REPORTABLE
CASE No. SA 37/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between

SALATIEL UUNONA	**FIRST APPELLANT**
JOSHUA DAVID	**SECOND APPELLANT**

and

THE STATE	**RESPONDENT**

Coram: Maritz, JA, Strydom, AJA et Mtambanengwe, AJA

Heard on : 02/06/2009

Delivered on: 23/07/2009

APPEAL JUDGMENT

STRYDOM, AJA: [1] This is a matter which originated in the Regional Court, Walvis Bay, where the appellants were arraigned on various serious charges. After a trial, in which the appellants defended themselves, they were convicted and sentenced as follows:

First Appellant:

Count 1 - Housebreaking with the intent to commit an offence unknown to the State; five (5) years imprisonment.

Count 2 – Robbery with aggravating circumstances; eight (8) years imprisonment.

Count 3 – Attempted murder; ten (10) years imprisonment.

Count 8 – Contravening sec. 2 of Act 7 of 1996 – Possession of a fire arm without a licence; one (1) year imprisonment.

Count 9 – Contravening sec. I 33 of Act 7 of 1996 – being in possession of ammunition without being in lawful possession of a firearm capable to fire such ammunition; six (6) years imprisonment.

Second Appellant:

[2] This appellant was convicted as follows:

Count 1 – Housebreaking with intent to commit an offence unknown to the State; four (4) years imprisonment.

Count 2 – Robbery with aggravating circumstances; eight (8) years imprisonment

Count 3 – Assault with intent to do grievous bodily harm; four (4) years imprisonment.

[3] The appellants were not satisfied and launched an appeal to the High Court against both their convictions and sentences imposed by the Regional Court. There was some delay in the hearing of the matter as the legal representative appointed for the appellants withdrew from the appeal. Another legal representative was then appointed *amicus curiae* to assist the Court and,

when the matter was thereupon heard in the High Court, only the second appellant was present.

[4] Prior to the hearing of the appeal in the Court *a quo,* the Court indicated to counsel that it would require argument in regard to certain legal questions. These were whether, on the evidence, it could still be said that housebreaking was committed with intent to commit an offence unknown to the State. The Court also invited argument in regard to Counts 2 and 3, namely whether the convictions did not amount to a splitting and whether the separate sentences imposed on Counts 8 and 9, in regard to the first appellant, should not have been taken together and only one composite sentence have been imposed by the Regional Court.

[5] Although the Court did not limit counsel's argument to the legal issues posed by it, both counsel arguing the matter, Mr. Corbett, who appeared *amicus curiae,* and Ms. Verhoef, who appeared for the State, only addressed the Court on the issues raised by the Court. No argument was presented to the Court concerning the merits of the appeal and no opportunity was given to second appellant, who was present in Court, to address the Court on the merits. According to this appellant he, in any event, did not understand the proceedings which were taking place.

[6] When the Court *a quo* subsequently handed down its judgment it was evident that the Court has altered some of the convictions as well as some of the sentences. It firstly changed the conviction on Count 1 from housebreaking with the intent to commit an offence unknown to the State to housebreaking with the intent to steal. This related to the convictions of both appellants. It however left the sentences imposed by the regional magistrate on that count undisturbed. In regard to the second appellant the Court set aside the conviction of assault with intent to do grievous bodily harm on count 3 and substituted therefor a conviction of attempted murder. The Court also set aside the sentence of 4 years imposed by the regional magistrate on that count and substituted a sentence of seven (7) years imprisonment. Thirdly the Court set aside the separate sentences imposed on counts 8 and 9, in regard to first appellant, and substituted therefor one sentence after taking together the two counts for purposes of sentencing. This did not bring about a change in the sentences imposed as the composite sentence remained a period of 18 months.

[7] There is no problem with the alterations brought about by the Court *a quo* in regard to counts 1, 8 and 9. However, in regard to count 3 the second appellant was now convicted of a more serious crime and heavier sentence was imposed. This happened without any prior notice to the second appellant that the Court, in the event that the appeal was unsuccessful, would consider these changes.

[8] Again the appellants were not satisfied with the outcome of their appeals in the High Court and they applied for leave to appeal to this Court. The applications were dismissed. They then petitioned the Chief Justice and leave was granted to them both to appeal against their convictions as well as the sentences imposed.

[9] This matter was due to be heard by this Court during its session in March 2009. On that occasion the first appellant terminated the services of Mr. Grobler, the counsel appointed by Legal Aid. In order to afford first appellant an opportunity to obtain another legal representative through Legal Aid the matter was postponed to the next session of the Court and was then set down for 2 June 2009. He was also informed that the hearing of the appeal would not be delayed indefinitely and that he may be well advised to prepare himself to argue his appeal in person should his application for legal aid be unsuccessfull.

[10] However, a day before the matter was due to be heard Legal Aid informed the Registrar that the first appellant's application for further assistance was unsuccessful. The result was that when the matter was called on the 2nd June the first appellant was again without legal representation. After the situation was explained to him by the Court through an interpreter, the first appellant informed the Court that he would argue his appeal in person. The matter then stood down until 18 June 2009 amongst other, to allow him more time to prepare his argument. Handwritten Heads of Argument were submitted by the first appellant

and the matter could proceed on the extended date. The first appellant addressed the Court through an interpreter who also interpreted the further proceedings to the appellant.

[11] The background to this appeal was testified to by one Gavin Robberts who stated that on the night of 18 October 1999, and at Swakopmund, he was woken by the sound of breaking glass. He went to investigate. He armed himself with his pistol and took with him a long metal torch. When he entered the lounge he was set upon by two persons. Although the lights were not switched on, street lights from outside the house lit up the room to such an extent that he could see that the person in front, closest to him, had something in his hand although he could not make out what it was. The other person, who was behind this attacker, held a knife in his hand. Robberts tried to ward off his attackers by hitting at them with his torch as he could not activate his pistol. He was all the time retreating towards his bedroom and he was hitting at the heads and arms of the attackers. He was stabbed in his neck and arm. The blade of a knife broke off in his neck and had later to be surgically removed.

[12] At some stage Robberts capitulated and went to sit in the corner of his bedroom. He told his attackers to take what they wanted and to leave. The taller of the two men then switched on the light in the room and went to rummage through his bags. The only description given by Robberts of his attackers was

that the one was taller and younger than the other. When he was attacked this person was at the back, behind the shorter attacker.

[13] Robberts further testified that during the struggle he lost his pistol. After the light was switched on it could be seen lying on the floor. The shorter of the two attackers then picked it up, walked up to where Robberts was sitting on the floor and tried to shoot him. Luckily for Robberts he either did not know how to operate a firearm or could not operate this particular pistol because, Robberts testified, it was a single action pistol which needed to be cocked by hand before it could be fired. In order to stop the attacker from working out how to operate the pistol, Robberts again used his torch with which he hit the attacker on the head and kicked him away from him. In the process Robberts also switched off the light and was able to set off the alarm system. They then both fled but took with them the torch and the pistol.

[14] Security was alerted by the alarm and after they had arrived, an ambulance was called and Robberts was taken to the hospital. Later that morning the police brought the second appellant to the hospital and although Robberts initially identified him as one of the attackers he later informed the police that he was not able to positively identify any one of them.

[15] On further investigation the police found a red woolly hat as well as a dagger inside the house. These articles did not belong to Robberts.

[16] When the police came to the hospital where Robberts was treated they saw the first appellant emerging from the hospital. He had bandages around his head and, when asked by the police what had happened to him, he told them that he had been attacked by a friend when he defended a lady. He said that he would later lay charges against his attacker.

[17] The police became suspicious, and when they were told by Robberts that he had defended himself with a torch by hitting his attackers on the head, the police went in search of the first appellant.

[18] Later that morning the police found the two appellants together with three other persons in a shack. The second appellant also had a wound on his forehead. They requested both to accompany them to the hospital where Robberts was. On their way to the police vehicle the first appellant disappeared. Second appellant put up some resistance but he was subdued and taken to Robberts. Because Robberts at that stage identified second appellant as one of his attackers, the appellant was arrested and locked up.

[19] Constable Matongwe, who found the red woolly hat in the house of Robberts, testified that he recognized the hat as belonging to the first appellant. He stated that he knew the first appellant well and saw him on the previous day of the robbery, as well as on other occasions, wearing the hat. The police then continued their search for the first appellant.

[20] The first appellant was found a few days later in the shack of one Gabriel Shikongo. The police also found the pistol belonging to Robberts lying on a bed in the shack. When questioned, Shikongo stated that the first appellant, when he came there, had the pistol with him. When the first appellant was confronted with the statement, he just kept quiet.

[21] The first issue which must be decided by this Court is the alleged irregularities committed in the Court *a quo,* namely that the appellants were not given an opportunity to address the Court; did not understand the proceedings and the fact that the first appellant was absent when the appeal was heard.

[22] Mr. Muvirimi, counsel for the State, conceded the above irregularities. He, however, submitted that it is only an irregularity which resulted in a failure of justice which would vitiate the proceedings. In this regard counsel referred to *S v Davids; S v Dladla,* 1989 (4) SA 172 (N).

[23] In the case of *S v Davids; S v Dladla, Nienaber, J,* as he then was, set out the law in regard to what constitutes an irregularity and what the Court's approach thereto should be. On p 193D to E the learned Judge stated the following:

> "For criminal proceedings to be vitiated and a conviction to be quashed there must first be an irregularity. An irregularity occurs 'whenever there

> is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated or conducted'. (*S v Xaba,* 1983 (3) SA 717 (A) at 728D). An irregularity will thus be committed if a rule of practice, procedure or evidence, or a precept of natural justice recognized in our law, is disregarded.
>
> Not every irregularity, however, is fatal. To be fatal to the proceedings the irregularity must result in a failure of justice; there will be no failure of justice if there is no prejudice to an accused, and there will be no prejudice to him if he would have been convicted in any event, irrespective of the irregularity. Prejudice must, in principle, be proved."

[24] Thus, where a conviction would in any event follow on the evidence before the Court, untainted by the irregularity, there is no prejudice to an accused and a conviction would be upheld.

[25] On the law, as set out by counsel for the State, he submitted that the evidence, untainted by the irregularities, still proved the guilt of both appellants and that the appeals should therefore be dismissed. Counsel submitted that in balancing the interest of society against that of the appellants the Court has a duty to ensure that guilty persons do not escape conviction so that the integrity of the judicial process is upheld.

[26] Counsel further pointed out what was stated by Mahomed, CJ, in the case of *S v Shikunga and Another,* 1997 NR 156 (SC) at 170F to 171D in regard to errors arising from a constitutional breach. In this regard the learned Chief Justice stated that there was no justification for setting aside on appeal all

convictions following upon a constitutional irregularity committed by a trial court, and he concluded that the test proposed by the common law was adequate also in relation to constitutional errors.

[27] However, in both the above cases, the Courts qualified the general rule and stated that where the irregularity impaired a fundamental facet of the administration of justice or when it could be said that the irregularity was so fundamental that in effect there was no trial, then the convictions should be set aside.

[28] In the *Davis and Dladla-case Nienaber, J,* collected various examples where the courts set aside convictions because the irregularity committed was such that it culminated into a failure of justice. *Inter alia,* the Court referred to the prerogative of an accused to present his defence and to be able to understand the proceedings. (See the cases referred to in the judgment.)

[29] In *Hiemstra: Suid-Afrikaanse Strafproses*; 5th Edition by Johann Kriegler, the learned author, also with reference to various court cases, referred to instances where proceedings were set aside as a result of irregularities which vitiated the proceedings. (See p 765 to 769). In regard to an accused's right to address the Court the following is stated on p 768:

> "Hoewel verontagsaming van die beskuldigde se betoogreg oor die algemeen minder ernstig is as uitsluiting van sy getuienis en meermale

> nie as fataal benadelend beskou is nie (*R v Cooper* 1926 AD 54), kan dit weldeeglik in bepaalde omstandighede 'n regskending veroorsaak (*S v Leso* 1975 (3) SA 694 (A))".
>
> (Although disregard of an accused's right to address the court is in general less serious than the exclusion of his evidence and has frequently not been considered as fatally prejudicial, it can, in particular circumstances, most certainly cause a breach of the law.") (My free translation.)

[30] In the *Leso*-case, *supra*, the trial judge, *per incuriam,* failed to give the accused persons, who were undefended and were convicted of robbery with aggravating circumstances and rape, an opportunity to address the court in regard to sentence or to present evidence of extenuating circumstances before imposing the death sentence. The Appeal Court set aside the sentence and referred the matter back to the Court *a quo* to hear evidence and then to sentence the accused afresh.

[31] In the present matter first appellant was not even in Court when his appeal was heard and he had no opportunity to make any submissions to the Court. Furthermore the Court *a quo* was at no stage addressed on the merits of the appeal. Adv. Corbett, who acted *amicus curiae,* only argued the questions raised by the Court.

[32] An *amicus curiae* counsel is appointed by the Court to assist the Court. He or she may in the process also be of assistance to the accused or appellant.

However, an *amicus* does not necessarily represent the appellant and does not normally act on the instructions of an appellant. Consequently concessions made by the *amicus* do not bind an appellant and cannot be held against him unless they are confirmed by him. Because the *amicus* does not speak for the appellant the latter should be present in Court and be given an opportunity to address the Court. Where necessary an interpreter should be provided to interpret to the appellant what is happening in Court and to convey to the Court any submissions made by the appellant. The appointment of an *amicus curiae* is no doubt a salutary practice and is mostly of great assistance to the Court as most appellants, who cannot afford legal representation, are lay persons without any knowledge of the law. However the role of the *amicus curiae* must not be lost sight of.

[33] Although I am sure that this oversight by the Court *a quo* happened *per incuriam* it is also clear from the *Leso*-case, *supra,* that that does not save the situation. (p. 695G).

[34] The right of a party to be heard at all stages of the legal process is in my opinion one of the fundamental tenets of the fair trial-principle in our law and non-compliance therewith must, in the specific circumstances of this case, vitiate the proceedings. However, this irregularity relates only to the proceedings before the High Court.

[35] Although the first appellant complained of irregularities during the investigation process and during the trial, none were evident from the record of the proceedings. The irregularities complained of are in my opinion imaginary. Firstly second appellant complained that the police did not hold an identification parade. However, Robberts, who was the only person who could possibly identify his attackers, had informed the police that he could not make any positive identification. Secondly second appellant complained that during the trial Robberts made a dock identification. This is untrue. Thirdly, it was said that the Regional Magistrate, after asking some questions to a witness Gariseb, did not then give appellant an opportunity to ask further questions to the witness. There was no witness with the name of Gariseb. If appellant meant the witness Gurirab then it is clear that the questions asked by the magistrate and the answers received in no way implicated the appellant.

[36] For the reasons set out hereinbefore, I am of the opinion that the Court should set aside the proceedings and orders of the Court *a quo.*

[37] The question now is whether we should refer the matter back to the High Court to hear the appeals afresh before a differently constituted Court, or whether we should deal with the appeals proper and bring the matter to finality. Given the requirement of fairness at hearings on every level of the appeal process, the former is generally the preferred practice unless, of course, compelling considerations require of this court to finally dispose of the appeal.

[38] Both appellants requested the Court to deal with the issues raised in the appeals and bring them to finality. We heard full argument on the issues raised in the appeals and in my opinion we are in as good a position as the High Court would have been to deal with them. The appeal of the appellants was furthermore plaqued by inordinate delays and a referral back to the Court *a quo* will only bring about further delay. Because of the conclusion to which I have come in regard to the appeal of the second appellant, a referral back to the High Court will only prolong his unjustifiable stay in prison. Also in regard to the first appellant it is necessary that finality in this long ongoing process be reached. I am therefore of the opinion that compelling considerations of fairness and justice justifies this Court to deal with the appeals and finalise them.

[39] The first appellant denied any complicity in the commission of the crimes. He flatly denied that the red woolly hat belonged to him or that he was in possession of Robberts' pistol. He changed his explanation under cross-examination as to how he sustained the head injury and some of his explanations are, to say the least, farfetched. I am not persuaded that the learned regional magistrate was wrong in rejecting his evidence as false.

[40] Although the evidence against the appellant is circumstantial, taken together they spun a net from which the appellant could not escape.

[41] In regard to first appellant there is direct evidence from Robberts that he hit the shorter of the two attackers on his head, using the metal torch. First appellant had a wound on his head when he was found by the police. The red woolly hat, found by Matongwe at scene of the crime, was recognized by him as belonging to the first appellant with whom he had been well acquianted. This evidence was accepted by the trial court and no reasons were put forward why this finding should be disturbed. The fact that the police subsequently kept up their search for this appellant supported, in my opinion, the evidence of Matongwe and, ultimately, it proved that the police had good reasons to tie him to the crime. The finding of the pistol in the presence of the appellant and the evidence of Shikongo that first appellant had the pistol on his person when he came to his shack clinched the case for the State. Although the description of Robberts of his attackers does not count for much at least it did not eliminate the first appellant as one of the offenders.

[42] In my opinion the State proved beyond reasonable doubt first appellant's complicity in the commission of the crimes for which he stood trial, and the appeal against his convictions must be dismissed.

[43] First appellant was also given leave to appeal against the sentences imposed.

[44] There is no doubt that the sentences which were imposed were heavy, more particularly the cumulative effect thereof. It is however trite that sentencing is the domain of the trial court and that a Court of Appeal would only interfere with the exercise of the discretion of the trial court on certain limited grounds. (See generally *S v Van Wyk,* 1993 NR 426 (SC) At 165 and *S v Alexander*, 2006(1) NR 1 (SCA) at 4D-5E). In the present instance there is no complaint of a misdirection committed by the trial court when it imposed the sentences and none is evident from the record. It is however still the duty of this Court to consider whether the sentence individually, or taken cumulatively, are such that it can be said that they are disturbingly inappropriate and whether this Court, sitting as a Court of first instance, would have imposed a different sentence. Only if there is such a difference between the sentence this Court would have imposed, and that which was imposed by the trial Court, can it be said that the trial court was unreasonable, would it be competent for this Court to interfere with the sentence. (See *S v M* 1976 (3) SA 644 (A) at 648H – 650F).

[45] Second appellant has various relevant previous convictions which clearly demonstrate his propensity to commit serious crimes. Robberts was attacked in his house and set upon with knives. He was stabbed in his neck and upper arm. It is common knowledge that the neck is a particularly vulnerable area and an attack on that part of the body may very well be fatal. The attack on Robberts was serious and went on until his resistance was overcome.

[46] The callousness of the first appellant was clearly demonstrated when he picked up Robberts's pistol, put it to his head, and pulled the trigger. Luckily for Robberts first appellant did not know how to load and fire the pistol. At that stage Robberts posed no threat to second appellant nor did he put up any resistance. He had completely capitulated and was sitting down on the floor of the bedroom. If second appellant had been successful in firing the gun his action would have amounted to nothing less than an execution.

[47] All the above evidence is clear proof that the first appellant is a dangerous criminal who would brook no resistance to fulfill his criminal intent. The only way to protect the public against people like him would be a lengthy sentence of imprisonment and the hope that, when he is again released he would mend his ways.

[48] In my opinion there are no grounds on which this Court can interfere with the sentences imposed by the Regional Court, either in regard to the sentences imposed individually, or when considering the cumulative effect thereof. In the result the appeal against the sentences imposed is also dismissed.

[49] Although the second appellant is in the same boat as the first appellant *vis-à-vis* the irregularity that was committed in the Court *a quo,* Mr. Grobler, who represented this appellant, indicated that he would not be relying on that irregularity and requested the Court to finalise the matter. He submitted firstly that there was not sufficient evidence to convict the appellant on any of the

charges laid against him and that he should have been discharged by the regional magistrate after the close of the State's case. In the alternative he submitted that the Court *a quo* erred in convicting the appellant of a more serious crime, namely that of attempted murder on the charge of assault with intent, and increasing his sentence of four years imprisonment to seven years imprisonment without any prior notice to him. From this it follows that the appellant would only be guilty of the crimes of housebreaking (Count 1) and robbery (Count 2) as the conviction of assault with intent was part of the robbery and would constitute a impermissible duplication of convictions.

[50] In regard to the alternative argument Mr. Grobler referred the Court to cases such as *S v Swanepoel* 1945 AD 444 at p 451; *S v du Toit* 1979 (3) SA 864 (A); *S V Abrahams* 1983 (1) SA 137 (A) at 146C and *S v Naidoo* 1987 (3) SA 834 (N).

[51] A reading of the above cases shows that a rule of practice requires in those circumstances that an appellant should be given prior notice whenever a Court of Appeal considers either an increase of sentence and/or to alter a conviction into a conviction of a more serious crime. Failure to do so would have the result that the Court cannot increase the sentence or convict the appellant of a more serious crime. However because of the conclusion to which I have come on Mr. Grobler's main submission I need not deal further with this issue.

[52] Mr. Grobler submitted that there was no evidence which tied the second appellant to the crimes charged and that nothing incriminating was found on the appellant. Furthermore counsel submitted that the evidence, such as there was, did not raise an inference, as the only reasonable one, of the appellant's guilt.

[53] I agree with counsel. The evidence relied upon by the State is circumstantial and although circumstantial evidence can be conclusive in proving the guilt of an accused, the evidence in this instance is of a neutral nature and raises no more than a suspicion which falls short of proof beyond reasonable doubt.

[54] There are three main grounds on which the State's case against the second appellant is based. It is common cause that Mr. Robberts was attacked by two persons. The State relies on his description of his assailants as one being taller than the other. This conforms with the fact that the second appellant is taller than the first appellant. However, this only means that the description does not exclude the second appellant and although it could therefore fit the second appellant it could also fit any other person who is taller than the first appellant.

[55] The second piece of evidence relied upon by the State was the fact that some time after the robbery second appellant was found in a shack with other people where first appellant was also present. This may show that there was a

closer association between first and second appellants than what they had wanted the court to believe. Yet, to conclude from that that the second appellant was involved in the commission of the crimes is purely speculative.

[56] The evidence, as I understood counsel for the State, which clinches the matter in favour of the State, is the head injury of the second appellant. This evidence, counsel contends, placed the second appellant at the scene of the crime and the other circumstantial evidence must be evaluated in the light of this evidence. Together the evidence amounted to an "unshaken edifice" in proving the guilt of the appellant.

[57] Whereas there is direct evidence by Mr. Robberts that he hit the smaller of his attackers on the head there is no such evidence in regard to the taller attacker except what was stated in general by the witness that he fended his attackers off by hitting them with the torch on the head and arms. Mr. Robbert's evidence was that the taller man was behind and at the back of the smaller person and whether in the circumstances he was able to hit the taller man was left unclear. Apart from the vagueness of the evidence I again find the evidence inconclusive as far as the guilt of the appellant was concerned.

[58] There is again nothing which distinguish this evidence from the other evidence relied upon by the State and to which I have referred hereinbefore. This evidence does not identify the appellant as one of the assailants who

attacked Mr. Robberts on the fateful night. Even if taken together with the other evidence I am satisfied that it remains inconclusive as far as the guilt of the appellant is concerned and it therefore does not raise the inference of guilt as the only reasonable possibility.

[59] There was also reference to the fact that the appellant 'resisted arrest' and that that is a further indication of guilt. Second appellant explained that he had previously broken his hand and the way the constable was holding his arm was painful. He then tried to get out of the painful grip by which the constable held him. This seems to me to be a plausible explanation and nothing was done by the State to refute this evidence. Even if the appellant was putting up some resistance against arrest then that is as consistent with innocence as it may be with guilt.

[60] The magistrate also found the second appellant to be a liar. However bearing in mind that there was no evidence which incriminated the second appellant the fact that he may have been lying was not enough to tip the scales in favour of a conviction.

[61] I have therefore come to the conclusion that the appeal of the second appellant must succeed.

[62] In the result the following orders are made:

1. In regard to the first appellant, i.e. Mr. Salatiel Uunona, the appeal against his convictions and sentences is dismissed.

2. In regard to the second appellant, Mr. Josua David, his appeal succeeds and his convictions and sentences are hereby set aside.

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STRYDOM, AJA.

I agree,

_____
MARITZ, JA.

I agree,

_____
MTAMBANENGWE, AJA.

COUNSEL ON BEHALF OF 1ST APPELLANT:	In Person
COUNSEL ON BEHALF OF 2ND APPELLANT:	Adv. Z.J. Grobler
Instructed by:	Legal Aid
COUNSEL ON BEHALF OF THE RESPONDENT:	Adv. A. Muvirimi
Instructed by:	The Prosecutor-General