

SOUTH AFRICA / JUDGMENT

Mphetsheni v S (CA & R 57/2023)
[2024] ZANCHC 65 (26 July 2024)
[2024] ZANCHC 65

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Lever

CASE / FILE NUMBER

CA & R 57/2023

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IN

THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No:	CA & R 57/2023
Heard on:	03/06/2024
Delivered on:	26/07/2024
Reportable:	YES / NO Circulate to
Judges:	YES / NO Circulate to
Magistrates:	YES / NO Circulate to Regional Magistrates: YES / NO In
the matter between:	MBUYISELO ASHLEY MPHETSHENI APPELLANT and THE STATE RESPONDENT
Coram:	Mamosebo J et Lever J

JUDGMENT**MAMOSEBO J**

- [1] The appellant stood trial in the Regional Court, Postmasburg on three counts. Count 1 was that of murder r/w s 51 of Act 105 of 1997 which prescribes a minimum sentence of not less than 15 years unless the Court has found that there are substantial and compelling circumstances justifying the imposition of a lesser sentence. In Count 2 the appellant was charged with attempted murder where the complainant, Keolebogile Priscilla Mooki, was knocked down by the appellant's motor vehicle. Count 3 was a contravention of s 16(1)(c) of the Road Traffic Act 93 of 1996 namely, failing to render assistance to the deceased, Motse Mooki, and the complainant. Whilst in count 4 the charge comprised failing to bring a motor vehicle to a halt, failing to ascertain the injuries and failing to report an accident within 24 hours.
- [2] On 28 October 2020 the Regional Magistrate, Mr Viewe, convicted the appellant on counts 1, 2 and 3 and acquitted him on count 4. The trial Court took counts 1 to 3 as one for purposes of sentence thereby sentencing him to an effective 17 years of direct imprisonment. Mr Viewe passed on before an application for leave to appeal could be brought. On 13 November 2023 another Regional Court Magistrate, Mr Hinana, granted the appellant leave to appeal his conviction and sentence. The record before us is incomplete. However, Mr Nel, for the appellant and Ms Krüger, for the respondent, agreed that it is adequate to enable this appeal to be heard.
- [3] The issues that stand for determination in this appeal are the following:
- 3.1 Whether there had been compliance with s 93ter(1) of the Magistrates' Court Act 32 of 1944 (the MCA) by the trial Court;
- 3.2 Whether there was any misdirection by the trial Court in its findings of fact;
- 3.3 Whether the trial Court had erred in convicting the appellant of murder and attempted murder; and
- 3.4 Whether the trial Court had erred in imposing a globular sentence of 17 years.

Section 93ter(1) of the MCA

- [4] The appellant contends that the trial Court had failed to comply with the peremptory provisions of s 93ter(1) of the MCA in that it did not enquire from the appellant if he was aware of the provisions of the section and for the mere fact that the trial Court explained in detail the provisions of s 51 (1) of the Criminal Law Amendment Act to the appellant, it ought to have similarly explained the provisions of s 93ter(1) and on this ground alone the conviction should be set aside.

[5] Evidently, this ground demands a proper interpretation and application of s 93ter(1) of the MCA. It is trite that the correct approach to the interpretation of any document, including statutes, is among others, as espoused by the Supreme Court of Appeal (SCA) in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

[6] Section 93ter(1) [1] provides that:

“(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, [2] summon to his or her assistance any one or two persons who, in his or her 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 or her as assessor or assessors.”

[7] Pre- and Post *S v Gayiya* 2016 (2) SACR 165 (SCA) there were conflicting judgments where in some instances it was found that a Regional Magistrate sitting without assessors in a murder trial was an irregularity fatal to the proceedings and in other cases the failure could be condoned if the interests of justice so permitted. In *Gayiya*, the SCA, having found that s 93ter(1) is peremptory and that the Regional Magistrate had to, before commencement of the proceedings, inform the accused that he or she

must be assisted by assessors unless the accused requests that the trial proceed without the assessors. The accused was unrepresented. He did not make the request for the trial to proceed without assessors. Further, he was only informed of the right to assessors after the guilty verdicts and it is only then that he made his election to dispense with assessors. It is for this reason that *Gayiya*’s appeal was upheld.

[8] *Mpati P in Gayiya* pronounced:

“[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 the recent SCA majority judgment *Director of Public Prosecutions, Kwazulu-Natal v Pillay* 2023 (2) SACR 254 (SCA) at paras 21 and 22, the Court considered the various decisions involving s 93ter(1), where the accused was legally represented, as follows:

“[21] On 29 July 2022 the judgment in S v Green (Green) was delivered. Green marked a departure from the approach adopted in the earlier judgments. In that matter the minute of a pretrial conference recorded that 'no lay assessors [are] required'. Dumisa AJ, who wrote the main judgment, accepted that the requirements of s 93ter(1) were met. He held that there was no reason to doubt the competence of the legal representative, and that the court was entitled to assume that the accused had made his election with the benefit of advice.

- [22] In a concurring judgment, Olsen J addressed the conflict between Ngomane and Langelitshoni. In relation to the judgments of Nxumalo, Hlatshwayo and Zulu, Olsen J stated:

'I have not found a report of any case in this division in which it was held, before the judgment in Langelitshoni was handed down, that a simple record of a request by an accused (conveyed by his legal representative) that the magistrate sit alone is inadequate to establish the proper constitution of a court presided over by a magistrate alone. That accords with my understanding of the attitude of this court at the time, that a record of the choice alone is sufficient. I have found three judgments which post-date Langelitshoni in which that case was followed in this division without comment. [References to Nxumalo, Hlatshwayo and Zulu omitted.] Despite the fact that Ngomane was published in 2021, the judgment was not drawn to the attention of the judges who presided in the three cases just mentioned. Being unaware of the conflict, they did not deal with it. In the circumstances I do not believe that in this appeal we are bound to follow the three decisions.”

- [10] In *S v Langelitshoni* 2020 (2) SACR 65 (ECM) the Full Bench in the Eastern Cape Division set aside the conviction by a Regional Court of a legally represented accused on the basis that the trial Court had failed to comply with s 93ter(1). In *S v Ngomane and Another* 2021 (2) SACR 654 (GP) the accused was legally represented but, the Court was alive to the issue of assessors and addressed it on two occasions. Similarly, unlike in *Gaiya*, the accused was legally represented in *Ngomane*.

- [11] The salutary remarks by the Goosen JA in *Pillay* at para 34 bear repeating:

“[34] 'Representation' in this sense is not confined to the conduct of the trial. A legal representative, who is engaged to represent an accused, is obliged to act in the best interests of their client. That means, inter alia, to act according to the highest standards of professional ethics; to advise the client of their rights fully and properly; and to guide and advise the client in exercising those rights. The legal representative must prepare thoroughly and properly on all aspects of the case. This includes advising the client about s 93ter(1), where it applies, informing the magistrate of the process and whether a request is made to proceed without assessors.”

Following the doctrine of precedent, Pillay is the most recent SCA matter and the fact that the SCA has endorsed Green, marking a departure from the previous judgments, the law is now settled. It follows, therefore, that the election made by the appellant before us regarding the use of the assessors, was with the benefit of advice and the appeal on this ground should fail.

Whether or not the trial Court had erred in its findings of fact and whether or not the court had erred in convicting the appellant of murder and attempted murder

[12] These two grounds are considered together. It was contended on behalf of the appellant that the trial Court had erred in its evaluation of the evidence and had wrongly concluded that the guilt of the accused had been proved beyond reasonable doubt.

[13] Four people testified on behalf of the State and their evidence is summarised to this effect. Earlier on the day of the incident, the appellant's son, whose age is not specified, was involved in a fight with another boy on the street. Mr Thobile Winston Peter, who testified for the State, informed the Court that he found two boys fighting, one was known to him but the other, who later became known as the appellant's son, were fighting on the street. He told the one he knew to go home and he, Peter, went to the shops. On his return he found the two boys still at each other. The appellant's son was assaulting the other boy. When Peter tried to intervene, the appellant's son swore

at him and Peter regrettably slapped him once and immediately apologised to him and left them. The appellant's son was bragging about the fact that they do not know his father who was apparently well known in that community. Mr Peter did not know who the boy was referring to.

[14] Later, as Peter watched a game of soccer at his wife's parental home, the furious appellant confronted them accompanied by his son, standing in the lounge, demanding to know who, among them, slapped his son. His son pointed out Peter. The appellant was enraged and in a fighting mood. Peter stood up and Peter's wife, the complainant in count 2, intervened by standing between the appellant and Peter. They suggested to the appellant that he should rather return the following day for them to address the matter when he was calmer. He ignored them. He insulted Peter's

wife. Their mother ordered the appellant to leave her home.

[15] Appellant left the house and boarded his vehicle. All the witnesses testified that he revved the vehicle, changed direction of the vehicle and the tyres were spinning. The one witness testified that the tyre marks were visible. The appellant could have simply proceeded straight to join the public road but the change in direction resulted in the vehicle injuring the complainant in count 2 and killing the deceased who took refuge in front of a tree. As the appellant sped off, Eugene Mooki, ran behind his vehicle flagging him to stop but he just continued driving. Poppy Thonyane is a neighbour who heard the appellant insulting the complainant. She also corroborated the other witnesses that the vehicle first reversed before it drove over the complainant's leg and reversed again and knocked down the deceased who was next to a tree before speeding off. The trial Court clarified the aspect of the differences

between the witnesses' versions in as far as whether the appellant had reversed once or twice and whether he had made a U-turn before reaching the deceased.

- [16] The uncontroverted evidence of the witnesses as to how the deceased and the complainant were knocked down by the motor vehicle was that the appellant boarded his vehicle, struggled to put it in the right gear, revved it, slightly reversed and turned the wheels slightly to the right. This resulted in the appellant's vehicle injuring the complainant on her right leg and thereafter colliding with the deceased who had sought refuge from a small tree. The appellant

did not even stop to ascertain if there were any injuries. Despite one witness pursuing appellant's vehicle in an attempt to stop him he sped off. They summoned the ambulance which did not arrive. The family then arranged private transport to take the deceased and Ms Mooki to hospital for medical treatment. The deceased was certified dead on arrival. Ms Mooki was treated and discharged. Mr Nel conceded that the witnesses corroborated each other in material aspects.

- [17] According to the evidence before the Magistrate, which in our view is material, the appellant changed direction by turning the vehicle to the right without following a public road when he could have just gone straight. But for the change of direction, there would not have been a collision which would lead to one person dead and the other injured. The change in direction, coupled with his rage for an earlier assault on his son, marks his intention when he confronted the Mooki family. It remains inexplicable why the appellant elected to confront the family instead of bringing charges at the police station directly.

- [18] It is settled that the correct approach to be followed when analysing the evidence is espoused in *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15. Of further significance are what Molemela JA, then, elucidated in *Haarhoff and Another v Director of Public Prosecutions*, Eastern Cape 2019 (1) SACR 371 (SCA) at 389d – e:

"[42] ...It behoves the courts to keep in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Contradictory versions must be considered and evaluated on a holistic basis. Furthermore, the circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions, the quality of the explanations and the connection between the contradictions and the rest of the witness's evidence are among other factors to be taken into consideration and weighed up."

- [19] There are contradictions in the versions of the respondent's evidence, however, such contradictions, in my view, were not material to affect the witnesses' credibility or reliability. In the main, the witnesses' version assessed as a whole, confirm the rage displayed by the appellant coupled with the fact that he had swerved the vehicle towards the complainant and the deceased as factors substantiating his form of intent. It must also be borne in mind that the appellant's reason for being at the witnesses' residence was to avenge his son. That does not support the averment that he went there merely to talk about the assault on his

son. Absent his explanation under oath which is not borne out by the facts there is nothing to corroborate his version.

- [20] The appellant failed to testify, as correctly conceded by his legal representative, Mr Nel, even in the face of damning evidence against him. There is no credible explanation by the appellant as to how the incident occurred. See *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC) at para 24 where Langa DP held:

*“[24] The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal* when he said the following:*

'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'

What is clear is that he was the driver of the vehicle that caused the death of the deceased and the complainant's injuries. The only reasonable inference is that the appellant foresaw that either injuries or death could result. Absent any explanation from him, the element of intent has been established.

- [21] Jafta AJA in *S v Katoo* 2005 (1) SACR 522 at para 19 made these insightful remarks pertaining to the weight to be attached by the Court to the evidence where the accused failed testify:

“[19] The other issue relates to the weight attached by the trial Judge to the defence version which was put to State witnesses under cross-examination. It was treated as if it were evidence when the trial Court considered its verdict on the merits. As the respondent failed to place any version before the Court by means of evidence, the Court's verdict should have been based on the evidence led by the prosecution only.”

- [22] It is inexplicable why the appellant did not testify when damning evidence presented before the trial Court called for an answer. According to the evidence there were other occupants in his vehicle when the incident occurred, including his son who was brought along to point out the person who had assaulted him. Although the age of the son and his level of maturity

is not known, we do not know if he would have been a competent witness. It follows that the failure by the appellant to testify has strengthened the State's case resultantly becoming conclusive proof of his guilt beyond reasonable doubt. The submission by Mr Nel that the appellant should have been convicted of culpable homicide is also not borne out by any facts. There was no misdirection by the trial Court when it convicted the appellant of murder and attempted murder. More so, because we have already made a finding regarding his intent when he swerved the vehicle to the right instead of proceeding straight. His counsel conceded that he changed direction instead of proceeding straight. This change in direction also remains inexplicable. It follows that the attack that there was a misdirection in the Regional Magistrate's findings of fact as well as the evaluation of his evidence, are without merit and stand to be dismissed.

On Sentence

[23] The last aspect to consider is whether or not the trial Court had erred in imposing an incompetent sentence by taking counts 1, 2, and 3 as one for purposes of sentence and imposing an effective imprisonment term of 17 years.

[24] Counsel for the respondent, Ms Krüger, correctly conceded that the trial Court should not have taken the three counts together for purposes of sentence, and that 17 years' imprisonment in respect of count 3, which is a statutory offence with a prescribed maximum sentence of nine years as contemplated by the National Road Traffic Act, 93 of 1996, is an incompetent sentence.

[25] I align with the elucidation by Corbett J, then, in *S v Leith* 1972

(4) SA 262 (C) at 262H – 263B that:

“When a court imposes such a globular sentence it is in effect decreeing that the single sentence imposed is to be regarded as the punishment for each of the singular offences of which the accused is convicted. If that be so, then it would seem to follow that is not competent to impose such a sentence where the severity thereof is such that it exceeds the jurisdiction of the court in respect of one or more of the counts which have been taken together for purposes of sentence.”

[26] It is trite that sentencing is pre-eminently within the discretion of a Court. An appeal Court can only interfere if there is a clear misdirection on the part of the trial Court, or the sentence is shockingly severe. See *Haarhoff and Another v Director of Public Prosecutions*, Eastern Cape 2019 (1) SACR 371 (SCA). It follows therefore that the trial Court misdirected itself in its approach to sentencing in count 3. In setting aside the sentence, it would mean that the 17 years' imprisonment term also imposed in counts 1 and 2 would also be affected. As a consequence, it therefore means that the imposition of a globular sentence leaves this Court at large to sentence the appellant afresh. It would not serve any purpose to remit the case to the trial Court to sentence afresh, more so, that the Regional Magistrate who convicted the appellant has since passed on and it would have to be dealt with by an available Regional Court Magistrate. There is sufficient information on the record to place

this Court in the same position as the trial Court to reconsider sentence.

[27] The appellant's personal circumstances which were addressed from the Bar were the following: He was 46 years old, born on 25 August 1974. He entered into a customary marriage. Three children were born out of that marriage aged 22, 16 and 10 years. He was an independent contractor mainly with the local mines and on average earned about R5,000.00 per month. In mitigation it was contended that the incident was not pre-meditated as it happened at the spur of the moment. It was also contended that the incident was also fuelled by some degree of provocation. The submission

was for the Court to find that the mitigatory factors are in fact substantial and compelling circumstances to warrant a deviation from the prescribed sentence. The Court was further asked to blend the sentence with an element of mercy.

[28] The trial Court had further established that the appellant was already sentenced in another court to 12 years imprisonment, of which two years were suspended. Before the Appeal Court, Mr Nel asked the Court to consider the cumulative effect when considering sentence afresh. The only information regarding this request made from the Bar, without any supporting documents, was that the appellant had initially sought leave to appeal against the sentence which was refused and subsequently petitioned the Judge President of this Division, but the petition is not finalised.

[29] The prosecutor a quo, in countering the request made by the defence for the appellant to be sentenced in terms of s 276 of the CPA, contended that the Court had already convicted him of a contravention of the Criminal Law Amendment Act, 105 of 1997 which prescribes minimum sentences and the request should therefore fail. The State asked the Court to impose direct imprisonment and that he be declared unfit to possess a firearm. The following were the aggravating factors submitted by Ms Krüger: that the appellant used his vehicle as a weapon when he injured the complainant and the deceased resultantly causing his death. He was convicted of murder with *dolus eventualis* as a form of intent. The appellant took the law into his own hands when confronting the witnesses instead of approaching the police to lay a charge of assault on his son. He insulted the complainant in count 2. He was filled with rage when he went to the witnesses' place of abode. Counsel for the respondent maintains that there are no substantial and compelling circumstances to warrant a deviation from the prescribed minimum sentences.

[30] A mere reading of the record paints a picture of the appellant as the Goliath who was seeking to avenge the assault on his son. When he confronted the witnesses, he was on a frolic of his own. He proffered no reason for not involving the police. I was unable to find any substantial or compelling circumstances warranting a deviation from the prescribed minimum sentences. It is also unclear how this Court would be expected to decide on the 12-year sentence already imposed on the appellant without any substantiating documentation to that effect. That amounts to attaching weight

to hearsay evidence without any motivation. Mr Nel argued that one cannot just ignore the fact that the appellant is serving

12 years imprisonment. However, what counsel seems to ignore is the fact that this

Court has not been placed in possession of any details whatsoever except for the say so of counsel. It is a quagmire that does not have to impede finalisation of this appeal. Should the appellant's appeal in that pending petition succeed, the Court hearing that appeal will be better placed to consider this sentence.

[31] Regard being had to the absence of substantial and compelling circumstances and the need to set aside the globular sentence, the following order is made:

1. The appeal in respect of conviction is dismissed.
2. The appeal against sentence succeeds.
3. The sentence of seventeen (17) years' imprisonment is set aside and substituted with the following:

"Count 1 of murder read with the provisions of s 51(2): Fifteen (15) years' imprisonment. Count 2: Attempted murder: Five (5) years' imprisonment. Count 3 of failing to render assistance: Three

(3) years' imprisonment. Counts 2 and 3 are ordered to run concurrently with count 1."

MC MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

I concur

L LEVER

For the Appellant Adv. IJ Nel For the Respondent: Adv. E Krüger Instructed by: The Director
Public Prosecutions

[1] Para.

(b) substituted by s. 2 of Act 15 of 2023 (wef 3 April 2024).

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