REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA
JOHANNESBURG

CASE NO: A370/2007

DATE: 03.06.2009

DELETE WHICHEVER IS NOT APPLICABLE	
REPORTABLE: YES/NO OF INTEREST TO OTHER JUDGES: YES/NO REVISED	
DATE	SIGNATURE

In the matter between:

JEROME DU PLESSIS Appellant

and

THE STATE Respondent

JUDGMENT

C. J. CLAASSEN J:

[1] This is an appeal by Jerome du Plessis who was accused 1 in the court *a quo* against a conviction on one count of murder as read with section 51 of Act 105 of 1997. There was a second accused Mr Albert Nel who is also appealing against the conviction and sentence passed. The particular Magistrate who presided in the Regional Court at the time was a Mr M. Z. Machowane. He convicted both appellants and sentenced them to 10 years' imprisonment each. Mr Machowane granted leave to appeal against both convictions and sentences to this court. The appellant's counsel submitted supplementary heads of argument, rather belatedly, and this was served upon the Magistrate in

the court *a quo* on 20 August 2008. However, no response was obtained from the Magistrate in reply thereto. There is also an application for the condonation of the late filing of these documents. It is to be condoned, as the State has no opposition thereto.

[2] The point raised in the supplementary heads of argument is a technical one in the sense that the court *a quo* failed to comply with the provisions of section 93ter (1) of the Magistrate's Court Act 32 of 1944. The relevant provisions read as follows:

> "93ter (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 pro*per se*ntence, 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.
> 2 (a) In considering whether summoning assessors under (1) would be expedient for the administration of justice, the judicial officer shall take into account –
> (i) the cultural and social environment from which the accused originates;
> (ii) the educational background of the accused;
> (iii) the nature and the seriousness of the offence of which the accused stands accused or has been convicted;
> (iv) the extent or probable extent of the punishment to which the accused will be exposed upon conviction, or is exposed, as the case may be;
> (v) any other matter or circumstance which he may deem to be indicative of the desirability of summoning an assessor or assessors and he may question the accused in relation to the matters referred to in this paragraph."

[3] Section 93ter (3) provides for an oath to be taken by the assessors as prescribed in section 93ter (5). More importantly section 93ter (3) provides expressly that once the assessors have been so invited and sworn in, they become members of the court subject to certain provisions. These provisions prescribe what their status would be in regard to the resolution of matters of law and matters of fact. In particular subsection 3(d) states the following:

> "Upon all matters of fact the decision or finding of the majority of the members of the court shall be the decision or finding of the court, except when only one assessor sits with the presiding judicial officer in which case the decision or finding of such judicial officer shall be the decision or finding of the court if there is a difference of opinion."

Subsections (10) and (11) deal with the situation where an assessor is to be recused and when an assessor is no longer able to continue with sitting as much.

[4] The facts in the present matter are common cause as far as they relate to the question of the appointment of assessors. The record clearly indicates that no assessors were appointed either before the evidence commenced or thereafter.

[5] The record also discloses no indication that any assessors were sworn in or given directions by the Magistrate as to what their functions were when acting as assessors.[1] The record further contains no indication that the judgment of the court *a quo* was either unanimous or a decision of the majority of the court. All of this leads one to the inescapable conclusion that the magistrate never implemented the provisions of section 93ter (1). The question then arises what effect such failure has on the legality of the trial.

[6] A comparable set of facts arose in the case of **S v Naicker** 2008 (2) SACR 54 (NPD). That case was presided over by Nsimang J and Ngubane AJ. In that case it was also common cause between the State and the defence that the appellant was convicted and sentenced without assessors being appointed, notwithstanding the fact that the appellant was arraigned on a charge of murder, nor was he approached by the Magistrate to enquire whether or not he required assessors to be appointed. In that case it was conceded by counsel for the State that the failure constituted an irregularity. The court held at page 57i as follows:

[1] See **S v Maphanga** [2001] 4 All SA 657 (W)

> "There can be no doubt that the provisions of the proviso to S 93ter (1)(a) are couched in peremptory terms and therefore that failure by the court *a quo* to apply the said provisions in the situation in which the requisite jurisdictional facts were present amounted to an irregularity. The issue to be determined by this court is the effect which that irregularity had on the integrity of the proceedings."

[7] With reference to the two well-known types of irregularities that one finds in criminal proceedings,[2] as set out by Holmes JA, the court came to the conclusion that such irregularity did not render the proceedings *per se* a failure of justice. It held that such failure fell into the first category, and that the irregularity was not so fundamental that it in fact amounted to a *per se* failure of justice. In this regard it was held at page 61h as follows:

> "Having regard to the purpose and history of the system of trial by assessors in the lower courts as briefly stated above, it is my considered opinion that, despite the peremptory manner whereby the proviso to s 93ter (1)(a) has been couched, failure to comply therewith is not so serious and fundamental as *per se* to vitiate the proceedings. To borrow from the American nomenclature, such an irregularity may be subjected to a harmless error analysis."

[8] The court there after continued with an enquiry to establish whether a reasonable court properly directing itself would inevitably have convicted in spite of the irregularity. It separated the bad from the good and considered the merits of the case including any findings as to the credibility of witnesses. In particular the court concluded that due to the fact that the judicial officer and the accused belonged to the same racial group, the irregularity could not have prejudiced the appellant during the trial and that no failure of justice resulted. The question arises whether this decision was correct.

[9] The learned judges in the **Naicker** case relied on an analysis of the provisions of section 93ter (2), which governs the considerations to be taken into account when deciding whether or not assessors would be appointed. In that regard Hurt J in **S v Gambushe** 1997 (1) SACR 639 (N) at 642h - i held as follows:

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[2] See **S v Moodie** 1961 (4) SA 752 (A) at 758f – g.

> "As I understand the object of these provisions, it was to bridge what was conceived to be the cultural gap between the magistrates, on the one hand, and the large number of intellectually unsophisticated and uneducated accused persons who come to trial before them, on the other hand. What was contemplated was that the presence of the assessors would make the trial of the accused more of a 'trial by peers' and constitute some protection against the conduct or reactions of the witnesses and the accused being judged by incorrect yardsticks not applicable to those of the environment and community to which those witnesses and the accused belong."

With respect, I wish to associate myself with the interpretation of Hurt J as to the underlying need for the provisions set out in section 93ter (2). However, that is not the only consideration that must be taken into account when considering the effect of a failure to comply with the provisions of section 93ter (1).

[10] As indicated above the proviso specifically enjoins in peremptory terms ("shall") a magistrate hearing a murder case to appoint assessors, unless the necessity to do so is waived by the particular accused. The import of this proviso, to my mind, is that a court does not have a discretion to do without assessors in a murder trial in the lower courts, unless a communication with the accused or his legal representative indicates that the court is relieved of the duty to appoint such assessors.

[11] In my view, there is a very good reason why the Legislature had couched the provision in such terms. Assessors in a murder trial in the lower courts are not only there to assist the magistrate in bridging any cultural or educational gaps that may exist between the court and the accused. In terms of subsection (3) assessors are also members of the court entitled to decide issues of fact and "give a true verdict". An accused in a murder trial in the magistrates' courts must therefore have the opportunity to make an informed election as to whether he wants the decision making forum to consist of one individual or more, irrespective of whether or not cultural differences may exist.

[12] I pause to mention at this stage that the history of the appointment of assessors came considerably to the fore after the abolition of jury trials. In South Africa up until 1969 jury trials were permitted at the election of an accused. Jury trials were allowed in order to cater for the needs of accused persons if they desired to be tried by their peers. Once jury trials were abolished,[3] alternative measures were necessary to cater for this need. The appointment of assessors became the only way in which any semblance of being tried by peers could be established.

[13] Problems usually arise when a member of the presiding forum died or became incapable of continuing further with the trial. The need to overcome this deficiency was already exposed in 1954 in the case of **Rex v Price** 1955 (1) SA 219 (A). In that case it was obligatory due to the demand of certain statutory requirements to appoint two assessors. One of the assessors died during the course of the trial. The defence made an application for an order that the case should proceed before the judge and the remaining assessor. This application was supported by both counsel for the Crown and the defence and so the judge granted the application.

[14] Subsequently, after conviction and sentence, one of the accused appealed by way of a special entry raising the question whether the court *a quo* had power to order the trial to continue in the absence of one of two appointed assessors despite the agreement of counsel for the State and the defence in that regard. On appeal the court held that after the death of the first assessor the court *a quo* was not properly constituted and consequently its verdict as well as the sentence were irregularities which could not be regularised by the agreement of an accused person.[4] Greenberg JA stated the following at 273E – G:

> "In *Rex v Gluck*, 1923 A.D. 140, the Court appears to have considered it almost axiomatic that, in a Court constituting of a president and two assessors, who were members of the court, the two assessors in the absence of the president, did not form *a quo*rum and that their decision was

[3] See the Abolition of Jury's Act 34 of 1969.
[4] See **R v Price**, supra at 223D

> not one of a Court properly constituted; it is also clear from *Green v Fitzgerald & Others* 1914 A.D. 65, that where a certain number of Judges is necessary to form *a quo*rum, the Court is not properly constituted if its number falls short of that quorum, even though that number would be enough to constitute a majority of the Court. In the present case, the quorum clearly was three members … and the fact that, in such *a quo*rum, the decision of two would be an effective majority does not cure the deficiency in its quorum."

Greenberg JA concluded at 224C as follows:

> "*Prima facie* when a decision is entrusted to a tribunal consisting of more than one person, every member of that tribunal should take part in the consideration of the decision. In *Ras Beharilhal and Others v The King Emperor* 150 L.T.R.3 which was followed in this Court in *Rex v Silber* 1940 AD 187, the Privy Council set aside the verdict of a jury because one of its members did not understand the language in which the proceedings or a material part of them were conducted. Lord Atkin said that the Board thought
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> > 'that the effect of the incompetence of a juror is to deny to the accused an essential part of the protection afforded to him by law and that the result of the trial in the present case was a clear miscarriage of justice.'
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> (See also *Silber's* case at pp 193 – 194). What was denied to the accused in these cases was his right to a consideration of his case by every member of the fact-finding tribunal."

[15] The importance of **Rex v Price** is that it was decided on facts where two assessors were essential[5] for a particular trial, much as in the present case where the Act demands the appointment of two assessors in the case of a murder trial. **Rex v Price** has been followed in **S v Malindi and Others** 1990 (1) SA 962 (AD) where Corbett CJ at 970G had the following to say:

> "An assessor appointed in terms of section 145 (of the Criminal Procedure Act 51 of 1977) is a member of the Court and participates in all decisions of the Court on questions of facts. Where the Judge sits with two assessors the decision of the majority (on factual questions) constitutes a decision of the Court. Where, on the other hand, the Judge sits with only one assessor, then in the event of a difference of opinion the decision of the Judge prevails (s 145 (4)). An accused person has a right to have his case considered by every member of the fact-finding tribunal, (see *R v Price* 1955 (1) SA 219 (A) at 224D – E) and it is especially important that this should be so in cases covered by the proviso to s 145 (2)."

[16] The proviso referred to above in section 145 (2) dealt with the imposition of the death sentence in cases of murder trials, which was subsequently deleted after the Constitutional Court declared the death sentence unconstitutional. Be that as it may, it is still important to an

[5] See **R v Price** *supra* at 226B – C

accused that assessors be part of the decision making and fact-finding process in a lower court where he/she is subjected to a murder trial.

[17] In the lower courts the highest jurisdiction afforded to a Regional Court is in fact to hear a murder trial and one can therefore understand why an accused would want to have a fact-finding tribunal consisting of more than one presiding officer. The problem that I have with **Naicker's** case aforesaid, is that the learned judges never considered the importance of an accused's right to have assessors as part of the fact-finding process. It seems to me as if the court restricted itself to considering whether a failure of justice occurred based purely on a consideration of the fact that the language and racial group of the court and the accused, were similar. That, to my mind, is not sufficient to decide whether or not a miscarriage of justice took place.

[18] In the present case before us, there is no indication in the record that the accused was ever asked whether he wanted to deny himself the right to have a fact-finding tribunal consisting of more than one presiding officer. That being the case, I am of the view that the Appeal Court cases of **Rex v Price** and **S v Malindi** constitute authority for the proposition that failure to comply with section 93ter (1) results in a *per se* irregularity which cannot be waived or condoned by either the accused or his legal representative and thus constitutes a failure of justice.

[19] It would seem to me that the weight of authority is in line with the aforesaid conclusion. A similar conclusion was arrived at by King and Farlam JJ in **S v Daniels and Another** 1997 (2) SACR 531. In that case the trial was commenced before a magistrate and two assessors. One of the assessors then absconded. The magistrate continued with the trial with one assessor. Farlam J held at 532I – J as follows:

> "I cannot agree with the magistrate's contention that the accused were not prejudiced because there was only one assessor, with the result that the magistrate's finding on the facts would in any event have been the finding of the court. This overlooks the fact that the assessor, if she had disagreed with

> the magistrate on the facts, might have been able to persuade the magistrate that her view was correct."

[20] In that matter the accused also consented to the defective procedure of continuing with one assessor only. Farlam J at 533D also rejected the contention that such a waiver was valid and stated that such consent did not cure the defect in the proceedings. As a result, the convictions and sentences were set aside on the basis that a miscarriage of justice occurred.

[21] We, therefore, are of the view that the decision in **S v Naicker** was wrongly decided. The court in that case never took cognisance of the Appeal Court cases laying down the importance of a right to have a fact-finding tribunal consisting of more than one member. This requirement is independent of any benefit contemplated in subsection (3).

[22] Finally it may be helpful to lay down some guidelines for magistrates dealing with murder trials in the Regional Court. Care should be taken to ensure that the record reflects clearly whether or not section 93ter (1) had been complied with. The record should show that the magistrate entered into discussion with the accused and/or the accused's legal representatives when the entitlement to the appointment of assessors is waived. Such waiver should be recorded in order for courts of appeal to be assured that the provisions of section 93ter had been complied with.

[23] In this regard I agree with what was stated in **S v Gambushe** 1997 (1) SACR 68 (N) at 645a – c where it was stated that any directions given to the assessors by the magistrate after appointing them as to their duties and/or their contribution to the trial and the fact-finding process, should also be recorded. The provisions must be complied with because assessors play such an important role in the conduct of a trial. It was said in **S v Jaipal** 2005 (4) SA 581 (CC) at paragraph [53] that

assessors have considerable power and could play an important role in the functioning as well as the legitimacy of criminal courts.

[24] We, therefore, conclude that the failure to comply with section 93ter (1) rendered the trial in the court *a quo* a failure of justice.

[25] There is, however, a further matter which is of concern and that is the conduct of the Regional Court magistrate Mr Machowane. When perusing the record, it appeared that Mr Machowane upon completion of the testimony of accused 1, embarked upon a lengthy series of questions comprising no less than ten pages. These were not questions to get clarity of certain unclear aspects but constituted cross-examination *per se*. Thereafter, when accused 2 testified and upon completion of his evidence, the magistrate proceeded to do the same by cross-examining accused 2 for another thirteen pages of questions and answers. In all, his cross-examination of the two accused amounted to 23 pages of impermissible questions. It has been said on many occasions that magistrates and other presiding judicial officers are not to utilise their position to show partiality by cross-examining accused persons. The court is there to sit as an impartial arbitrator in deciding cases without fear or favour. Favouring the State by cross-examining an accused can only lead to the administration of justice falling into disrepute and a perception of bias on the part of the presiding officer.

[26] It seems to me that this is a case where the conduct of Mr Machowane should be taken further in order to remind him of his duties as an impartial presiding officer in criminal trials. I am therefore of the view that it would be advisable for this judgment to be laid before the Magistrate's Commission for their comment. Finally, I make the following order:

1. Condonation for the late filing of the notices of appeal is granted.
2. The convictions and sentences imposed by the lower court are set aside.

3. This judgment is to be placed before the Magistrate's Commission.

THUS DATED AND SIGNED AT JOHANNESBURG THIS DAY OF JUNE 2011.

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C.J.CLAASSEN
JUDGE OF THE HIGH COURT

I agree:

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P/P