REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A199/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

17/9/2019 .....

DATE MOKOSE SNI

In the matter between:

JACOB MAKGENE — Appellant 1

VUSI MJWARA — Appellant 2

And

THE STATE — Respondent

JUDGMENT

MOKOSE J

[1] Appellant 2 (the appellant) and the now deceased appellant 1, were convicted in the Fochville Regional Court of one count of murder and one count of attempted murder. They were sentenced to life imprisonment on count 1 and eight years' imprisonment on count 2. The court ordered the sentence in respect of count 2 to run concurrently

with count 1. Furthermore, the appellant was declared unfit to possess a firearm in terms of Section 103 (1) of Act 60 of 2000.

[2] The appellant appeals against both conviction and sentence.

[3] At the commencement of the appeal a point in *limine* was raised by the appellant that the court *a quo* had failed to observe the provisions of Section 93 ter (1) of the Magistrates' Court Act 32 of 1944 ("the Magistrates' Court Act"). The appellant contended that the Magistrate had failed to ascertain from him or his legal representative whether he required the services of assessors. As such, the Magistrate had failed to comply with the Act and had misdirected himself and rendered the trial unfair to the appellant.

[4] Counsel for the respondent concurred with the appellant that the provisions of Section 93 ter (1) are peremptory as far as the Regional Court is concerned unless the accused requests that the trial be proceeded with without assessors. However, he was of the view that the note made by the Magistrate was a recordal by the Magistrate that the appellant's legal representative, Mr Mothibedi, submitted on his client's behalf that no assessors were requested. As such, the trial court dispensed with the requirement to sit with assessors.

[5] Section 93 ter (1) of the Magistrate's Court Act provides that a 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) in considering a community-based punishment in respect of any person who has been convicted of any offence,

summons 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 other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused person requests that the trial be proceeded with assessor, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.

[6] The record noted the presence on 17 February 2015 of the presiding officer, the prosecutor, the interpreter and Mr Mothibedi acting on behalf of both the appellants. The following was noted:[1]

"Def Not consulted yet. No assessors requested."

[7] In the matter of **S v Du Plessis**[2], a case with similar facts, the court held that the impact of the proviso to Section 93 ter (1) is that a court does not have a discretion to do without assessors in a murder trial in the lower courts, unless a communication with the accused or his legal representative indicates that the court is relieved of the duty to appoint such assessors. Failure to comply with the section results in a per se irregularity which cannot be waived or condoned by either the accused or his legal representative and this would constitute a failure of justice.

[1] Page 14 of the record
[2] 2012 (2) SACR 247 e - g

[8] Guidelines were laid down in the matter of **S v Du Plessis (supra)** for Magistrates dealing with murder trial in the regional court. Care needs to be taken to ensure that the record reflects clearly whether or not Section 93 ter (1) has been complied with. The record should show that the magistrate engaged the accused or his legal representative and that the entitlement to the appointment of assessors is waived by the accused. Such waiver should be recorded in order for the courts of appeal to be assured that the provisions of Section 93 ter have been complied with.

[9] A thorough reading of the record indicates no other mention of assessors having been appointed either before the evidence commenced or thereafter. The record also does not indicate whether any assessors were sworn in or given directions by the Magistrate as to what their functions were when acting as such. There was also no evidence in the judgment of the court *a quo* whether it was a unanimous decision or one which was a majority decision of the court.

[10] A conclusion can therefore be drawn that the Magistrate failed to invoke the provisions of Section 93 ter (1) f the Magistrates' Court Act. What then is the effect of such failure on the legality of the trial?

[11] In the matter of **Green v Fitzgerald & Others**[3] it was held that:

"Where a certain is necessary to form a quorum, the court is not properly constituted if its number falls short of that quorum."

[3] 1914 AD 652

In **S v Malindi & Others**[4] the court emphasized the importance of the appointment of assessors in terms of Section 145 of the Criminal Procedure Act 51 of 1977 that they are for all intents and purposes, officers of the court.

[12] It appears from the record that in this case the Presiding Officer sat alone to adjudicate this murder case. Therefore, he did not form a quorum as is required by law and as a result, the court was not properly constituted. The court a quo was therefore not competent to take a decision in this case without the presence of assessors. Its conviction and sentence in respect of count 1 is therefore set aside.

[13] In addition, the fact that the Magistrate failed to ensure that the recordal of proceedings reflects that he engaged the appellant and/or his legal representative about the appointment of assessors, the court is obliged to follow the guidelines as set out in the matter of **S v Du Plessis (supra).** The failure to clearly record that the Magistrate engaged the appellant and that he elected to proceed without the appointment of assessors result in an injustice.

[14] In **S v Diadia**[5] it was held that the appointment of assessors in terms of Section 93 ter is prescribed only for instances of a charge of murder and not attempted murder. The appellant was also convicted of the offence of attempted murder.

[15] The appellant averred that a break-in at his house had occurred and he had information that it was the deceased and Mr Mokoena. The appellant and Appellant 1 went to the

[4] 1990 (1) SA 962 at 970G
[5] (A583/14) [2014] ZAGPPHC 595 (14 August 2104)

house of the deceased and Mr Mokoena where they lived with their grandmother. They found the two at home and chased them into the house. The two then emerged with sticks and as they came out of the house, he was stabbed once in the neck and the deceased, stabbed many more times resulting in his demise.

[16] The conviction is assailed on the issue of self-defence and the fact that the appellant's version is reasonably possibly true. In **S v Francis**[6] the approach of an appeal court to findings of fact by a trial court was crisply summarised as follows:

"The powers of a Court of Appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of Appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."

[17] It is clear that the complainant's evidence is corroborated by the evidence of independent witnesses. The appellant's version did not meet the requirements of self-defence on the charge of attempted murder. The complainant did not assault the appellant at all. There can never be self-defence where the act was never consummated. Accordingly, there was no misdirection by the court a quo and the conviction is in order in as far as the charge of attempted murder is concerned.

[6] 1991 (1) SACR 198 (A) at 198j- 199a

[18] I am of the view the trial court gave proper consideration to the triad in sentencing and even took into account the appellant's personal circumstances. The sentence of seven years on the conviction of attempted murder is appropriate in the circumstances. There was no misdirection by the Magistrate in respect of the sentence.

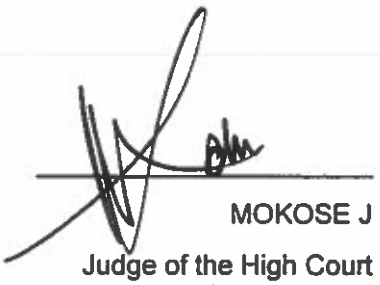
[19] Accordingly, the following order is granted:

(i) the point in *limine* is respect of count 1 is upheld;

(ii) the conviction and sentence in respect of count 1 is set aside;

(iii) the appeal in respect of count 2 is dismissed;

(iv) The conviction and sentence in respect of count 2 is upheld.



MOKOSE J
Judge of the High Court
of South Africa

Gauteng Division,
Pretoria

I agree and is so ordered

MUNZHELELE AJ
Acting Judge of the High Court
of South Africa
Gauteng Division,
Pretoria

For the Appellant:

Mr MB Kgarara instructed by

Pretoria Justice Centre

Pretoria

For the State:

Adv MJ Makgwatha instructed by

The Office of the Director of Public Prosecutions

Pretoria

Date of hearing: 11 September 2019

Date of judgement: 17 September 2019