IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A411/2008

DATE: 31 OCTOBER 2008

In the matter between:

K SASS

versus

THE STATE

JUDGMENT

ROUX, AJ:

The appellant was charged in the Regional Court of the Cape, sitting in Paarl, with the murder of one Hendrik Isaacs. The appellant was represented at the trial by an attorney and he pleaded not guilty to the charge. On 24 July of this year he was convicted of murder and sentenced to an effective term of ten years imprisonment. He was also declared unfit to possess a firearm.

This Court granted the appellant leave to appeal against the conviction and the sentence.

The first ground of appeal raised by Mr De Villiers, who appeared for the appellant before us, but who did not represent the appellant in the trial, is that the magistrate had acted irregularly in that she had failed to comply with Section 93 ter (1) of the Magistrates' Courts Act 32 of 1944 (the Act). This section reads as follows:-

"1. 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." (emphasis added)

The magistrate was not assisted by assessors in the trial. It is clear from the wording of the aforestated section that it is only where the accused specifically requests the magistrate that assessors not be summoned, that the trial may be proceeded with without assessors. It does not appear from the record that any such request was ever made by the appellant or his attorney in this case. In fact, it would appear that the subject was never broached. In the circumstances, the State and the defence are *ad idem* that the failure by the magistrate to have summoned assessors constituted an irregularity.

Mr De Villiers submitted that since the aforestated provisions of the Act are peremptory - "the judicial officer shall" - the conviction cannot stand.

Ms Cook, who appeared for the State, submitted that non-compliance with the aforestated peremptory provisions do not necessarily amount to a failure of justice. She argued that it

must be established whether a reasonable Court, sitting with assessors, would not inevitably have convicted the accused.

The consequences of non-compliance with section 93 ter (1) of the Act has been considered by our Courts. In S v Khambule, 1999(2) SACR 365 (O), it was held that non-compliance with the section is not only irregular but also constitutes a failure of justice.

In S v Titus, 2005(2) SACR 204 (NCD), the Court came to a similar conclusion. In paragraph 14 of that judgment the following was said by Tlaletsi J (Lacock J concurring):-

> "In my view the Act prescribes the manner in which a court should be constituted. Non-compliance with the peremptory provisions of how a court should be constituted in murder trials is *per se* grossly irregular. One need not go further and check whether such an irregularity amounts to a failure of justice, or that, given the circumstances of the case and the seriousness of the offence, it would not be in the interests of justice to upset the conviction. The fact that the Legislature makes it incompetent for the magistrate to preside alone under certain circumstances, cannot be made

competent by the fact that there is overwhelming evidence that the appellant is guilty of the offence of which he has been convicted."

In S v Naicker, 2008(2) SACR 54 (NPD), a different view was adopted. The Natal Court held that although non-compliance with the peremptory terms of s 93 ter (1) amounts to an irregularity, it does not necessarily follow that it amounts to a failure of justice; the issue to be determined in each case is the effect the irregularity had on the integrity of the proceedings.

In my view it would be undesirable to conjecture in each case on the effect the absence of assessors had on the proceedings. Assessors fulfil an important function and have considerable power. I respectfully associate myself with the remarks made by Tlaletsi J and Lacock J in the Titus case, quoted above. See also S v Jaipal, 2005(1) SACR 215 (CC) and S v Mitshama and Another, 2000(2) SACR 181 (WLD).

I would therefore order that the conviction and sentence be SET ASIDE and it be left to the Director of Public Prosecutions to decide on what course to follow. The appellant should understand that he may be tried again.

ROUX, AJ

I agree.

MEER, J

jp /...