



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

Case No: CA&R 38/2024

In the matter between:

THEMBINKOSI BOOI

1st Appellant

FUZILE KANGO

2nd Appellant

MASIBULELE MOLOSI

3rd Appellant

SIYABULELA MCASA

4th Appellant

And

THE STATE

Respondent

APPEAL JUDGMENT

MHAMBI AJ

INTRODUCTION

1. This is an appeal brought in terms of section **308 B (1) (a) of the Criminal Procedure Act, 51 of 1977**.
2. The basis of this appeal is whether the court a quo erred in proceeding with a trial without observing or complying with section 93ter of the Magistrates Court's Act 32 of 1944 "**the MCA**".
3. The Appellants appeared before the Regional Court, Ngcobo and before the Regional Court Magistrate, Mr. Gwazela. On 23 November 2023 the Appellants were convicted and on 24 November 2024, the Appellants were sentenced on a charge of murder, and a charge of assault with intent to do grievous bodily harm.
4. It is necessary for this court to stress that during conviction and the subsequent sentencing of the Appellants, the amended section 93ter (1) (b), having been substituted by section 2 of Act 15 of 2023 was not operative as the amendment was with effect from 3 April 2024. This appeal therefore will be considered on the old dispensation of section 93ter (1) (b) of the **MCA**.
5. This criminal appeal raises the following question of law:
 - a) Whether the court a quo's failure to summon two assessors to assist him in the conduct of the trial, and whether failure by the court a quo to advise the Appellants of their rights to have two assessors present during the trial proceedings, and establish from them whether trial could proceed in the absence of the assessors, renders the trial a nullity.
 - b) This point needs to be considered in the light of the charge of murder to which the appellants were facing, and the requirements of section 93ter of **MCA**.
6. This appeal squarely falls within Section 93ter (1) of the **MCA**:

The relevant portion thereof reads as follows:

1. the judicial officer presiding at any trial may, if he deems expedient for administration of justice:

(a) before any evidence has been led; 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 the 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 request that the trial be proceeded without assessors, where upon the judicial officer may in his discretion summon one or two assessors to assist him. **My emphasis added.**

7. The genesis of or catalyst for all authorities on Section 93ter (1) of the MCA is the Supreme Court of Appeal, (SCA) judgment in *S v Gayiya* ¹.

8. **Gayiya** was re-affirmed by the SCA in **S v Mntambo**² as follows:

(9) Until the judgment in *S v Gayiya* there were conflicting judgments in relation to the interpretation of S93 ter (1). This court referred to *Chala and Others v Director of Public Prosecutions, KwaZulu Natal and Another* ³, stating that the conflicting authorities had succinctly been dealt with in that case. In *Gayiya*, it was held that the appointment of assessors was peremptory, unless the accused request, prior to him pleading to a murder, that the trial should proceed without assessors.

9. In **Chala** the court considered that where the Regional Court Magistrate had not sat with assessors, and the accused had not requested that the trial proceed without assessors, the court was not properly constituted and that the convictions and sentences had to be set aside.

¹ [2016] ZASCA 65, 2016 (2) SACR 165 (SCA)

² Case no 478/202 (2021 ZASCA 17 11 March 2021 para 9 and 10

³ 2015 (2) SACR 283 (KZP)

10. The court in an orbiter in *Evodia Manyophang v The State*⁴ held:

“What S93ter (1) requires is that an accused person must be informed of the Sections mandatory provisions and that he may request that the trial proceed without assessors”.

11. The court in *Evodia Manyophang*, analysing the judgment in **DPP KZN v Pillay (2023 ZASCA 105, 2023 (2) SACR 254 SCA)** says:

“where an accused is represented, it must be established that the representative and the accused were aware of the provisions of the section, and further whether the accused, as represented, has made a request as envisaged. It is incumbent upon the presiding officer to ensure that the court is properly constituted in accordance with section 93ter (1). As indicated in Gayiya, the presiding officer must take the lead in doing so, at the stage before any evidence is led”.

12. Clearly, no evidence shall be led if there was an election to have the assessors appointed, put differently, no evidence should be led without the presiding officer establishing from the accused or his representative whether the assessors are requested or not.

13. In that regard the accused's right to a fair trial is empty without proper explanation to the manner and exigency of the right conferred by Section 93 (1) ter of the **MCA**.

14. It is apposite to state that once appointed, an assessor becomes a member of the court and before he hears any evidence, he or she has to take an oath or make an affirmation, administered by the trial judge to give true verdict upon issues to be tried, on the evidence placed before him or her.

⁴ Unreported judgment of North West Division, CA08/2023 delivered 24 February 2024

15. In **DPP, KZN v Pillay** (supra), the court held that compliance with section 93(1) ter of the **MCA** is a fact-based inquiry. Considering this, it is equally undesirable to lay down a general rule regarding what must be done to comply with the section.
16. In *S v SEJAPHALE (2000 (1) SACR 603 (T)*, where a magistrate failed to advise the accused of his rights regarding the evidence given at a bail hearing. At 604 I-J and 605 A-B, **Jordan J** said that where one was dealing with a mandatory provision of an Act one should always bear in mind that the legislature had a reason for it and that it was binding on the court.
17. The record reflects that the trial proceedings in this matter started on 14 September 2023, the appellants were legally represented by Mr. Rayi on private instructions. During the start of the trial proceedings, the prosecutor put the charges, the court informed the appellants of the provisions of section 51(2) of the Criminal Law Amendment act 105 of 1997, and the accused were made to plead to the charges.
18. From the entire record, it shows, the appellants were not advised or informed of their right to have the trial proceed with assessors, and their election on this regard was not established. As I have demonstrated in authorities cited in this judgment, the presiding officer must take the lead in doing so, at the stage before any evidence is led.
19. The Regional Magistrate should have established whether the accused legal representative was aware of the peremptory provisions of S93 ter (1) and had a duty to establish whether the appellants elect to proceed with two assessors or not, to ensure that the court is properly constituted.

CONCLUSION

20. The failure by the court a quo to summon assessors or advise the appellants of their right to have the trial heard in the presence of assessors constitutes an irregularity.

21. Section 304 (2) of the Criminal Procedure Act, 51 of 1977 empowers this court to reverse or alter by the reason of an irregularity proceedings which in the opinion of this court appears to be a failure of justice, resulting from such irregularity or defect.

22. In *S v Naidoo*, 1962 (4) SA 348 (A) at 354 D-G, **Holmes J** distinguished between irregularities which are so gross in nature as per se to vitiate the trial and irregularities of a lesser nature and regarding the former, which is relevant to this case, he states:

“In such a case the court of appeal sets aside the conviction without reference to the merits. There remains thus neither a conviction nor an acquittal and the accused can be re-tried”

23. In **S v Rice**, 1955 (1) SA 219 A 223 D, the court held that:

“if in fact the court convicting the accused was not properly constituted, this was an irregularity that could not be waived”

24. Consequently, on this ground of points of law, the appellants appeal should succeed.

25. It follows that the court a quo was not properly constituted. The resultant proceedings were a nullity. The convictions and sentences imposed upon the appellants must be set aside on that basis.

26. It is important that a copy of this judgment be circulated to the chief Magistrate and the regional magistrates for the district of Mthatha, on the basis that criminal trials and convictions and sentences after 3 April 2024, be not dealt with in accordance with the authorities cited in this judgment or any other authority decided before 3 April 2024, instead the regional magistrates should deal with criminal trials on the basis of the amended section 93 (1) ter as substituted by section 2 of Act 15 of 2023, that took effect from 3 April 2024.

ORDER:

1. The appeals are upheld.
2. The convictions and sentences of all the appellants are set aside.
3. The registrar of this court is directed to send a copy of this judgment to the clerk of the Regional Court, Ngcobo and Mthatha for the attention of the Chief Magistrate, and the Regional Court Magistrates, Ngcobo and Mthatha.

M MHAMBI
JUDGE OF THE HIGH COURT (ACTING)

I agree

RWN BROOKS
JUDGE OF THE HIGH COURT

DATE HEARD: 22 October 2024
DATE DELIVERED: 25 October 2024