

FINAL

NOT REPORTABLE

**IN THE KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NUMBER : AR 348/2018
HEARD AT : PIETERMARITZBURG
DATE : 19 OCTOBER 2018

MSIZI MBUYISELWA MBATHA

versus

THE STATE

**BEFORE
THE HONOURABLE JUDGE PRESIDENT JAPPIE
and
THE HONOURABLE JUDGE MBATHA**

FOR THE APPELLANT : MS L MARAIS

FOR THE RESPONDENT : ADVOCATE M E MTHEMBU

INTERPRETER :

TRANSCRIBER : KERRY DICKINSON
DATE TRANSCRIBED : 25 OCTOBER 2018

CONTRACTOR

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JUDGMENT

(19 OCTOBER 2018)

MBATHA J The appellant was convicted by the regional court, Ixopo, on 6 July 2017 of one count of murder read with the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997.

5 The court found that there were substantial and compelling circumstances and sentenced the appellant to twenty years' imprisonment.

The appellant was refused leave to appeal by the trial court. Then on 7 August 2018 the appellant's petition on conviction and sentence was granted by the Judge President of this Division of the High Court.

10 The issue raised by the appellant is that the regional court magistrate had not set with assessors as required by Section 93*ter*(1) of the Magistrate's Court Act 32 of 1944 and that the appellant had not requested the learned magistrate not to sit with assessors in terms of the proviso to the subsection. The provision provides as follows –

15 “93*ter* Magistrate may be assisted by assessors

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

(a) evidence has been led; or

20 (b) in considering a community-based
punishment in respect of any before any
person who has been convicted of any
offence, summon to his assistance any one
or two persons who, in his opinion, may be of
25 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 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.”

It is trite that the appointment of assessors is peremptory in murder cases in the regional court, save where the accused dispenses with their appointment.

In *S v Gayiya* 2016 (2) SACR 165 (SCA) the court held that where the regional court had not sat with assessors and the accused had not dispensed with their appointment the court was not properly constituted and that the convictions and sentences had to be set aside.

In this matter, although the appellant was legally represented throughout the trial there is nothing on the record that suggests that he was ever made aware of this requirement or given an option to elect whether the court should sit with or without the assessors. There is no record of any discussion with the appellant regarding the provisions of Section 93*ter*(1) in the entire record. It is only mentioned in the judgment which, in my view,

appears to have been an afterthought at the instance of the learned magistrate.

The respondent has conceded that this was a material irregularity as the provision is peremptory.

5 Accordingly I find that the court was not properly constituted. The conviction and sentence must be set aside as being incompetent within the meaning of Section 32(a) of the Criminal Procedure Act.

I propose the following order, that –

- THE APPEAL BE UPHELD.
- 10 • THE CONVICTION AND SENTENCE BE SET ASIDE.
- THE APPELLANT BE RELEASED FROM CUSTODY WITH IMMEDIATE EFFECT.

JAPPIE JP I agree and it is so ordered.

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