

SOUTH AFRICA / JUDGMENT

Ndawonde and Another v S (A107/2018) [2019] ZAGPJHC 61 (4 March 2019)

[2019] ZAGPJHC 61**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Wright, Wanless

CASE / FILE NUMBER

A107/2018

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
LOCAL SEAT, JOHANNESBURG
CASE NO: A 107/2018
DPP REF: 10/2/5/1 –
(2018/103)

DATE: 4 MARCH 2019

In the matter between: NDAWONDE, JUSTICE
CHINUZE, FERNANDO
FIRST APPELLANT
SECOND APPELLANT
and
THE STATE
RESPONDENT

JUDGMENT

WRIGHT J

1. The two appellants were each tried, convicted and sentenced to life imprisonment on two counts of murder. They appeal their convictions and sentences as of right. The presiding regional magistrate sat without assessors.

2. Under section 93ter of the Magistrates' Courts Act 32 of 1944, where 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."
3. During the evidence of the first state witness, the prosecutor asked the court to "clarify" the question of lack of assessors. The legal representatives for both appellants indicated that assessors were not necessary. It would appear from the record that, at least when the prosecutor raised the question of assessors, neither legal representative asked his or her client about the need for assessors. Whether or not the appellants were asked about assessors by their lawyers at an earlier stage is not known. Given the circumstances of this case, it is in my view not necessary to go into the extent to which the appellants' views needed to be canvassed by their lawyers and, concomitantly the leeway allowed the lawyers to run the defences as they saw fit. See *R v Matonsi* 1958 (2) AD 450 at 455 – 458.
4. In my view, the purported waiver of the rights of the appellants, even if otherwise valid, and I make no finding thereon, came too late in the proceedings. See *S v Gayiya* 2016(2) SACR 165 SCA. The provisions of section 93ter are peremptory. Under section 93ter
- (3) the judicial officer is required to administer an oath to the assessor or assessors before the trial.
5. In *Gayiya* the SCA left their order at simply upholding the appeals and setting aside the convictions and sentences.
6. I make no finding on whether or not the appellants should or could be re-tried.
7. I propose the following order:-

ORDER

1. The appeals of both appellants against their convictions and sentences on both counts are upheld and their convictions and sentences on both counts are set aside.

WRIGHT J

WANLESS AJ

I agree

It is so ordered

Appearances: On behalf of Appellant 1 Adv W Robertse 079 191 3105 On behalf of Appellant 2: Adv G Y Sidwell 082 920 2950 Instructed by: Legal Aid SA On behalf of the state: Adv K T Ngubane Instructed by: DPP 011 220 4207

Date of Hearing: 4 March 2019 Date of Judgment: 4 March 2019

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