

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Appeal no: A 600/16

Case no.: 333/169/10

In the matter between: -

STEVENS MOLEKOA

Appellant

And

STATE

Respondent

JUDGMENT

NE NKOSI AJ

[1] The Appellant appeared in the Regional Court for the Regional Division of Gauteng held at Attredgeville facing a charge of murder (count 1) and unlawful possession of a firearm in contravention of Section 3 reads with Section 1, 103, 117, 121A and 121 read with schedule 4 of section 51 of the Firearms Control Act 60 of 2000 and further read with section 250 of the Criminal Procedure Act 51 of 1977 (count 2).

[2] He was found guilty on both counts and sentenced to 15 years' imprisonment on each count. The Court ordered that 10 years of the 15 years in respect of count 1 shall run concurrently with the 15 years' imprisonment in the murder charge. Effectively he was sentenced to 20 years imprisonment.

[3] On the 19th of August 2016, the Appellant was granted leave to appeal against both, the conviction and sentence. During the hearing of his appeal, Mr. Van As appearing for the Appellant argued that in respect of count 1, the court was not properly constituted in terms of section 93 ter (1) of the Magistrates Court Act 32 of 1944.

[4] Mr. Van As referred the Court to *Gayiya v S* (1018/15 [2016] ZASCA 65 (19 May 2016) at para [8]. The Court in that case was dealing with a question of law similar to the present case and held that:

“The section [section 93 ter (1)] is peremptory. It ordains that the judicial officer presiding in a Regional Court before which an accused is charged with murder 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) request that the trial proceed without assessors”.

[5] Mr Fourie on behalf of the Respondent conceded that the record does not reflect that the learned Magistrate did advise the Appellant of the requirement

contained in Section 93 ter (1) and consequently both counsels are in agreement that the conviction and sentence ought to be set aside.

[6] The Supreme Court of Appeal in Giyiya's case set aside the conviction and sentence in the circumstances similar to the present case. I am therefore satisfied that the appeal must succeed.

[7] I therefore make the following order:

7.1 The appeal in respect of the conviction and sentence succeeds.

7.2 The conviction and sentence are set aside.

7.3 The appellant is to be released from custody with immediate effect.

NE NKOSI

Acting judge of the High Court

I agree and it is so ordered

SARDIWALLA, J

Judge of the High Court

Date of Hearing : 6 November 2019

Date of Judgement : 07 November 2019

For the Plaintiff : Adv Van As

Instructed by : Legal Aid South Africa

For the Defendant : Adv Fourie

Instructed by : Director of Public Prosecutions