THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1018/2015

In the matter between:

CHARLES VUYO GAYIYA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Gayiya v S* (1018/15) [2016] ZASCA 65 (19 May 2016)

Coram: Mpati P, Wallis, Pillay, Mathopo JJA & Tsoka AJA

Heard: 5 May 2016

Delivered: 19 May 2016

Summary: Criminal law – practice and procedure – trial – charge of murder – appointment of assessors in terms of proviso to s 93*ter*(1) of Magistrates' Courts Act 32 of 1944 – such appointment compulsory unless accused requests, prior to plea, that assessors not be appointed – failure by regional magistrate to invoke proviso – court not properly constituted – purported waiver by accused of assessors after guilty verdict cannot cure defect.

ORDER

On appeal from Gauteng Division of the High Court, Pretoria (Bertelsmann J, sitting as a court of first instance):

The appeal succeeds and the convictions and sentences are set aside.

JUDGMENT

Mpati P (Wallis, Pillay and Mathopo JJA and Tsoka AJA concurring):

[1] This appeal involves the interpretation of the proviso to s 93*ter*(1) of the Magistrates' Courts Act 32 of 1944 ('the Magistrates' Courts Act'). The appellant, to whom I shall, purely for convenience, henceforth refer as 'the accused', was arraigned before the regional court, Bethal, on 20 February 2002 on five charges. The first (count 1) was a charge of kidnapping, allegedly committed on 29 September 1998. The second (count 2) was a charge of assault with intent to cause grievous bodily harm, allegedly committed on the same day. Counts 3, 4 and 5 were charges of murder, possession of a firearm without a licence (in contravention of the provisions of s 2 of the Arms and Ammunition Act 75 of 1969) and possession of ammunition without a licence (in contravention of the provisions of s 36 of Act 75 of 1969), respectively, which were also allegedly committed on the same day as counts 1 and 2. The accused pleaded guilty to counts 1 and 3, but not guilty to counts 2, 4 and 5. The regional magistrate thereafter questioned him, in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977 ('the Act'), in respect of counts 1 and 3. Having satisfied himself that the accused admitted the allegations in the charges to which he had pleaded guilty and that he was guilty of the offences in issue, the regional magistrate convicted him accordingly.

[2] It appears that after the regional magistrate had returned a guilty verdict in respect of counts 1 and 3 he explained the provisions of s 115 of the Act to the accused and asked whether he was prepared to make a statement indicating the basis of his defence in respect of the remaining three counts. The accused chose to exercise his right to remain silent. The matter was then postponed. On 7 March 2002 the regional magistrate proceeded to question the accused in terms of s 115(2)*(b)*. The accused, in the course of answering the questions posed, made certain admissions that were subsequently recorded as such in terms of s 220. The State, being satisfied with the admissions made by the accused and recorded by the regional magistrate in terms of s 220, closed its case without leading any evidence. Despite the regional magistrate's explanation that the exculpatory part of the accused's plea explanation was not evidence in his favour and that should he wish it to have evidential value he should testify under oath, the accused decided not to testify and closed his case. After both the State and the accused had addressed the court the accused was convicted on counts 2, 4 and 5 on the strength of the formal admissions that had been recorded in terms of s 220 of the Act. The matter was then once again postponed.

[3] What emerges from the answers given and admissions made by the accused during his questioning is the following. On the evening of 29 September 1998 the accused and six others were enjoying a drink at a certain house at Embalenhle in the district Hoëvelddrif. They later agreed to go to the house of one Themba to fetch a firearm that belonged to one of the members of the group, namely Doctor Nkambule (Doctor), from a person named Castro. They also agreed that they should take along a firearm so that they could shoot Themba were he to threaten to shoot them. When they arrived at Themba's house and enquired where Castro was, Themba informed them that he was in the room. They proceeded to the room where one of the accused's companions, Moyeni Mtsweni, struck Castro on the head with a bottle, which broke, probably as a result of the force of the blow. At that stage the accused was watching from where he was standing near the door of the room in which they had found Castro and did nothing ('Ek het naby die deur gestaan en kyk. Ek het niks gedoen nie'). When Doctor asked where his firearm was Castro said it was with one Johnny. Doctor then pointed a firearm at Castro and instructed him to accompany

them to Johnny's home to fetch his firearm. Castro obliged, but before they had reached Johnny's home Doctor said he was going to shoot him. However, he changed his mind and, instead, handed the firearm to the accused, instructing him to shoot Castro ('skiet hom'). The accused took the firearm, held it against Castro's head and fired two shots, after which he gave the firearm back to Doctor. It is not clear from the record whether Castro died immediately upon being shot, but they left him at the spot where he was shot. The accused went home to sleep. He said that before deciding to fetch Doctor's firearm from Castro they drank liquor and used drugs ('Ons het toe gedrink en dwelms gebruik'). As to counts 1 and 2 the accused was convicted on the basis of the doctrine of common purpose.

[4] I have serious doubts about the correctness of the accused's conviction on those two counts, but in the view I take of the matter it is not necessary to say more in that regard. At the accused's next court appearance on 15 March 2002 his sister, Ms Miemie Gayiya, testified in his favour in mitigation of sentence. After the accused and the prosecutor had addressed the court on sentence, the regional magistrate stopped the proceedings and committed the accused for sentence by the high court in terms of s 52(*a*)(i) of Criminal Law Amendment Act 105 of 1997. On 27 May 2002 the accused made another appearance before the regional magistrate, who, for the first time, told the accused that he (the regional magistrate) had omitted to inform him of his right to have assessors appointed to assist the judicial officer ('reg tot assessore') and of the role of assessors in the proceedings. The regional magistrate also informed the accused that his convictions could be set aside, presumably upon review. The accused's response was that he did not need assessors at the trial, but that he would want them at the sentencing stage.

[5] On 30 July 2002 the accused was sentenced by Bertelsmann J in the High Court, Eastern District Circuit Local Division, Middelburg, as follows:

Count 1: imprisonment for one (1) year;

Count 2: imprisonment for one (1) year;

Count 3: imprisonment for life;

Counts 4 and 5 (taken together for purposes of sentence): six (6) months' imprisonment.

The court ordered that the sentences imposed in respect of counts 2, 4 and 5 be served concurrently ('gesamentlik uitgedien word').

[6] The accused's application for leave to appeal against the sentences imposed on him was heard only on 14 April 2014, while his notice of application for leave to appeal and for condonation for the late filing thereof were lodged with the registrar of the North Gauteng High Court on 25 May 2010. When the application for leave to appeal was argued before him, Bertelsmann J raised with counsel what he considered to be an irregularity, which he dealt with in the first paragraph of his judgment granting leave to appeal, where he said:

'There is one fundamental problem arising in this matter. The applicant was charged with murder in the regional court. An irregularity occurred as the presiding officer sat without assessors without having been requested to do so by the defence.'

And further:

'There are conflicting judgments on the question whether the resulting irregularity is fatal to the proceedings, or can be condoned if the interests of justice are served thereby.'

The learned Judge consequently granted leave to appeal to this court against both conviction and sentence. It is not clear from the record why there was a delay of almost four years from the date upon which the accused's application for leave to appeal was lodged until the application was argued before Bertelsmann J. The delay is in any event unacceptable.

[7] It is not necessary, in my view, to mention the conflicting judgments referred to by the court below. They are collected and comprehensively discussed in *Chala & others v Director of Public Prosecutions, KwaZulu-Natal & another* 2015 (2) SACR 283 (KZP). Subsection (1) of s 93*ter* of the Magistrates' Courts Act reads:

'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,

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 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.'

In the present matter the proviso was undoubtedly of application as count 3 was a charge of murder. It is common cause that the accused was never afforded an opportunity by the regional magistrate to decide whether or not to request that the trial proceed without assessors before he was asked to plead to the charges he faced.

[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 two assessors, unless he (the accused) requests that the trial proceed without assessors.

[9] In *R v Price* 1955 (1) SA 219 (A) the appellant had been charged on, among others, a number of counts relating to breaches of regulations dealing with the price and control of hides. The Minister of Justice, acting in terms of relevant legislation, ordered that he be tried by a Judge and two assessors. He was accordingly arraigned in the appropriate superior court where he pleaded not guilty to the charges. After the State had closed its case the defence did likewise without leading any evidence. At the conclusion of submissions from both counsel in respect of the verdict, judgment was reserved. But before a verdict had been determined on any of the charges one of the assessors collapsed and died. At a later sitting of the court counsel for the appellant made a request, in terms of another section of the relevant legislation, for an order that the case proceed before the Judge and the remaining assessor. The Judge made the order sought and a verdict (of guilty) was delivered at a subsequent date.

[10] Following the guilty verdict, a special entry was made on behalf of the appellant for consideration by this court of the question:

'Whether the presiding Judge, notwithstanding the application made to that end on behalf of the accused and the concurrence therewith of the Crown, wrongly and irregularly ordered the proceedings to continue after the death of the assessor, . . . inasmuch as there was after his death, no longer a properly constituted Court.'

In answering that question this court said:

'It was rightly not contended on behalf of the Crown that the appellant was precluded in any way, because of the request made on his behalf at the trial, from contending in this Court that the Court which had convicted him was not a properly constituted Court. If in fact the Court was not properly constituted then its verdict, and consequently also its sentence, are irregularities that cannot be waived by an accused person.'[1]

And further:

'. . . it is also clear from *Green v Fitzgerald & others* 1914 AD 652, that where a certain number of Judges is necessary to form a quorum, the Court is not properly constituted if its number falls short of that quorum, even though that number would be enough to constitute a

[1] At 223C-D.

majority of the Court. In the present case, the quorum clearly was three members . . . and the fact that, in such a quorum, the decision of two would be an effective majority does not cure the deficiency in its quorum.'[2]

This court accordingly allowed the appeal and set aside the appellant's convictions and sentences.

[11] In the present matter, the quorum prescribed by the proviso to subsec (1) of s 93*ter* of the Magistrates' Courts Act was three members, namely the regional magistrate and two assessors, unless the accused had requested that the trial proceed without assessors, in which event in his discretion the regional magistrate could, sitting alone, have constituted a quorum. No such request was made by the accused. The fact that the accused, when informed of his right to assessors only after the guilty verdicts, indicated that he did not require assessors and that he would only do so at the sentencing stage, did not cure the deficiency. It follows that the court that tried and convicted the accused was not properly constituted. That defect could not be waived by the accused at the time that he purportedly did so, or cured by the subsequent proceedings before the court below. Counsel for the State did not argue otherwise. The appeal must accordingly be upheld.

[12] In the result the following order is made:

The appeal succeeds and the convictions and sentences are set aside.

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L Mpati
President

[2] At 223F-G.

APPEARANCES

For the Appellant:	HL Alberts Instructed by: Pretoria Justice Centre, Pretoria Bloemfontein Justice Centre, Bloemfontein
For the Respondent	FW van der Merwe Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein