IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: AR509/2017

In the matter between:

MUSAWENKOSI SOLOMON SIWELA **APPELLANT**

And

THE STATE **RESPONDENT**

APPEAL JUDGMENT

MADONDO DJP

[1] Upon the plea of guilty the Vryheid Regional Court convicted the appellant of murder and sentenced him to fifteen (15) years' imprisonment of which two years were suspended on usual conditions. With the leave of this Court the appellant now appeals against sentence.

[2] Section 93 ter of the Magistrates' Courts Act, 1944 makes it peremptory for the regional court magistrate presiding over a murder trial to sit with assessors unless the accused himself requests that his trial proceeds without assessors.

[3] It is common cause that at the time of the conviction and sentence of the appellant, the presiding regional magistrate was sitting without assessors in violation of the provisions of s 93 ter, nor did the presiding magistrate canvass the issue with the appellant or his defence whether or not he wished his trial to be proceeded without assessors.

[4] Ms Anastasiou for the appellant has contended that the learned magistrate's failure to invoke the provisions of se 93 ter, constituted a gross irregularity which vitiated the proceedings on the ground that the court a quo was not properly constituted.

[5] Subsection1 of s 93 ter of the Magistrates Court 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, maybe of assistance at the trial of the case or in determination of a proper sentence, as the case may maybe, to set 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.'

[6] The section is peremptory. It prescribes that the judicial officer presiding in a regional court before which an accused is charged will murder shall be assisted by two assessors at the trial, unless the accused requests that the trial be proceeded with without assessors.

[7] In the present case the learned magistrate failed to comply with the provisions of s 93 ter. Nor did he enquire from the accused whether or not he wished his trial to proceed without assessors. The provisions of s 93 ter are couched in a peremptory terms and the failure to comply therewith amounts to a fundamental irregularity as to per se vitiate the entire proceedings.

[8] In *S v Moodie* 1961(4) SA 752 (A) the court held that with regard to an irregularity which per se amounts to a failure of justice the inquiry is whether:

> '. . . the nature of irregularity is so fundamental and serious that the proper administration of justice and the dictates of public interest require it to be regarded as fatal to the proceedings in which it occurred.'

[9] In *S v Shikunga and Another* 1997 (2) SACR 470 (NMS) Mahomed CJ said that where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside.

[10] In *S v Naidoo* 2008(2) SACR 54(N) 62 b-d the court held that the irregularity must have resulted in a failure of justice. In *Chala and others v Director of Public Prosecutions, KwaZulu-Natal and Another* 2015(2) SACR 283 (KZP) para 25 the court held that the failure to properly invoke the provisions of s 93 ter of the Magistrates' Court Act constitutes a fatal irregularity viating the entire trial.

[11] Apparently, the vitiation of the entire proceedings is a consequence of the judicial officers' failure to discharge a mandatory obligation which the statute imposed on him or her. This remains the position even if it had not for the irregularity, the presiding officer would inevitably convict him. Otherwise the appellant's conviction could not in any other way be challenged.

[12] In the present case the appellant had admitted murdering the deceased, nor had he raised any lawful defence. Had it not been for the magistrate's failure to invoke the provisions of s 93 ter the appellant would have legitimately been convicted of murder as pleaded and sentenced.

[13] It has been common cause between the defence and the state that technically, the failure by the magistrate had the effect of vitiating the entire proceedings merely on the ground that the court a quo was not properly constituted. It appears from the decided cases that the mere failure of the judicial officer to comply with the peremptory provisions of the statute deprives the appeal court discretion to assess the effect of such failure or its impact on the entire proceedings.

[14] Both the state and defence have conceded that the appellant had been convicted of a very serious offence, murder, and sentenced to a lengthy term of imprisonment. The risk therefore that he may not stand trial again should he be allowed to be at large, after the setting aside of the conviction and sentence, is far too great.

[15] The state and the defence have agreed that in order to avoid unnecessary delay, hardship to the appellant and ultimately to prevent a miscarriage of justice from occurring, the matter be refereed back to the regional court for hearing before another magistrate sitting with assessors unless the appellant requests that his trial proceeds without assessors. However, the defence has asked that in sentencing the appellant the trial court must take into account the period the appellant will have thus far served.

ORDER

[16] In the result I make the following order:

(a) Appeal is upheld;

(b) Both conviction and sentence are set aside;

(c) The matter is referred back to the regional court for hearing de novo before another regional magistrate sitting with assessors unless the appellant requests his trial proceeds without assessors.

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MADONDO DJP

I agree;

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SISHI J

Appearances

Date reserved: 18 May 2018

Date delivered: 20 June 2018

For appellant: Adv Anastasiou

Instructed by: PMB Justice Centre

For respondent: Adv PN Ngcobo

Instructed by: The Director of Public Prosecution, Pietermaritzburg