IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED:

02/06/2020
DATE

SIGNATURE

CASE NO: A230/2019

In the matter between:

VILANE, SIBONELO **Appellant**

and

THE STATE **Respondent**

JUDGMENT

MBONGWE AJ:

INTRODUCTION

[1] The appellant, an Eswatini national aged 27 years of age at the time, stood trial before the Regional Court, Benoni, on the 16 November 2018 on charges of murder read with Section 51(1) of the Criminal Law Amendment Act105, 1997 and Sections 257 and 258 of the Criminal Procedure Act 51, 1977and for having entered and

being in the Republic of South Africa illegally in contravention of the provisions of Section 49(1)(a) of the Immigration Act 13, 2000, count 1 and count 2, respectively. The appellant was legally represented by counsel throughout the proceedings. The appellant had initially pleaded guilty to both counts, but subsequent to intervention by the court, followed by his counsel, he pleaded not guilty to count 1 and guilty to count 2. In the end the court found the appellant guilty of pre – meditated murder, count 1 and for having entered and being in the country illegally. The court imposed life imprisonment in respect of count 1 and two years imprisonment on count 2.

SUMMARY OF EVIDENCE

[2] The appellant had admittedly entered the Republic of South Africa on the 18 April 2018 without a passport or proper documentation authorising him to do so. The year of the appellant's entry into the country as reflected in the charge sheet and his statement in terms of Section 112(2) of Act 51 of 1977 is clearly incorrect as his admitted stabbing and subsequent death of the deceased, count 1, occurred inside the country, in Benoni, on the 18 December 2017. In proving its case the State called two witnesses who testified that the appellant came from a tavern situated next door to the house outside which they were sitting with the deceased. The appellant, allegedly without permission, took a bottle of beer that was on the ground and in front of the deceased and poured the contents on the deceased. The latter had stood up and demanded to know why the appellant poured beer on him. The appellant told the deceased that the latter 'was not going to see the Christmas" as he was going to kill him. The appellant then left, threatening to return. He lived up to his threat as he had returned after a while, walked to the deceased and produced a knife. The deceased, who was unarmed, stood up and the appellant stabbed him in the neck. The deceased complained of getting weak. He eventually collapsed and died at the scene.

APPELLANT'S VERSION

[3] The appellant's sole evidence for the defence was that he had stabbed the deceased in self – defence as the deceased attempted to attack and stab him with a broken beer bottle; a version that was disputed as false by both State witnesses and rejected on the same ground by the trial court which convicted the appellant of pre – meditated murder and sentenced him to life imprisonment.

[4] The trial magistrate refused to hear an application for leave to appeal labelling it a waste of time. Indeed, section 309 (1) (a) of the Criminal Procedure Act 51 of 1977 ordains the accused sentenced to life imprisonment by a magistrate with an automatic right to appeal to the high court.

THE GROUNDS OF APPEAL

[5] The accused filed a notice to appeal against his conviction on a charge of pre-meditated murder and his sentence of life imprisonment imposed by the magistrate. The appellant listed the following reasons as the grounds for his appeal:

5.1 That the magistrate erred in finding that the state has proved his guilt beyond reasonable doubt;
5.2 That the magistrate failed to properly analyse and evaluate the evidence of the state witnesses;
5.3 The magistrate erred in rejecting the version of the appellant as not being reasonably possibly true;
5.4 That the sentence of life imprisonment is strikingly inappropriate.
5.5 The magistrate erred in not finding that substantial and compelling circumstances existed justifying a lesser sentence than life imprisonment.

HEARING OF THE APPEAL

[6] It needs to be mentioned that the appellant did not list as a ground the magistrate's alleged failure to comply with the peremptory provisions of section 93ter (1) of the Magistrates Court Act 32 of 1944. The alleged failure by the magistrate was, however, raised as a point in limine at the hearing of this appeal. While the omission to list the said failure as a ground may have deprived the magistrate of the opportunity to respond, such response would have been of no moment as, if established, her failure could not be waived or condoned by the accused or his legal representative and remained an irregularity and a failure of justice (**see S v Du Plessis 2012 (2) SACR**

[7] Not only is it procedural to firstly hear and make a determination on a point in *limine* raised, but it also becomes a necessary point of departure where the challenge is with regard to the legality of the composition of the trial court. The importance of this approach lies in the fact that, should it be established that the

court was not properly constituted, the trial proceedings are vitiated as irregular, resulting in the conviction and sentence being set aside. (See S v Gayiya below)

[8] In considering this particular point in *limine*, it will be amiss to even begin without traversing the applicable provisions of Section 93ter (1) of Act 32 of 1944 which read as follows :

> *Section 93ter (1)"The judicial officer presiding at any trial may, if he deems it fit 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 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 or without assessors, whereupon the judicial officer may in his discretion summon one or two assessor to assist him."*

[9] Upon perusal of the record of the proceedings in the trial court, it is noted that the trial magistrate sat without the assistance of assessors throughout the trial despite the charge of murder being one of the two charges the appellant stood trial for. This constituted a violation of the provisions, particularly the proviso in Section 93ter(1) in

that there is no indication on record that the magistrate had prior to the commencement of the trial explained the provisions of this section to the appellant, nor was the magistrate ordained to singularly preside over the case by the appellant's express waiver of his entitlement to being tried by the magistrate duly assisted by two assessors. In **S v Du Plessis 2012 (2) SACR 247 (GSJ)** the court said the following in this regard:

> *"The record should show that the magistrate entered into a discussion with the accused and/or the accused's legal representative when the entitlement to the appointment of assessors is waived. Such a waiver should be recorded in order for courts of appeal to be assured that the provisions of section 93ter have been complied with."*

[10] The courts have pronounced that the magistrate does not have discretion to do without assessors in a murder trial and further found that a failure to comply with section 93ter(1) is an irregularity and a failure of justice [**see S v Khambule 1999 (2) SACR 365 (O)**].

[11] The closest the trial magistrate has hinted to the provisions of s 93ter (1) is where she on different occasions at the commencement of the trial uttered the words: "No assessors requested /required." to which the prosecutor replied in the affirmative. It is important to highlight that nothing in the provisions of section 93ter(1) bases the appointment of assessors on a request or requirement by an accused. In **S v Gayiya 2016 (2) SACR 165 (SCA)** at paragraph 8 the court aptly stated :

> *"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 proceeds without assessors."* The

absence from the record of the discussion envisioned in the proviso to section 93ter (1) between the magistrate and the accused is prima facie proof of the magistrate's non- compliance Thus the conviction and sentence meted out resulted from irregular proceedings and stand to be set aside.

ORDER

[12] In the result, I propose the following:

The appeal succeeds and the convictions and sentences are set aside

M. MBONGWE AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

C. COLLIS J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA.

Appearances;

For the Appellant : Mr R. Du Plessis

Attorney for the Appellant : Legal Aid South Africa, Pretoria

For the Respondent : Adv. W.K.K. Mphahlane

Attorney for the Respondent : The Director of Public Prosecutions, Pretoria

Date of hearing : 2 March 2020

Date of Judgement : 2 June 2020

JUDGMENT ELECTRONICALLY TRANSMITTED