

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)



CASE NO: A38/2013

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO
(3)	REVISED.
<u>9/1/14</u> DATE	
<u>[Signature]</u> SIGNATURE	

9/1/2014

In the matter between:

NICOLAS MOGANE

APELLANT

and

THE STATE

RESPONDENT

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J U D G M E N T

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TWALA, AJ

1. On the 1<sup>st</sup> August 2011 the Appellant was convicted of murder and sentenced to 15 (fifteen) years imprisonment by the Regional Court Magistrate sitting at Pretoria North.
2. The Appellant was granted leave to appeal against both conviction and sentence.
3. It appears from the record that the Appellant was legally represented on the hearing of this matter
4. The Appellant raises two issues in his appeal which are for determination by this Court, namely:
  - I. That the court *a quo* misdirected itself in not summoning Assessors to assist it in the trial of this matter in terms of Section 93 ter (1) of the Magistrate Courts Act 32 of 1944.
  - II. That the Appellant was not informed at the start of the trial that the State will rely on the provisions of Section 51 of Act 105 of 1997.
5. First I have to consider the provisions of Section 93 ter (1) to determine whether they are peremptory and whether non-compliance therewith vitiates the proceedings in this matter.
6. Section 93 ter (1) of Act 32 of 1944 provides as follows:

“1.The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice –

- a) before any evidence is led; or
- b) .....

summon to his assistance any one or more 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 an 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 an accused requests that the trial be proceeded with without assessors whereupon the judicial officer in his discretion may summon one or two assessors to assist him.”  
(my emphasis)

7. It is apparent that the provisions of section 93ter (1) are peremptory in that it provides that if the accused appears in a court of a regional division and is charged with murder the judicial officer shall at that trial be assisted by two assessors unless the accused requests for the assessors to be done away with.
8. In the present case, Magistrate Denge, who is a Magistrate in the Regional Court, noted on the 5<sup>th</sup> October 2010 when the matter was postponed to 30 May 2011 for plea and trial “no assessors needed”.

9. In a document titled “reasons for judgment” dated 25 January 2013 filed of record by the presiding officer, B.J.O. van Schalkwyk, contends that he confirmed with the legal representative of the Appellant the note of the 5<sup>th</sup> October 2010 by Mrs. Denge that no assessors are needed but did not think it necessary for him to record it again.
10. The appointment of assessors to assist the Court in terms of this Section 93 of the Act goes to the root as to how the Court hearing a matter of this nature should be constituted. If the Court sits without assessors in contravention of Section 93 of Act 44 of 1932 it is tantamount to a Court trying the accused when it does not have the necessary jurisdiction to do so.
11. In *S vs Mokalaka* 2010 (1) SACR 88 (GNP) at 91(par 7) Southwood J and Makgoka, AJ observed as follows in this regard:

“The issue is the constitution of the court. If the court is not properly constituted it has no power to hear the matter; the proceedings are irregular and must be set aside. The court is in the same position as a court which lacks jurisdiction.”
12. Having regard to the record and to the document filed of record by the presiding officer dated 25 January 2013, I am of the view that there was sufficient compliance with the provisions of Section 93 ter (1) of Act 32 of 1944.

13. I now turn to deal with the second issue regarding section 51 of Act 105 of 1997.

It was argued by the Appellant that the charge sheet does not make mention of the fact that the State shall rely on the provisions of Section 51 of Act 105 of 1997 in respect of the offence – therefor the Appellant was not warned about the fact that the minimum sentence is applicable.

14. It appears from the record that Magistrate Denge has on the first appearance of the Appellant on 7 September 2010 noted that: “Rights explained. Sentence implications in terms of the provisions of Section 51 (2) of Act 105 of 1997 explained”.

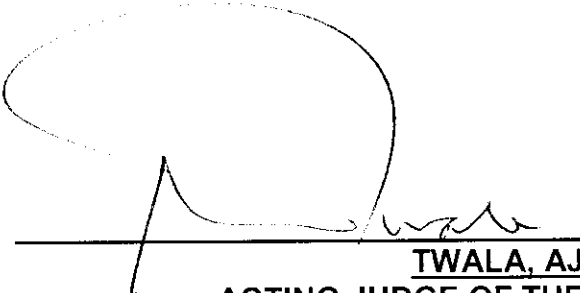
15. It is clear from the record that the Appellant was apprised of the provisions of Section 51 (2) of the Act 105 of 1997 on his first appearance in Court and therefore the Appellant was fully informed that the State will rely upon the provisions of the minimum sentences act when it comes to sentencing.

16. The attack on the deceased was brutal and without any provocation. The two State witnesses testified that the deceased was sitting there enjoying his drinks with his girlfriend when the Appellant attacked him with a bottle of beer. Even when the deceased pleaded with the Appellant that he was killing him – the Appellant did not stop assaulting him.

17. I am of the view that the Court *a quo* did not misdirect itself in finding that there were no substantial and compelling circumstances to justify it deviating from the prescribed minimum sentence.

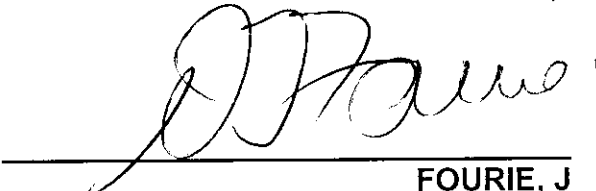
18. I therefor make the following order:

“Appeal is dismissed”



TWALA, AJ  
ACTING JUDGE OF THE  
NORTH GAUTENG HIGH COURT

I agree and it is so ordered.



FOURIE, J  
JUDGE OF THE NORTH  
GAUTENG HIGH COURT

**Representation for the applicant:**

Counsel

Adv: MB KGAGARA

Adv

Instructed by LEGAL AID SA

**Representation for respondent**

Counsel

Adv: NTULI

Instructed by: THE DIRECTOR OF PUBLIC PROSECUTIONS