

SOUTH AFRICA / JUDGMENT

## Van Staden v S (CA21/2017) [2018] ZANWHC 82 (26 April 2018)

[2018] ZANWHC 82

COURT

North West High Court, Mafikeng

BEFORE

Gutta, Djaje

CASE / FILE NUMBER

CA21/2017

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*“IN THE HIGH COURT OF SOUTH AFRICA”*

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: CA21/2017

In the matter between:-

MOLATHIWA SAMPIE VAN STADEN

Appellant

And

THE STATE

Respondent

GUTTA J & DJAJE J

JUDGMENT

GUTTA J.

A.

### INTRODUCTION

- [1] The appellant was arraigned at the Regional Division of North West held at Atamelang on a charge of murder read with the provisions of Section 51(2) of Act 105 of 1997 and the contravention of Section 3(1) of the Sexual Offences and Related Matters Act 32 of 2007 (Rape) read with the provisions of section 51(1) of Act 105 of 1997.

- [2] The appellant pleaded guilty to both counts and he was convicted on his plea of guilty. The appellant was subsequently sentenced to fifteen (15) years imprisonment for murder and life imprisonment for rape.
- [3] The appellant appeals his conviction and sentence.
- [4] The appellant raised one ground of appeal namely that, the Court a quo failed to comply with the peremptory provisions of section 93 of the Magistrates Court Act 32 of 1944 (Act 32 of 1944) by proceeding with the trial without assessors or without ascertaining from the appellant whether he wanted to proceed with the trial without assessors.

## B. EVALUATION

- [5] Section 93 Act 32 of 1944 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, 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 as accused requests the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him ...”. (own emphasis)
- [6] On reading of the foregoing provisions it is clear that Section 93 is couched in peremptory terms, namely that a judicial officer “shall” be assisted by two assessors unless the accused who is charged with murder requests that the trial proceed without assessors. Hence the appointment of assessors is compulsory unless the accused, prior to pleading, waives the need for assessors.
  - [7] The starting point therefore, is for the Regional Magistrate to inform the accused before the commencement of the trial about the provisions of Section 93. It is only where an accused requests that the trial proceed without assessors, that the judicial officer becomes clothed with a discretion either to summons one or two assessors to assist him or to sit without an assessor.
  - [8] The appellant was not informed by the Regional Magistrate of his right to have assessors appointed and was not called upon to make a choice whether or not to request that the trial proceed without assessor before he was asked to plead to the charges.

[9] Counsel for the State, Mr Moeketsi conceded this point and relied on the case of *S v Nhlapo and Others*[1] to submit that failure to appoint assessors constitutes a gross irregularity. Mr Moeketsi submitted that because of the irregularities, the sentences of fifteen (15) years and life imprisonment imposed by the Court a quo should be set aside and that the proceedings should be declared void ab initio and should commence de novo before another presiding officer.

[10] Tlhabi AJ (as she then was) in the case of *Khambule v The State*[2], in this division considered the issue of whether the irregularities were so fatal so as to vitiate the entire proceedings. The Court at para 7.7 held that:

*“The importance of assessors was emphasized in S v Maphanga*[3], *where a Magistrate in a murder case appointed assessors in terms of Section 93ter*

(1) of the Magistrate’s Court Act 32 of 1944 as amended, referred the matter for review before the trial commenced regarding

the role of lay-assessors during the trial. He was of the opinion that it was not practicable to use assessors in view of their limited participation and knowledge of the law and sought the Court’s guidance. According to Labe J, Magistrates could not dispense with a mandatory requirement of the law, and at 660 G-J he said:

*“... the learned Magistrate does not have to be satisfied that the assessors will be of assistance to him. It is sufficient if they may be of assistance to him..... The assessors should be regarded by the Magistrate as being in a position analogous mutatis mutandis to lay jurors who also do not have any legal experience, but are in some jurisdictions regarded on proper instruction to be the sole arbiters of fact”*

There is therefore a reason why the legislature deemed it necessary to appoint assessors to assist Regional Court Magistrate in murder cases. A Magistrate is therefore duty bound to comply with the provisions of the Act in this regard.”

[11] Accordingly non-compliance with the peremptory provisions of section 93 amounts to an irregularity and stands to be set aside.

[12] On the issue of the matter being referred back to Regional Court for trial de novo, the Court in *Khambule v The State* supra at paragraph 7.10 said the following;

*“7.10 This brings us to the respondent’s submission that the matter be referred back for trial de novo before a different Magistrate. In S v Balatseng 2005(2) SACR 28 (Bophuthatswana Provincial Division), an application was made on behalf of the State that the matter be referred to a trial de novo, and this application was opposed. After several cases were considered the following was said at 39E-F by Mogoeng JP:*

*“such an order should be made only when all parties to the appeal agree that the accused be tried de novo. The only instance where it is permissible to order that a trial should start de novo without first securing the agreement of the*

accused is in the case of an automatic review”

7.10 Again at 39 G-I of the Balatseng case supra, Mogoeng JP stated that the provisions of section 322(1)(c) of the Criminal Procedure Act 51 of 1977 empowered the Court to make such an order as would serve the interests of justice. However, where the Court had determined that the trial proceedings were irregular and where it was not necessary for consideration of the merits of such case, the Court would not order a trial de novo in the absence of an agreement by the parties to the appeal. In this way the accused would be afforded the opportunity to raise such defence/s he may wish to raise at a retrial.

The Court was not made aware that an agreement had been secured by the parties”.

[13] In casu, counsel for the appellant, Mr Setumu agreed that the matter could be referred back to the Court a quo to commence proceedings de novo.

### C. ORDER

[14] In the result,

- 1) the appeal is upheld
- 2) the conviction and sentence are set aside; and
- 3) the matter is remitted back to the Regional Court to commence proceedings de novo before another magistrate.

N. GUTTA

JUDGE OF THE HIGH COURT

I agree

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T.J DJAJE

APPEARANCES

DATE OF HEARING

: 23 MARCH 2018

DATE OF JUDGMENT

: 26 APRIL 2018

ADVOCATE FOR APPELLANT : MR SETUMU

ADVOCATE FOR RESPONDENT : ADV MOEKETSI

ATTORNEYS FOR APPLICANT : LEGAL AID SOUTH AFRICA

ATTORNEYS FOR RESPONDENT: THE DIRECTOR OF PUBLIC PROSECUTIONS

[1] 2016(SACR) 1 489 GP

[2] Bophuthatswana Provincial Division (CA No 2013/04)

[3]

[2001] 4 All 657(W)

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