law. It must be noted that during the proceedings, the appellant was legally represented.

[8] It is trite that where a word is defined in a statute, the meaning attached to it by the legislature should prevail over its ordinary meaning. The section provides that;

“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....”.

⁴ Director of Public Prosecutions, KwaZulu-Natal v Pillay 706/2022 [2023] ZASCA 105, 23 JUNE 2023.

⁵ 2016 (2) SACR 165 (SCA).

The section makes it preemptory for the judicial officer to summon to his or her assistance one or two assessors before evidence is led.

[9] In casu, the appellant handed in a section 112(2) statement which led to his conviction. He also elected not to testify in mitigation of sentence. His personal circumstances were placed from the bar by his legal representative and the prosecutor addressed the court from the bar and did not lead any evidence. The state did not lead any evidence to contradict the facts outlined in the appellant's section 112(2) statement, which was accepted by the state.

[10] The term 'evidence' is not assigned a special definition in the Act. As a result, its ordinary meaning should prevail. In *Independent Institute of Education (Pty) Ltd v Kwazulu-Natal Law Society and Others*,⁶ it was held that:

"[18] To concretize this approach, the following must never be lost sight of. First, a special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored. Fourth, the definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could be given to a word or expression in a statute without straining the language, "promotes the spirit, purport and objects of the Bill of Rights" then that is the meaning to be adopted even if it is at odds with any another meaning in other statutes".

⁶ [2019] ZACC 47 at para 18.

[11] A statement in terms of section 112(2) provides a factual matrix, which is a factual foundation on which a conviction can follow. Section 112 dispenses with the need to call witnesses to testify under oath, but places an obligation on the accused person to set out the facts on which his plea is premised. In *S v Thole*,⁷ the court stated that:

“It has been held in a number of cases that where an accused pleads guilty and hands in a written statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, detailing the facts on which his plea is premised, and the prosecution accepts the plea, the plea so explained and accepted constitutes the essential factual matrix on the strength of which sentence should be considered and imposed. . .”

[12] Having said this, what needs to be determined at this stage is whether the handing of a statement in terms of section 112(2) amounts to the leading of evidence as intended in section 93*ter* (1) of the Magistrates Court Act. Furthermore, the court needs to determine whether the trial court misdirected itself in convicting and sentencing the appellant without enquiring from the appellant whether that court should or not summon the assistance of the assessors.

[13] It is well established, following a number of decided cases, that if the proceedings are declared a nullity due to failure of a judicial officer to comply with the relevant provisions, that such failure vitiates the proceedings, resulting in the conviction and sentence being set aside.⁸

[14] The primary purpose of the written statement in terms of section 112(2) is to set out the admissions of the accused and the factual basis supporting his or her plea of guilty.⁹ The statement should, in principle, address the merits of the case and need not be made under oath.

⁷ 2012 (2) SACR 306 (FB) at para 8.

⁸ Above n5.

⁹ *S v Hlangotho* 1979 (4) SA 199 (B) at 201 B.

[15] Shorter Oxford English Dictionary, 5th Edition defines evidence as “information (in the form of personal or documented testimony or the production of material objects) tending or used to establish facts in a legal investigation or material admissible as testimony in a court of law.” It is trite that for a particular material or facts to be admissible as evidence, it must be provided under oath by the person presenting such. Affidavits have been readily admitted as evidence by the courts. Section 220 makes provision for the admission of certain facts made by the state or by the accused;¹⁰ especially relating to issues not in dispute between the state and the defence; such admission is recognized as ‘admission of fact’ and simply dispenses with the need for proof of the fact admitted. This simply means that once a fact is formally admitted under section 220, it then becomes evidence. The same cannot be true with regard to an admission made under section 112(2), as it remains part of factual matrix.

[16] Section 112(3)¹¹ calls upon the prosecutor to present evidence or adduce evidence, but this only applies after the conviction, prior to sentencing. In casu, the prosecutor did not supplement the statement handed in by the appellant.

[17] Section 81(1)¹² uses the same wording as section 93*ter* (1) of the Magistrates Court Act, and provide as follows:

“Any number of charges may be joined in the same proceedings against an accused at any time before any evidence has been led in respect of any particular charge, and where several charges are so joined, each charge shall be numbered consecutively.”

This subsection makes provision for the joinder of charges of the accused, but the essence of it is that once evidence is led, such joinder of charges cannot occur.

¹⁰ Above n 1

¹¹ Above n 1.

¹² Above n 1.

[18] In a plea of guilty scenario, wherein a section 112(2) statement is handed in, and the accused implicates another person, practically that cannot be the basis of joining the implicated person in the trial of the accused. Such a guilty plea statement can also not be used against such implicated person, as it will remain a previous inconsistent statement, with less evidential value in the trial of the implicated person.

[19] Based on the above, I am of the considered view that the handing of the statement in terms of section 112(2) does not amount to leading of evidence intended in section 93ter (1) of the Magistrates Court Act. Therefore, despite the fact that no enquiry was made by the trial court as to whether assessors should be summoned or not, I find that the trial court did not misdirect itself to the extent of vitiating the proceedings and rendering them a nullity. As a result, the point *in limine* raised by the appellant ought not to succeed.

Sentence

[20] The appellant was convicted of murder, read with the provisions of section 51(1)¹³ which mandates a minimum imprisonment of 15 years. The state accepted the plea and is thus bound, so is the trial court by the factual matrix admitted in the section 112(2) statement. No evidence was led by the state to contradict the admitted facts.

[21] In *S v Boggards*,¹⁴ the Constitutional Court when dealing with the appellate courts' powers, stated the following:

"Ordinarily, sentencing is within the discretion of the trial court. An appellate courts' power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice, the court below misdirected itself to such an extent that its decision on sentence is

¹³ Above n 2.

¹⁴ 2013 (1) SACR 1 (CC).

vitiated or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.”¹⁵

[22] When deviating from the prescribed minimum sentence, the trial court considered the personal circumstances of the appellant, including the fact that he was 33 years old, he has seven children aged 5 to 12 years old and he is not married. The trial court further considered that all the appellant's children are staying with their mothers and he is not a primary caregiver; that he was a street vendor and all his children are recipients of the government child support grant.

[23] Also, it took into account the fact that the deceased was the initial aggressor as he first stabbed the appellant, according to the admitted facts; that the appellant managed to disarm the deceased of the knife after he overpowered him and stabbed him eight times; and that the appellant was angry when stabbing the deceased. Despite the appellant having two previous convictions for possession of an unlicensed firearm and a conviction for robbery, the trial court treated him as a first offender for purposes of sentencing.

[24] In 2010, before this incident, the deceased stabbed the appellant and injured him, resulting in the latter opening of a criminal case of assault against the deceased. I am alive of the fact that the appellant was not standing charged of that particular incident, but this is a fact that was stated in the appellant's statement when pleading guilty and also a fact that was accepted by the state. The appellant was intimidated by the deceased into withdrawing such a criminal case. It should be noted that on the day of the incident, which is the subject of this appeal, the appellant was seated with friends when, without provocation, the deceased stabbed him with a knife.

[25] The appellant himself did not have any weapon with him, but after being stabbed on the mouth and back, he managed to fight back, overpowered the deceased and then

¹⁵ Id at para 41.

took the knife from him. It is not clear from the record how serious were the injuries sustained by the appellant and whether he did receive medical attention for such injuries.

[26] Having overpowered the deceased, I believe the deceased was at that point helpless and for the appellant to have stabbed him eight times needs no justification.

[27] The trial court, in addition to all the circumstances listed above, also considered the fact that the appellant pleaded guilty and the period of ten months spent in custody awaiting the finalization of his trial, and for that reason, deviated from the prescribed minimum sentence. The fact that a person pleaded guilty is not itself substantial and compelling circumstances. The period spent awaiting finalization of the trial on its own does not constitute substantial and compelling circumstances and must be considered cumulatively with other circumstances.¹⁶

[28] In light of the above, it is therefore concluded that the trial court did not misdirect itself when sentencing the appellant and for that reason, this court need not to interfere with such a finding. This appeal ought to fail.

Order

[29] In the result, the following order is made;

1. Appeal against sentence imposed by the Tsakane Regional Court is hereby dismissed.


M.J MOSOPA

**JUDGE OF THE HIGH
COURT, PRETORIA**

I agree,

¹⁶ S v Radebe 2013 (2) SACR 165 (SCA).



T.P BOKAKO
ACTING JUDGE OF THE
HIGH COURT, PRETORIA

APPEARANCES:

For the Appellant	:	ADVOCATE M KGAKGARA	
Instructed By	:	LEGAL AID SOUTH AFRICA	
For the Respondent	:	ADVOCATE H MENU	
Instructed By	:	DIRECTOR	OF PUBLIC PROSECUTIONS
Date of Hearing	:	04 SEPTEMBER 2024	
Date of Judgment	:	21 OCTOBER 2024	
		(electronically transmitted)	