



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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Director of Public Prosecutions, Kwazulu-Natal v Pillay (Case no 706/2022) [2023] ZASCA 105 (23 June 2023)

The Supreme Court of Appeal (SCA) today upheld an appeal against an order of the KwaZulu Natal Division of the High Court, Pietermaritzburg (the high court), which set aside the conviction of the respondent, Pillay, on a charge of murder. The Director of Public Prosecutions (the DPP) appealed on question of law in terms of s 311 of the Criminal Procedure Act, 51 of 1977.

Pillay had been charged with murder before the Regional Court for the Regional Division of the KwaZulu Natal Division in Durban. He was legally represented at the trial. He was convicted on 18 August 2018. On 21 August 2018, he was sentenced to 10 years' imprisonment.

Pillay appealed to the high court against his conviction. Shortly before the appeal hearing, the high court requested the parties to submit further argument on whether the provisions of s 93*ter*(1) of the Magistrates' Court Act, 32 of 1944 (the MCA) had been complied with. Section 93*ter*(1) provides that in a trial involving a charge of murder, the magistrate shall be assisted by assessors unless the accused requests that the trial proceed without assessors.

The high court accepted that s 93*ter*(1) is peremptory, as had been authoritatively stated in judgments of the SCA. It held that the trial magistrate was obliged to explain the provisions of the section to an accused directly and to explain the effect of electing to proceed without assessors. It based its finding upon several judgments of the KwaZulu Natal Division of the High Court, to which it considered itself bound. It found that the section had not been explained to Pillay. It therefore found that the trial was not conducted before a properly constituted court and set aside the conviction and sentence.

On appeal to the SCA, the DPP contended that the High Court's interpretation and application of s 93*ter*(1) was wrong in law, since it was not a requirement of the section that a magistrate should explain the nature and effect of the section to a represented accused directly and without reference to the legal representative.

The SCA noted that since its judgment in *S v Gayiya*, which set out the meaning and effect of s 93*ter*(1) of the MCA, a sharp difference had emerged between judgments in various Divisions of the High Court. That difference also manifested itself in judgments of the KwaZulu Natal Division, including the judgment under appeal. The difference of judicial opinion related to the extent of the duties of a magistrate when an accused person is represented; the nature of the right conferred by the section; and what requirements need to be met to establish compliance.

The SCA held that s 93*ter*(1) confers only a right to request that the trial proceed without assessors. The section does not confer a right to choose or elect the constitution of a court. It held that when an accused person is represented by a legal representative, a magistrate's duties are carried out with due

deference to the fact that the right to legal representation has been exercised. In the context of s 93*ter*(1) of the MCA, a magistrate is obliged to ensure that the court is constituted as ordained by the section. This requires that the magistrate establish that the legal representative and the accused is aware of the section and has advised the accused. The magistrate must establish whether the accused wishes to exercise the right to request that the trial proceed without assessors. The SCA held that compliance with the section involves a fact-based enquiry and that it was undesirable to lay down a set of guidelines and requirements by which that enquiry may be satisfied.

With reference to the facts, the SCA held that at an earlier remand hearing, the presiding magistrate had indeed explained s 93*ter*(1) of the MCA, in the presence of the legal representative and that the accused had understood it. The legal representative stated that they did not require the appointment of assessors. The accused confirmed this in person. These facts had not been considered by the high court. The SCA found that when the trial magistrate asked the legal representatives, at the commencement of the trial, whether the views previously expressed were still the views of the accused, the magistrate was confirming the request that the trial proceed without assessors. The provisions of s 93*ter*(1) of the MCA had therefore been met and the trial court was properly constituted.

The SCA upheld the appeal and reinstated the conviction and sentence imposed by the regional court. Since the high court had not dealt with the appeal on the merits, the SCA remitted the appeal to the high court for consideration on its merits.

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