IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR176/2021

In the matter between:

CHARLES GREEN **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

The following order is made:

1. The appeal is dismissed.
2. Both the conviction and sentence are upheld.

APPEAL JUDGMENT

Delivered on: Friday, 29 July 2022

Dumisa AJ (Olsen J concurring)

[1] The appellant in this c.ase, Charles Green, was charged before a regional magistrate on one count of murder and one count of robbery with aggravating circumstances. The appellant pleaded not guilty to both counts. The regional magistrate having heard evidence found him guilty on both counts and sentenced him to life imprisonment and fifteen (15) years respectively.

[2] The appellant enjoys an automatic right to appeal in respect of the murder count and also appeals also on the robbery count with leave having been granted by the regional magistrate on the 12th of March 2020. The appeal is against both conviction and sentence.

[3] The appellant's appeal has two parts:

(a) The main argument is that the conviction and sentence should be set aside on the ground that the court a quo was not properly constituted; as the regional magistrate did not have the assistance of assessors, as provided for in s 93*ter* of the Magistrates' Courts Act 32 of 1944.

(b) The second part of the appeal concerns the merits of the case.

The focus of this judgment will thus be both on the issue of s 93*ter* and on the merits of the case.

[4] The record of the regional magistrates' court shows the following participants at the trial:

(a) The regional magistrate was Ms N C Singh;

(b) The prosecutor was Mr N G Mkhize; and

(c) Ms Chanderdath who appeared on behalf of the appellant.

[5] The record further shows that on the 19th of September 2019 there was a pre-trial conference where the above-three met together with the appellant, where a number of issues pertaining to the hearing were discussed, including the confirmation that no lay assessors would be required.

Grounds of appeal on conviction and sentence

[6] The appellant argued that the whole State case was based on circumstantial evidence.

(a) The State case was that the appellant, acting in common purpose with another, unlawfully and intentionally killed his friend Summet Singh.

(b) One State witness, Bradley Davids, identified the appellant at an ID parade on the 2nd of July 2018 as the person who, with one Nkosi, had pawned him the deceased's car for R8000.

(c) Another State witness, Phumzile Hadebe, testified that she witnessed her cousin, by the name of Nkosi, and the appellant taking the deceased from a red Hyundai motor vehicle (in effect the deceased's car) and assaulting him on the 11th of June 2018.

(d) Hadebe said the appellant had confessed that they had killed the deceased and dumped his body somewhere.

(e) Another witness, Nathaniel Padayachee, testified that he, Hadebe, the appellant, and the deceased used to take drugs together. Padayachee confirmed hearing the deceased pleading for his life, saying "Leave me, leave me, don't kill me or don't me"; and that he saw the appellant the following day arriving driving the deceased's motor vehicle, with Nkosi, but without the deceased.

(f) When Padayachee asked where the deceased was, the appellant said "Well, Nkosi stabbed him and I shot him and we dumped the body in Lamontville".

(g) The appellant attempted to discredit the evidence given by the witnesses Hadebe, Padayachee and Davids, labelling all as not credible witnesses. The testimony of all these three witnesses is, however, consistent in implicating the appellant in the crimes.

(h) The appellant submits that the mere fact the witnesses did not voluntarily go to the police immediately after they heard the appellant admitting that they killed the deceased makes them less credible. However, whilst they may be criticised for that omission, that does not mean that their evidence is unreliable. The record reveals that the evidence of all of them, as well as the appellant, could not be approached upon the basis that they are ordinary law abiding citizens, unburdened by a reluctance to become involved with the police. The magistrate made favourable credibility findings concerning the state's witnesses, and there is no basis on which these can be disturbed on appeal.

[7] In substance the only submission on behalf of the appellant concerning sentence is that, seen in relation to his personal circumstances, the sentences induces a sense of shock. However, the appellant's personal circumstances are unexceptional. This case concerns a cruel and callous murder, perpetrated with no purpose other than to steal the deceased's car and profit from that. The magistrate's decision on sentence cannot be faulted.

The constitution of the court: s 93*ter*

[8] The appellant submits that the failure by the magistrate in the court a quo to invoke the provisions of s 93*ter* of the Magistrates' Courts Act constituted a gross irregularity which vitiated the proceedings as the Court *a quo* was not properly constituted. Based on these grounds the appellant submits that

(a) it is clear from the record and the charge sheet that the appellant was never engaged in terms of s 93*ter*; and that

(b) s 93*ter* creates a mandatory obligation on the presiding officer of a murder trial to canvass the issue of assessors with the accused. The presiding officer in this case failed to comply with that statutory duty.

[9] Subsection (1) of s 93*ter* reads as follows:

> '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) in considering a community-based punishment in respect of any person who has been convicted of any offence,
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> 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 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.'

[10] The legal question to be answered here is whether the pre-trial conference minute of the 19th of September 2019, where it says the defence lawyer confirmed that "No lay assessors required" gave the presiding magistrate the discretion not to have any assessors with her, as was the case. The State argued that

(a) the existence of that pre-trial conference minute which says "No lay assessors required" made the trial compliant with the provisions of s 93*ter*, despite the absence of the assessor(s); and

(b) the mere fact that the defence lawyer, a competent officer of the court, confirmed that "No lay assessors required" meant the defence lawyer

present at that pre-trial conference was representing the interests of the appellant in so saying.

[11] It is as well to quote the relevant portion of the record of the pre-trial conference. The proceedings were in open court on the last remand date before the trial commenced. The record was kept by the magistrate in longhand. After dealing with formal admissions, the basis of the defence (a so-called "bare denial') and the nature of the evidence to be presented, the record reads as follows:

'No lay assessors required by the accused, + defence + State'.

[12] In its appeal papers, the appellant cited the following three cases.

(a) *Chala and Others v Director of Public Prosecutions, KwaZulu-Natal and Another* 2015 (2) SACR 283 (KZP). In this case the court observed:
'The failure to properly invoke the provisions of s 93*ter* of the Magistrates' Courts Act 32 of 1944 will constitute a fatal irregularity vitiating the entire trial. It should always appear from the record of proceedings in cases where s 93*ter* is required to be invoked that a proper explanation is given by the magistrate to the accused, that they have the choice in the appointment of assessors, together with a brief exposition of the import of that choice and as to what was required of them. The record should also reflect, after having given such an explanation and requesting a response from the accused, in cases where they elected not to have assessors, that the magistrate nevertheless still considered whether such course was advisable in this particular case before him'.

(i) In this case, the pre-trial conference minute is clear that the defence lawyer and the appellant said that "No lay assessors required". Given that lawyers regularly take instructions from their clients during such meetings, the Court has the duty to accept that the defence lawyer at this pre-trial conference had fully applied her mind to what was in the best interests of the appellant before confirming "No assessors required".

(ii) It is a reasonable assumption under the circumstances that the defence lawyer fully explained the implications of s 93*ter* to the appellant.

(b) *State v Gayiya* 2016 (2) SACR 165 (SCA) (May 2016). In this case the appellant challenged his conviction on grounds that the State did not invoke the provisions of s 93*ter*. Mpati P opined:

'[8] In my view the issue in the appeal is the proper constitution of the court before which the accused stood trial. The section is peremptory. It ordains that the judicial officer presiding in a regional court before which an accused is charged with murder (as in this case) *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 assessors, unless he (the accused) requests that the trial proceed without assessors'.

(c) *S v Langalitshoni* 2020 (2) SACR 65 (ECM). In this appeal case, the court outlined how the *Gayiya* case could be applied in cases where s 93*ter* is required:

'[8] The statement of the legal principle quoted in (the Gayiya case) has the effect of creating an obligation on the part of a regional magistrate presiding over a trial involving a charge of murder. There are two elements to the obligation. The first is to inform the accused person before the commencement of the proceedings what the peremptory provisions of the law require to ensure proper constitution of the regional court. The second element is to inform the accused person that he or she may elect to proceed with the trial without assessors.'

[13] Subject to what is said in the separate concurring judgment, in my view the requirements for compliance with s 93*ter* were met in this case. There is not only a record of the defence lawyer dispensing with the need for assessors, but also a record of the appellant himself doing so.

[14] At this appeal hearing, Mr *Majola* appearing for the respondent warned that in deciding whether the court a quo was properly constituted we must avoid "*throwing the baby with the bath water"* by setting aside the proceedings where there is a clear record of the subject of the section being dealt with by a represented accused. As to the significance of the argument, I refer to *S v Gumede and Others* 2020 (1) SACR 644 (KZP), where Olsen J (with Vahed J and Masipa J concurring) wrote:

'[13] Legal representatives are officers of the court. Judicial officers "act on the assumption that a duly admitted lawyer is competent". (*S v Halgryn* 2002 (2) SACR 211 (SCA) [2002] 4 All SA 157) para 12.) Whilst the assumption of competency may prove to be erroneous in any particular case, it is nevertheless the assumption upon which courts can and must act unless and until adequate reason not to do so emerges.'

This court has no reason to doubt the legal competence of the defence lawyer in this case. We therefore accept that the defence lawyer's "No assessors required" confirmation rendered the continuation of the appellant's trial to be within the prescripts of s 93*ter*. It may be assumed that the appellant made his election with the benefit of advice.

Order

The following order is made:

(a) The appeal is dismissed.

(b) Both conviction and sentence are confirmed.

Olsen J (DUMISA AJ concurring)

[15] I write this concurring judgment in order to address the conflict between the judgments in *S v Langalitshoni* 2020 (2) SACR 65 (ECM) and *S v Ngomane and Another* 2021 (2) SACR 654 (GP), and to furnish reasons for our failure to follow the former judgment.

[16] In both these cases an election to proceed without assessors was conveyed to the presiding magistrate by the defence lawyer. In *Langalitshoni* that was found to be insufficient to bring about that the court was properly constituted when the magistrate sat alone. In *Ngomane* the court declined to follow that precedent and held that in those circumstances the magistrate could preside alone. As appears from the main judgment, in the present case the magistrate took the trouble to record that not only the appellant's lawyer, but the appellant himself, conveyed an election to proceed without assessors. In my view that fact does not distinguish this case from the two under consideration where, although the accused did not himself convey the election, it was done in his presence and on his behalf by his lawyer.

[17] In enacting s 93*ter* of the Magistrates' Courts Act the legislature deemed it appropriate, in the case of a charge of murder, that there be a default position. The magistrate must sit with two assessors unless the accused asks that the magistrate sit alone. All that is required by the statute in order to validly constitute a court presided over by a magistrate sitting alone is a request from the accused that the court should be so constituted. The use of the word "request" holds no significance beyond the fact that its use is appropriate because the section allows the magistrate in appropriate circumstances to override the choice made by the accused by convening a court in which the magistrate is assisted by one or two assessors.

[18] I am in respectful disagreement with the analysis of the position set out in paragraph 11 of the judgment in *Langalitshoni*. In that case the magistrate posed the question "are you going to use the services of assessors?". The appeal court in paragraph 11 took the view that in posing that question

‘the magistrate is not conveying to the appellant that the proper constitution of the court requires that the magistrate ordinarily sit with two assessors. The question posed suggests that the court is constituted ordinarily by the regional magistrate sitting alone. It conveys the suggestion that the appellant’s legal representative has a right to request the participation of assessors as an additional “service”. In the circumstances, the question asks whether the appellant’s legal representative wishes to invoke an additional right, whereas it should have been clear that what is required is an indication of whether or not the appellant elected to waive an existing right.’

In my respectful view the court in *Langalitshoni* erred in equating the default position ordained by the legislature with the ordinary position. Magistrates, including regional magistrates, ordinarily sit alone. The fact that the legislature ordained that there should be a default position, that a magistrate sits with assessors in a murder trial, does not mean that in murder trials regional magistrates ordinarily sit alone. The question of what is ordinary is one of fact. In my years on this bench hearing appeals I have not once come across a murder trial in which the magistrate sat with assessors. I do not know what the position is in the Eastern Cape, but in this province I would have two objections to a magistrate conveying to the accused, directly or indirectly, that in murder cases the magistrate ordinarily sits with two assessors.

(a) Firstly, such a statement would probably be false.

(b) Secondly, the impact of such a statement would, I suggest, encourage an accused person not to elect to be tried by a magistrate sitting alone. The accused may be encouraged to take the view that if accused persons ordinarily choose that course, it is probably the right way to go. That is not a sound basis upon which to make a decision as to whether in the particular case the accused should ask to be tried by a magistrate sitting alone.

[19] In each of paragraphs 9, 11 and 12 of the judgment in *Langalitshoni* a decision by an accused person to request that the magistrate sits alone is characterised as a waiver of a right to be tried by what the learned judge called a

"properly constituted court consisting of a regional magistrate and two assessors". In my respectful view that is a mischaracterisation.

(a) Firstly, a court comprised of a magistrate sitting alone, when the accused has requested that, is as "properly constituted" as a court comprised:

(i) of a magistrate and two assessors when the accused has not requested the magistrate to sit alone;

(ii) of a magistrate and one or two assessors when the magistrate has decided that the accused's request that the magistrate sit alone should be declined.

(b) Secondly, an accused's right of substance is to be tried by a court constituted according to law. How a magistrate's court should be constituted is a matter for the legislature acting in compliance with the Constitution. Section 93*ter* of the Magistrates' Courts Act introduces a novel feature, namely a qualified right on the part of an accused person to choose how the court should be constituted. The exercise of that right does not constitute a waiver of the accused's right of substance, to be tried by a properly constituted court. Introducing the law of waiver, with all its complexities and strict conditions for validity, into this milieu is in my view unhelpful if not incorrect. Of course, the section in effect affords the accused an election between inconsistent options or rights. Making an election of that type involves waiving the one option available as of right in order to enjoy the other one, also available as of right (*Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 698). The law regarding waiver requires that a decision to abandon a right (or an option in the case of election) rests for its validity or enforceability on the person having "full knowledge" of the right being relinquished (*Laws v Rutherfurd* 1924 AD 261 at 262). It seems to me that "full knowledge" of the right to be tried with assessors, or the right to be tried by a magistrate alone, is an illusory concept. Rights have content, which is realised when a right is exercised. In the present context, once one moves beyond the right to choose (of which the accused must have knowledge if he or she is making a choice), "full"

knowledge is unattainable because the real content of the right to be tried by one or other constitution of the court is quite uncertain. The choice made may or may not turn out to be the correct or advantageous one.

[20] Of course, it is correctly not disputed by counsel for the State that in a case such as the present one, it must appear *ex facie* the record that the accused person asked that the magistrate sit alone. However, I am in respectful disagreement with what appears implicit in paragraph 12 of the judgment in *Langalitshoni*, that the record should convey that when asking that the magistrate sit alone, the accused is aware that if his or her request is not made, the magistrate would sit with two assessors. In my respectful view it is implicit in a request that assessors do not sit that the accused is aware of the fact that otherwise assessors would sit with the magistrate. The accused's lawyer would certainly draw that to the attention of the accused.

[21] In *Ngomane's* case the Gauteng Division, in declining to follow *Langaltishoni*, emphasised that it is an accused's right to have a legal representative. It is axiomatic that it is the duty of the legal representative to advise the accused on the various decisions which must be made in preparation for and during the course of a criminal trial. In paragraph 22 of the judgment in *Ngomane* it is observed that it is the duty of the legal representative "to ensure that the accused's constitutional rights are not violated, and that the accused has a fair trial in accordance with all procedural aspects and relevant legislation". In paragraph 21 of the judgment the court expressed the view that a legal representative appearing before a regional court in a murder case would obviously be aware of the provisions of s 93*ter* of the Magistrates' Courts Act and that there is no reason to suppose that such a legal representative would not explain to an accused person "what the issue of assessors entailed".

[22] As to the last mentioned consideration, whilst the question as to whether an accused person should ask for the magistrate to sit alone requires a simple yes or no answer, the considerations which may affect the choice are by no means simple. One of the important factors, from the accused's perspective, is the question as to the prospect of the outcome of the case being different, depending on whether the

magistrate sits alone or with assessors. Reflections on that subject will inevitably traverse the prospect of an incorrect conviction on the evidence placed before the court; or, on the other hand, a fortunate acquittal. These and kindred issues do not concern the magistrate, but they are matters which need be considered when making an informed decision.

[23] I am in respectful agreement with the sentiment expressed in *Ngomane* (para 23) that there is no need, when an accused is represented, for the regional magistrate to explain "what the Act provides in respect of assessors, and what his rights in that regard are." It is safe to assume that a lawyer who on record asks that the magistrate should sit alone has in fact conveyed to the accused that if the request is not made the magistrate will sit with two assessors. The "detail" which underlies a decision as to whether that request should be made is a matter for advice and consideration by the legal representative and the accused person. In my view, and for the reasons stated in the main judgment and in *Ngomane*, a magistrate is bound to assume that an accused's lawyer has competently explained the options to the accused person unless, as may happen exceptionally, something emerges which suggests otherwise.

[24] As has been done in the main judgment, the cases of *Chala* and *Gayiya* are often cited in tandem. It is important to note that the court in *Gayiya* did not expressly endorse *Chala*, but referred to and adopted its collection and comprehensive discussion of earlier conflicting cases on the subject of s 93*ter*. In paragraph 28 of the judgment in *Chala* the learned judge expressed the view that in addition to advising the accused of the choice to be made under s 93*ter*, the magistrate should provide the accused with a "brief exposition of the import of that choice". I am uncertain as to what the learned judge had in mind concerning the "import" of the choice, but if he intended that the magistrate should ordinarily say anything more than that the accused has a choice, and that if he does not ask the magistrate to sit alone the court would be convened with two assessors, then I respectfully disagree with that view. In paragraph 8 of the judgment in *Gayiya* the position was put as follows.

‘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) requests that the trial proceed without assessors.’

Whilst this statement of the duties of a magistrate is labelled the “starting point”, the court said nothing about anything else a magistrate has to do to satisfy the requirements of s 93*ter*. In *Ngomane* (para 15) it was pointed out that in *Gayiya* the court was dealing with an unrepresented accused in a case where nothing at all was said by the magistrate concerning assessors. In my view it would not be correct to interpret *Gayiya* to convey that in a case where the accused is represented, the magistrate is duty-bound to go through the motions, and describe the choice which is clearly already within the knowledge of the lawyer, and accordingly at least presumptively known to her or his client. To do so would impermissibly elevate form above substance.

[25] I have not found a report of any case in this division in which it was held, before the judgment in *Langalitshoni* was handed down, that a simple record of a request by an accused (conveyed by his legal representative) that the magistrate sit alone is inadequate to establish the proper constitution of a court presided over by a magistrate alone. That accords with my understanding of the attitude of this court at the time, that a record of the choice alone is sufficient. I have found three judgments which post-date *Langalitshoni* in which that case was followed in this division without comment. They are *Nxumalo v S* (AR263/2019 RC51/2013) [2022] ZAKZDHC 23 (10 February 2022), *Hlatshwayo and Another v State* (AR 354/20) [2022] ZAKZPHC 8 (28 March 2022) and *Zulu v S* (AR 319/2021) [2022] ZAKZPHC 20 (13 May 2022). Despite the fact that *Ngomane* was published in 2021, the judgment was not drawn to the attention of the judges who presided in the three cases just mentioned. Being unaware of the conflict, they did not deal with it. In the circumstances I do not believe that in this appeal we are bound to follow the three decisions.

[26] Finally, I believe it is appropriate to express concern about the implications of the number of cases in which it has been found that courts were not correctly constituted in the light of the provisions of s 93*ter* of the Magistrates’ Courts Act. The

result of such a finding is that the proceedings themselves are set aside, as well as, obviously, the resultant conviction and sentence, despite the fact that in some if not many of the cases it may otherwise appear clear that the decision of the regional magistrate sitting alone was correct. This involves an unacceptable waste of judicial resources. Furthermore, in some cases a retrial may be either impossible or impractical. (The present matter may be such a case. The trial took four days over a period of about three months. One of the principal witnesses had to be placed in witness protection. Whether it would be feasible to do that again, given what transpired in the original trial, is doubtful.) Elevating the requirements for the establishment on record of the proper constitution of a court presided over by a magistrate sitting alone, above what the statute actually requires (i.e. a request that the magistrate should sit alone), would increase the risk of wasting judicial and associated resources. The case of *S v Titus* 2005 (2) SACR 204 (NC) affords an example of what can go wrong if the magistrate is required to do any more than solicit and record the accused's choice.

[27] For these reasons we prefer the approach in *Ngomane* to that adopted in *Langalitshoni*. In the result the main judgment holds that the court a quo was properly constituted in the light of the provisions of s 93*ter* of the Magistrates' Courts Act.

Olsen J

Dumisa AJ

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Date of Hearing: Friday, 20 May 2022
Date of Judgment: Friday, 29 July 2022

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