

SOUTH AFRICA / JUDGMENT

Ngomane and Another v S (A109/2020) [2021] ZAGPPHC 172; 2021 (2) SACR 654 (GP) (24 March 2021)

[2021] ZAGPPHC 172

COURT

North Gauteng High Court, Pretoria

BEFORE

BAM, M MUNZHELELE

CASE / FILE NUMBER

A109/2020

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION PRETORIA

CASE

NO: A109/2020

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

SIZWE

SIYABONGA

NGOMANE

1st Appellant

KHUMBULANI

SANELE MKHIZE

2nd

Appellant

And

THE

STATE

Respondent

JUDGMENT

BAM J:

1. The two appellants and a co-accused were arraigned in the Regional Court, Benoni on the following charges:

Count 1: Robbery with Aggravating Circumstances. The State alleged that the accused and his (read their) co-perpetrators committed the crime.

Count 2: Attempted murder.

Count 3: Murder. The State alleged that the crime was committed by the accused in the furtherance of a common purpose.

Count 4: Unlawful possession of a firearm.

Count 5: Unlawful possession of ammunition.

2. The two appellants were convicted on counts 1, 4 and 5, but found not guilty and were discharged on counts 2 and
3. The third accused was acquitted on all charges.
3. A summary of the facts found by the trial court to have been proved is as follows: The complainant was attacked by a number of perpetrators. The attack started when one of the robbers knocked at the complainant's window, and when the complainant opened the window he was pointed with a fire arm. Several other men then approached and joined the first one with the firearm. Thereafter the complainant was robbed of his vehicle. The robbers then drove away with the vehicle. The police were alerted and succeeded to notice the vehicle and follow the robbers in hot pursuit. Shots were fired from the vehicle at the police, who returned fire. After the vehicle had stopped, the two appellants and the former accused 3 were arrested. One robber got away. The fifth robber died at the spot of a fatal bullet wound, fired by one of the policemen. A firearm was found next to the vehicle. The appellants' defence that they, innocent bystanders, were forced into the complainant's vehicle by the robber, was rejected.
4. The accused were sentenced on the three charges to a cumulative period of 15 year's imprisonment.
5. Upon petition to this court both appellants were granted leave to appeal against the convictions and sentences.

6. The appellants' grounds of appeal, in respect of the conviction, are, but for one ground, non-specific, and not complying with the required process. It is not sufficient to aver that the trial court erred in finding that the State has proved its case beyond reasonable doubt, and to reject the defence of the accused. The only acceptable specific ground seems to turn upon the identification of the appellants in respect of what exactly any one of the two appellants did during the attack on, and robbery of the complainant, by the perpetrators.

In respect of the sentence, the appellants complain that the sentence is too severe in the circumstances.

7. Adding to the mentioned grounds, before us, the appellants raised a point in limine, namely that the trial court was not constitutionally constituted in that the provisions of Section 93ter
 - (1) of the Magistrate's Court Act 32 of 1944, concerning the issue of assessors, have not been complied with. It involves that the trial court did not properly explain to the appellants what exactly their rights in regard to assessors entailed.
8. It is submitted on behalf of the appellants that this is a material and fatal defect in the trial, affecting the lawfulness, and thus resulted in a failure of justice.
9. Counsel for the State agreed with that submission, and conceded that the conviction of the appellants should be set aside, but suggested that the matter should then be referred back to the court a quo, for re-trial before another Regional Court Magistrate.
10. It is unfortunate that this point in limine was not brought to the attention of the trial court, and we considered to let the matter stand down in order to afford the Regional Magistrate the opportunity to respond. In this regard Mr van As, on behalf of the appellant's submitted that it was a question of procedure, and not the merits, and that this court has jurisdiction to deal with it without more. Adv Mahomed, appearing for the State, conceded. However, it appeared from enquiries that the regional magistrate has already retired, accordingly, whether we agree with the counsel or not, after having considered both sets of the heads of argument, and the record of the proceedings, we deemed it in the interests of justice to dispose of the matter in respect of all issues raised.
11. Section 93ter(1) of the Magistrate's Court Act provides in what circumstances a regional court should address the appointment of assessors. The relevant provision in subsection (1) (b) reads as follows:

"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 not, the judicial officer shall at that trial be assisted by two assessors unless such an accused request that the trial be proceeded with without assessors ..."
12. The record shows that at all material times the Regional Court Magistrate, an experienced presiding officer, was acutely alert to the provisions of Section 93ter
 - (1) of the Act.

This is borne out by the following:

12.1 On 18 September 2017, during one of the pre-trial appearances, the two appellants and their co-accused, represented by their respective legal advisors, appeared before the same regional magistrate on the day the case was postponed for plea and trial. The following cryptic note appears on record made and undersigned by the Magistrate:

“No Assessors required or requested.”

Remanded to 19/10/2017 RC 2 Plea and trial

Acc 1 i/c

Acc 2 + 3 on bail

All confirm”.

12.2 On 10 January 2018, at the inception of the trial the trial magistrate again addressed the issue of assessors. Both appellants were legally represented. The issue was recorded as follows – p12 to p13, and p14 of the record:

Court: “..... What about assessors and I am sure I took it up with both parties ...”

Prosecutor: “Yes”.

Court: “So assessors were not requested or required. Is that right?”

Mr Graf: “Correct your worship.”

Prosecutor: “It was taken up.”

Mr Graf: “Accused 1 on his behalf we do not require the assessors.”

Court: “Ja Advocate van Drunick. This should be placed on record in the first instance.”

Prosecutor: “I was not aware of that...”

Court: “What”.

13. Mr van As, on behalf of the appellants contended that the regional Magistrate erred in not explaining to the appellants that a proper constitution of the court (in murder cases) required that the magistrate should sit with two assessors, but instead conveyed to the appellants that the magistrate would sit alone, and that the appellants, if they wished to do so, could request (or) require that assessors be appointed. In this regard Mr van As relied on the dictum in *S v Langelitshoni* 2020(2) SACR 65 (ECM), and submitted that the magistrate was obliged to address the appellants personally, and explain to them their rights in respect of assessors, as the magistrate did in respect of the minimum sentence issues.

14. In par 3 of her heads, Counsel for the State referred us to *S v Ginyana* 2016(2) SACR 165, par 8, where it was clearly stated that: “The section is peremptory . . .” and “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.”
15. What, however, must be kept in mind, is of material importance, is that this matter differs materially from the facts of *Ginyana*, in the following respects:
 - (i) In *Ginyana* the court had to deal with an unrepresented accused, whilst in this matter the appellants were at all relevant times represented by legal practitioners.
 - (ii) In *Ginyana* the issue of assessors was not at all addressed by the magistrate at any stage before the trial commenced: In this matter the issue was addressed by the magistrate on two occasions before the trial proceeded, to wit on 18 September 2017 when the matter was postponed for trial, and again, 4 months later, on 10 January 2018, on the day the trial commenced.\
16. It is further of importance to note that on both occasions in this matter the legal representatives acknowledged the magistrate’s address of the issue, and then waived the appointment of assessors.
17. It was submitted by Adv Mahomed that, in view of the fact that it does not appear from the record that the Regional Magistrate explained the provisions of Section 93 ter (1), it can be inferred that the magistrate was not alert to the fact that the accused had an existing right. This submission is without substance. As pointed out above, the magistrate was clearly alert to the issue of assessors by addressing it on two occasions. The fact that it appears on record that only cryptic notes were made by the magistrate about the issue, and not the complete relevant part of the sub section, is of no consequence. It is standard practice.
18. It seems that what is expected of a magistrate in the circumstances, as submitted by both counsel before this court, is that the legal representative of an accused should be by passed by the magistrate in order to explain the accused’s constitutional rights. The question then arising is where does it start and where does it stop, and, what is the duties of the magistrate. The answer is clear, only when it comes to the attention of the magistrate that some or other procedural issue, or relevant law implication has not been properly explained to the accused by their legal representatives, or at all, should the magistrate attend to it. This happened in this case when the magistrate established that it was not explained to the accused that they could be convicted of murder even when somebody is killed after the robbery during the pursuit of the suspects. (Record p12).
19. Accordingly, when the accused is legally represented, there is no overriding duty on the presiding magistrate to explain to the accused in any detail each and every single one of his numerous constitutional rights.

20. It is obvious in this case, that the legal representatives of the appellants were also fully alert to the issue of assessors, which was attended to and disposed of when the appointment of assessors was addressed by the magistrate and waived on behalf of the appellants. The section provides that only the accused, obviously as advised by his legal representative, and through his legal representative, may waive the appointment of without assessors.
21. I will never be persuaded that any legal representative appearing before a regional court in a murder case, would not be aware of the provisions of the said section. There is no reason why it could be inferred that the legal representatives did not explain to the appellants what the issue of assessors entailed.
22. It is a constitutional right of any accused to appoint a legal representative, and it is a long standing and incontestable issue that once the accused has placed his case in the hands of the representative, the representative has full control over the case. That includes the duty to ensure that the accused's constitutional rights are not violated, and that the accused has a fair trial in accordance with all procedural aspects and relevant legislation. This principle was again underlined in *S v Maseko* SA 1982(1) AD 99.
23. In my view there is no need, as apparently ruled in *Langalitshoni*, when the accused is represented, for the regional magistrate, to in minute detail explain to the accused what the act provides in respect of assessors, and what his rights in that regard are. We, respectfully, are of a different opinion, and we are not bound by the said ECM judgment.
24. There is no reason to find that the regional court magistrate erred in any way in respect of the assessor issue, there was no failure of justice. The point in limine is dismissed.
25. In respect of the appeal on the merits, I am satisfied that the State succeeded to prove (as noted by Adv Mahomed, in par 2.8, in summarising the facts of the matter) that the complainant's "vehicle was hi-jacked by 5 assailants."

At all relevant times the appellants and the other perpetrators acted as a gang when the complainant was accosted and pointed with a firearm in order to rob him. All five perpetrators escaped from the scene of robbery in the complainant's vehicle. The version of the appellants that they were innocent bystanders forced into the vehicle by the robber with the firearm, was correctly rejected by the magistrate. We are not called upon to comment on the fact that accused 3 was found not guilty on all charges.

26. In respect of the question of common purpose, raised by both representatives before us, mainly concerning the issue of joint possession of the firearm and ammunition (counts 4 and 5), the State alleged in the charge sheet that the accused and his co-perpetrators were involved. On p17 the regional magistrate explained the implications of the doctrine of common purpose concerning the joint

possession of the firearm to the accused.

27. It is remarkable that the issue of common purpose in respect of the robbery and the possession of the firearm was addressed by the legal representative of accused 2 (second appellant) at the trial.
28. P28 – 29. Mr MASANGU: “Your worship the – essentially what is in dispute is the common purpose. We deny that we had – both accused 2 and accused 3 deny that they had any prior knowledge of the robbery.”
29. The contention, or concession of the State representative that the magistrate erred in relying on the doctrine of common purpose and finding that the appellants had joint possession of the firearm, and relying on the relevant decisions, including *S v Mbuli* 2003(1) SACR 78 SCA, lose sight of what was mentioned above and the proved

facts.

The following are of importance:

- (i) The robbery was purposefully premeditated and successful executed by a number of five perpetrators:
 - (ii) The two appellants intentionally participated in whatever happened.
 - (iii) The firearm was used to intimidate the complainant to the extent that the robbers were able to execute their plans.
 - (iv) The two appellants, in partaking in the armed robbery, although not brandishing the firearm foresaw and realised that the firearm would be used as instrument to enable them to commit the crime (*Dolus eventualis*.)
 - (v) In associating themselves with the use of the firearm in the commission of the robbery, and escaping with the vehicle of the complainant, the appellants also foresaw that the firearm would be use to escape when confronted.
30. We are satisfied that the regional magistrate was correct in convicting the appellants on counts 4 and 5 as well.
 31. The regional magistrate appreciated, in respect of counts 2 and 3, attempted murder and murder, that, consistent with our law, in respect of common purpose and *dolus eventualis*, any member of a gang of robbers where a firearm was used, is liable to be convicted of any consequent crime like attempted murder and murder, when one of their gang is killed, or other people endangered, when shots are fired during the gang’s attempt to escape arrest. See, *inter alia*, *S v Nkosi* 2016(1) SACR 301 SCA. Although we have no jurisdiction in that regard, we deem it appropriate to remark that the two appellants should regard themselves very fortunate to have been acquitted in the circumstances.

ORDER

1. The appeal is dismissed.

AJ BAM (J)

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION

I agree

M MUNZHELELE (AJ)

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

DATE OF HEARING (ON PAPER)

: 15 March 2021

DATE OF JUDGMENT

: 24 March 2021

APPEARANCES:

For the Appellants : Advocate F van As

For the Respondent : Advocate S Mahomed

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