

SOUTH AFRICA / JUDGMENT

Dyantyi v S (CA&R71/15) [2017] ZAECHMHC 28 (29 August 2017)

[2017] ZAECHMHC 28

COURT

Eastern Cape High Court, Mthatha

BEFORE

S M Mbenenge, F Y Renqe

CASE / FILE NUMBER

CA&R71/15

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, MTHATHA)

CASE NO: CA &

R71/15

In

the matter between:

MZOLOLO

DYANTYI

Appellant

and

THE

STATE

Respondent

JUDGMENT

MBENENGE, ADJP:

- [1] The appellant stood charged before the Regional Magistrates' Court, Mthatha on a charge of murder in contravention of section 84 of the Transkeian Penal Code, Act 9 of 1983 as read with the provisions of section 51 (1) and Part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997. He pleaded not guilty to the charge, raising self defence as the basis of his defence.

[2] The trial, which proceeded to finality, without assessors featuring therein, ended with the appellant being convicted of murder, for which he was sentenced to undergo life imprisonment.

[3] The preliminary issue which has arisen for consideration, dispositive of the appeal is whether the Court a quo had been properly constituted.

[4] The answer to the question at hand is to be found in section 93 ter

(1) of the Magistrates' Court Act 32 of 1994, which reads:

"The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice

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(a) Before any evidence has been led; or

(b) ...

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." (My emphasis.)

[5] Even though the appellant had been legally represented there is nothing on the record suggestive of him having been made aware of the requirement that the regional magistrate sit with assessors or of having been afforded the opportunity to choose whether assessors should assist with the trial.

[6] The requirement that a judicial officer sit with assessors in the circumstances outlined in the proviso to section 93 ter (1)(b) is peremptory.[1]

[7] Accordingly, the court a quo was not properly constituted when it convicted the appellant, with the result that the conviction and sentence fall to be set aside as being incompetent within the meaning of section 324 (a) of the Criminal Procedure Act 51 of 1977. Mr Mzila has conceded as much.

[8] In the result:

(a) The appeal is upheld

(b) The conviction and sentence imposed by the Court a quo are set aside.

(c) The appellant is to be released from custody with immediate effect.

S M MBENENGE

ACTING DEPUTY JUDGE PRESIDENT

HIGH COURT, MTHATHA

I agree:

F Y RENQE

ACTING JUDGE OF THE HIGH COURT

Counsel for the appellant: S Njisane

Legal Aid Board

MTHATHA

Counsel for the respondent: M F Mzila

Office of the DPP

Heard on:

25 August 2017

Ex tempore judgment delivered on: 25 August 2017

Typed version delivered on : 29 August 2017

[1] S v Gayiya 2016 (2) SACR 165 (SCA); Chala v DPP, KZN 2015 (2) SACR 283 (KZN); also see Shange v S (613/2016) [2017] ZASCA 51 (2) May 2017

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