THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Gayiya v S (1018/15) [2016] ZASCA 65 (19 May 2016)

The Supreme Court of Appeal (SCA) today handed down judgment concerning interpretation of the proviso to s 93*ter*(1) of the Magistrates' Courts Act 32 of 1944.

The appellant (accused) had been arraigned before the Bethal regional court on 20 February 2002 on five charges, namely: kidnapping (count 1); assault with intent to cause grievous bodily harm (count 2); murder (count 3); possession of a firearm without a licence in contravention of the provisions of s 2 of the Arms and Ammunition Act 75 of 1969 (count 4); and possession of ammunition without a licence in contravention of the provisions of s 36 of the Arms and Ammunition Act (count 5).

The accused pleaded guilty to counts 1 and 3, but pleaded not guilty to counts 2, 4 and 5. The regional magistrate thereafter questioned him in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the Act), in respect of counts 1 and 3. Having satisfied himself that the accused admitted the allegations in the charges to which he had pleaded guilty and that he was guilty of the offences in issue, the regional magistrate returned a guilty verdict in respect of counts 1 and 3. He had explained the provisions of s 115 of the Act to the accused and had asked whether the accused was prepared to make a statement indicating the basis of his defence in respect of the remaining three counts. The accused chose to exercise his right to remain silent. On 7 March 2002 the regional magistrate had proceeded to question the accused in terms of s 115(1)*(a)*(i). The accused, in the course of answering the questions posed, made certain admissions that were subsequently recorded as such in terms of s 220. The State, being satisfied with the admissions made by the accused and recorded by the regional magistrate in terms of s 220, closed its case without leading any evidence. Despite the regional magistrate's explanation that the exculpatory part of the accused's plea explanation was not evidence in his favour and that should he wish it to have evidential value he should testify under oath, the accused had decided not to testify and closed his case. After both the State and the accused had addressed the court, the accused was convicted on counts 2, 4 and 5 on the strength of the recorded formal admissions.

After the accused and the prosecutor had addressed the court on sentence, the regional magistrate stopped the proceedings and committed the accused for sentence by the high court in terms of s 52*(a)*(i) of Criminal Law Amendment Act 105 of 1997. On 27 May 2002 the accused made another

appearance before the regional magistrate, who, for the first time, told the accused that he had omitted to inform the accused of his right to have assessors appointed to assist the judicial officer and of the role of assessors in the proceedings. The regional magistrate also informed the accused that his convictions could be set aside, presumably upon review. The accused's response was that he did not need assessors at the trial, but that he would want them at the sentencing stage. On 30 July 2002 the accused was sentenced by the Eastern District Circuit Local Division of the High Court, Middelburg (Bertelsmann J), as follows: Count 1: imprisonment for one (1) year; Count 2: imprisonment for one (1) year; Count 3: imprisonment for life; Counts 4 and 5 (taken together for purposes of sentence): six (6) months' imprisonment. The court ordered that the sentences imposed in respect of counts 2, 4 and 5 be served concurrently.

The accused's application for leave to appeal against the sentences imposed on him was heard by Bertelsmann J on 14 April 2014. During argument before Bertelsmann J, he raised with counsel the improper constitution trial court, which he considered to an irregularity. The learned judge consequently granted leave to appeal to the SCA against both conviction and sentence. Thus the issue on appeal was the proper constitution of the court before which the accused stood trial.

The SCA held that the proviso to s 93*ter*(1) of the Magistrates' Courts Act ordains that the judicial officer presiding in a regional court before which an accused is charged with murder as in this case *shall* be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. And that it is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor. The SCA held that the section is peremptory.

The SCA further held that the quorum prescribed by the section was three members, namely the regional magistrate and two assessors, unless the accused had requested that the trial proceed without assessors, in which event in his discretion the regional magistrate could, sitting alone, have constituted a quorum.

The SCA found that no such request had been made by the accused in this instance, and that the fact that, when informed of his right to assessors only after the guilty verdicts, he indicated that he did not require assessors and that he would only do so at the sentencing stage, did not cure the deficiency.

The SCA held that it followed that the court that tried and convicted the accused was not properly constituted and that the defect could not be waived by the accused at the time that he purportedly did so in the subsequent proceedings before Bertelsmann J.

The SCA accordingly upheld the appeal.

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