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REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no::CA 67/2010

In the matter between:

SHILUNGA THOMAS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Thomas v The State* (CA 67/2010) [2012] NAHCNLD 11
(26 November 2012)

Coram: LIEBENBERG J and TOMMASI J

Heard: **23 July 2012**

Delivered: **26 November 2012**

Flynote: Criminal procedure Appeal – misdirection on facts - When misdirection on fact the court of appeal will not easily interfere – where no misdirection it is presumed

that conclusion is correct – where misdirection on the facts occurred not per se that the conclusion is also wrong - Legal Representation – request for postponement – court should exercise judicial discretion when an accused apply for postponement to obtain legal representation – An accused may forfeit right to legal representation if obstructive, deploying delaying tactics or unreasonably procrastinates – in casu irregularity did not taint the conviction – Putting into operation of suspended sentence – irregular procedure – set aside in terms of section 304(4) - sentence – no reason for appeal court to interfere – sentence imposed when considering cumulative effect was appropriate - Evidence – footprint evidence admissible provided caution is applied – evidence of the co-accused need not be satisfactory in every material respects – sufficient if the important feature of their evidence is true - Criminal Law – identity of the deceased not an element of murder.

Summary: The court will be slow to interfere where there has been a misdirection on the facts. The appellant was charged with having robbed and killed a person The deceased was found with multiple stab wounds. Shoeprints with a pattern similar to that of the appellant's sneakers were found a few meters away from where the body was discovered. The shoeprints were followed and it led the police officer to a flat where the appellants and his co-accused were. Court a quo found that appellant and his co-accused acted in concert when they robbed the deceased and that the appellant unlawfully and intentionally killed the deceased. The appellant appealed against both convictions and the sentences imposed. The court found no reason to interfere with the court a quo's conclusion that appellant was complicit and found that there was sufficient evidence that they acted with common purpose. The court further found that despite a misdirection on fact, that the conclusion reached by the court a quo was correct. The court further found that the sentence imposed was appropriate when one considers the cumulative effect thereof. The procedure adopted when the court put into operation of the suspended sentence however was irregular and consequently put aside.

ORDER

1. Condonation for the late noting of the appeal is refused;

2. The matter is struck of the roll;

3. The putting into operation of the suspended sentence in case no 596A/2000 is set aside.

JUDGMENT

TOMMASI J (LIEBENBERG J concurring):

[1] The appellant and his co-accused (accused 2 and 3) were charged with robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) and murder. All three accused were convicted of robbery with aggravating circumstances. The appellant was convicted and accused 2 and 3 acquitted on the charge of murder. On the robbery charge, the appellant and his co-accused were sentenced to 8 years imprisonment of which 3 years were suspended on condition that they are not convicted of an offence involving violence on the person of another or dishonesty committed during the period of suspension. It was further ordered that the suspended sentence of one year imprisonment imposed by the district court in respect of the appellant for a previous conviction of armed robbery, be brought into effect. The appellant was sentenced to 17 years imprisonment for murder. The appellant now appeals against the conviction and sentence on both counts.

[2] The appellant filed his notice of appeal outside the time period prescribed by rule 67 of the Magistrate's court rules and applied for condonation. The respondent opposed

the application for condonation solely on the ground that there are no reasonable prospects of success. The matter was thus heard on the merits in order to determine whether or not there are reasonable prospects of success.

[3] The appellant was represented by Ms Mainga and the respondent by Mr Shileka.

[4] The appellant and his co-accused were charged with having robbed and murdered Domingos Fransico Antonio during the early morning hours of 15 July 2006. The body of the deceased was found lying outside Take Five Bar in Oshikango with multiple stab wounds. The post mortem medical report revealed that the deceased had a cut wound on the left front side of his head; a stab wound between his shoulder blades measuring 22mm in length and 45mm deep; a second stab wound located in the left hollow side of the back measuring 25mm in length and 55mm in depth which penetrated the upper part of the left kidney; a 10 mm angular shaped superficial cut on the back of the right fifth finger; and irregular abrasions on the back of his left hand. The cause of death was recorded as “stabbing to the back”.

[5] A police officer (Conrad) arrived at the scene shortly after the deceased was found. The deceased was bare feet and he tracked the deceased’s footprint. Some distance from where the deceased was lying he observed a shoeprint with a zigzag pattern of a person who, according to his observations, was pursuing the deceased. He tracked the shoeprint from that point to a flat where he found the appellant, his girlfriend and accused 2. Accused 3 arrived later. It transpired that the flat belonged to the appellant’s girlfriend and accused 2 was living with her.

[6] Conrad subsequently discovered that the appellant had a cut wound to his head. The police seized N$300 from a witness who in turn had received it from the appellant. The appellant’s girlfriend pointed out a torch; a border pass bearing the name of the deceased; and a bunch of keys which were brought to the flat by accused 3. She also handed the shirt and pants which the appellant was wearing that evening and which she had placed in a bucket of water underneath the bed to the police. The clothing was

blood stained. The appellant's sneakers he found on top of the roof of the flat where the appellant's girlfriend had thrown it.

[7] The State's case was that the appellant and his co-accused conspired to rob and kill the deceased. The only eyewitnesses to the robbery were the appellant and his co-accused, whereas the appellant was the only eyewitness to the murder. The State therefore had to rely on extra-curial admissions made by accused 2 and 3 and circumstantial evidence to prove its case against the appellant and his co-accused.

Count 1

[8] The appellant raised the following two grounds of appeal against the conviction of robbery:

(a) the magistrate erred by finding that the appellant was an active participant in the robbery whilst the evidence proves the contrary;

(b) the magistrate erred by relying on the hearsay evidence of Bonita Kuimbra especially when such evidence was not corroborated by other evidence.

[9] Ms Mainga argued that there was no evidence that the appellant had sent his co-accused to identify the target to be robbed; and that no evidence was led to disprove the appellant's version of events.

[10] The court a quo, in arriving at the conclusion that the appellant was an active participant, considered the appellant's testimony and rejected same in favour of the version of events given by his co-accused. The central issue raised was whether the court a quo was correct in doing so, bearing in mind that the evidence of his co-accused should have been treated with caution.

[11] The testimony given by accused 2 and 3 was essentially the same. They testified that they were coming from Oshikango lodge. They saw the appellant sitting on a stone outside the lodge. He followed them and when a man approached them walking in the

opposite direction, the appellant handed glasses he had in his hand to accused 3. The appellant turned around and grabbed the man by his shirt. He grabbed the torch which the man had in his hands and handed it to accused 3. The appellant ordered them the remove the money from the man's pockets and to run away which they did. They both witnessed the appellant stabbing the man on his head before running away.

[12] The appellant testified that he had left the lodge with his co-accused after they persuaded him that his girlfriend was looking for him. Outside the gate of Oshikango lodge accused 2 spoke to a man. The appellant was talking to accused 3 who informed him that they had met the man at another bar. He called accused 2 and the man approached him wanting to know what he was saying. He did not dispute that he handed the drinking glass which he was holding in his hand to accused 3. He informed the man that he was not talking to him whereupon the man grabbed him by his shirt. He fought back and was hit over the head with an unknown object. He lost consciousness and when he regained consciousness he noticed that his co-accused had left or was leaving. He explained that the torch the man was carrying fell down during the fight and was picked up by accused 3. He did not dispute that his co-accused had robbed the man but denied that he witnessed such a robbery. He denied that he had stabbed the man as testified by his co accused.

[13] The court a quo in evaluating the evidence determined what was common to both versions. There was clear evidence that the appellant and his co accused were together when they had met a Portuguese speaking man and that they were involved in an incident outside the gates of the lodge. It rejected both versions insofar as it related to how the encounter started. The court a quo accepted the appellant's version that accused 2 and 3 persuaded him to leave the lodge. This evidence was confirmed by a witness called by the appellant who was present at the time. Their evidence that they met the appellant outside the lodge, sitting on a stone, was rejected.

[14] The appellant however takes issue with the fact that the court should not have relied on the evidence of Bonita, a witness called by the State, when it concluded that

there was a prior agreement between the parties to rob the victim. The existence of such an agreement was denied by the appellant and his co-accused. Bonita, testified that accused 3 informed her that they had met earlier with an Angolan man. They believed that the man had a lot of money and went to look for the appellant to help them rob the man.

[15] The evidence of Bonita was admissible against accused 3 who was the maker of the admission. The magistrate in his response to the grounds of appeal correctly stated that the evidence was inadmissible against the appellant. He further stated that he relied on Bonita's evidence primarily as it related to accused 3. The court a quo could, from the evidence of Bonita reason that accused 3 approached the appellant with the intention to seek his assistance with the robbery. It could not by extension reason that she had communicated such intention to the appellant particularly given the fact that accused 3 did not confirm her conversation with Bonita under oath.

[16] The conclusion reached by the court a quo was not that the appellant had sent his co-accused to identify the victim. It inferred from the testimony of the appellant that accused 2 had identified the victim by conduct and accused 3 had done so verbally. It further found that the appellant had prepared himself for a conspired attack by handing the drinking glass to accused. It would appear that the court a quo had indirectly relied on the testimony of Bonita to reach this conclusion.

[17] Even in the event that the court a quo had erred in this regard, it was not the only evidence the court a quo relied on to conclude that there was an agreement between the parties or to establish that they had acted in concert. It also inferred common purpose from the conduct of the appellant who, according to the testimony of accused 2 and 3, requested them to remove the money from the victim's pocket and their compliance with this request. Having correctly rejected the defence off compulsion raised by accused 2 and 3, this evidence alone would have been sufficient to have established common purpose.

[18] The court a quo thus did not rely solely on the evidence of Bonita to establish that the appellant acted in concert with his co-accused.

[19] The important feature of the testimony of accused 2 and 3 was that the appellant had assaulted the man with the intention of forcing him into submission and thereafter had enlisted their help. The court a quo considered the version of the appellant that he was attacked merely because he had called accused 2. When weighing the two versions, the court found the version of the co-accused more probable. Logic dictates that where there are two different versions of who commenced the assault, only one can be true. The court a quo acknowledged that accused 1 and 2 were not entirely truthful but found that their evidence was consistent with the post-mortem report which reflected that the deceased had a “scalp cut” of 13 mm. The court a quo cannot be faulted for favouring the version of accused 1 and 2 particularly given the fact that their testimony was made adversely to their interest. The court a quo rejected the appellant’s version as being less probable. The version of the co-accused accounts for how the items were found in their possession whereas the appellant’s version cannot adequately explain this.

[20] The testimony of the appellant’s co-accused constituted evidence contrary to his version and the only question was whether such evidence constituted evidence beyond reasonable doubt. There is thus no merit in the ground of the appellant that there was no such evidence.

[21] The evidence of a co-accused need not be satisfactory in every respect. The court a quo was entitled to rely on the essential part of evidence of the co-accused provided that it approached their evidence with caution.[1] It is evident from the judgment of the court a quo that such caution was applied as the court looked at evidence adduced consistent with their testimony and had considered the probabilities. We are satisfied that the evidence of the appellant’s co-accused was treated with the required

[1] See S v Tuzembeho 1993 NR 134 (HC).

measure of caution by the court a quo; and having done so, found that the essential feature of their story was true.

[22] An appeal court will not easily interfere with a credibility finding and care must be taken not to compartmentalise the evidence. The court a quo considered the evidence of both the appellant and his co-accused in its totality and had the benefit of seeing and hearing the witnesses. There was no misdirection by the court a quo on the finding of facts and the presumption must be that the conclusion reached by the court a quo was correct.[2] This court will consequently not interfere with the conclusion reached by the court a quo in respect of the robbery.

[23] The issue whether the court a quo was justified to infer that the post mortem was conducted on the person who was robbed will be discussed hereunder.

Count 2

Identification of the deceased

[24] The appellant raised a number of grounds against the conviction in respect of count 2 (murder): The grounds relating the whether or not the court a quo correctly concluded that the appellant caused the death of Domingos Francisco Antononio are that the learned magistrate erred on the facts/and or in law by finding that:

(a) the deceased was the same person who was robbed by the appellant and his co-accused when there was no evidence supporting such a finding; and

(b) the appellant caused the death of the deceased when no evidence was led that the body did not sustain any further injuries during transportation; and in respect of the identification of the body.

[2] R v Dlumayo 1948 (2) SA 677 (A).

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[25] The magistrate responded that this issue was never placed in dispute by the appellant or his co-accused. The magistrate was also of the view that it would not make a difference if the deceased was a different person who was robbed by the appellant as the facts would still support a conviction of murder.

[26] Ms Mainga argued that the accused was not asked to identify the deceased as the person whom they had robbed. She submitted that the border pass, which ordinarily does not bear a photograph of the holder, was insufficient proof that the deceased was in fact the person who was robbed. The State admittedly did not adduce evidence that the body they found lying outside Take Five Bar was transported to the police mortuary without sustaining further injuries and neither was the police officer who identified the body to the pathologist who examined the deceased, called to testify.

[27] Before the post-mortem report and photo plan were handed in, the magistrate asked the appellant whether he had any objection to the handing in thereof. The appellant indicated that he had no objections. In terms of the provisions the of section 212(7A)(a) the post mortem report was admissible and prima facie proof that the victim concerned suffered the injuries recorded in that document. The document is prima facie proof of injuries the victim suffered and on its production, becomes conclusive proof in the absence of evidence to the contrary. This was however not explained to the appellant and in the absence thereof this court has to consider the appellant's ground of appeal in the light hereof.

[28] The appellant did not take issue with the veracity of the contents of the post mortem report. The issue raised was whether the post mortem was performed on the same person who was robbed. The photographs depict a body lying in front of Take Five Bar in Oshikango. Ms Mainga argued that there were discrepancies between the injuries which are apparent on the photographs and that which was recorded on the post mortem report. The reason for these discrepancies is however explicable. The photographs depict a person lying on the sand in such a way that any injury to the front part of the head and hands are not visible. Conrad, the police officer who found the

deceased, described the injuries he had observed. He observed a wound on the deceased's head and on his back. The location of the two stab wounds on the back of the deceased is clearly visible on the photographs and corresponds with the location indicated by the pathologist. The pathologist recorded that the person he examined was wearing blue overall trousers. This description corresponds with the trousers worn by the person depicted on the photographs. The pathologist was informed by the officer who identified the body to him that the deceased died on 15 July 2006. This date corresponds with the date given by Conrad as the date on which he found the body. The post mortem report recorded that the examination revealed that death took place three days prior to the examination which was conducted on 18 July 2006.

[29] The facts of this case are distinguishable from those in *S v Andima 2010 (2) NR 639 (HC)*. In that case the name of the person who identified the body to the doctor was not filled in and the doctor failed to note his/her observations as to when and how long before the post-mortem the death had occurred. In the present case sufficient information and description of identifying features were given to satisfy this court that the body of the deceased depicted in the photographs was indeed the body which was examined by the pathologist.

[30] The State in the present case should have led evidence on how the identity of the deceased was determined but failed to do so. This however does not mean that such a lacuna was necessarily fatal to the case of the State. The identity of the deceased is not an element of the crime of murder although it may impact on the weight of evidence and burden of proof.[3]

Evaluation of the evidence presented in respect of count 2

[31] A further necessary link between the deceased found lying in front of Take Five Bar and the person who was robbed must be examined in order to determine whether

[3]See R v Nhleko 1960 (4) SA 712 (A) & S v Rossow 1994 (1) SACR 626 (E)

there is merit in the appellant's ground that no evidence was presented to prove that the deceased was the person who was robbed.

[32] The evidence which pointed at the fact that it was the same person was the fact that the body they found displayed a head injury which was consistent with the evidence of accused 2 and 3 that the appellant stabbed the victim on his head.

[33] Further evidence which linked the appellant to deceased and the robbery was the shoeprint evidence of Conrad. This evidence sought to establish that the appellant was in close proximity of the deceased; and that he had pursued the deceased.

[34] This ground raises two factual issues namely (a) whether it was proven that the shoeprint was that of the appellant; and (b) whether the appellant was chasing the deceased at the material time.

[35] The appellant testified that after he regained consciousness he fled the scene. According to his testimony the same person who attacked him in the vicinity of Oshikango Lodge followed him and found him some distance from the lodge where he collapsed due to the injury he had sustained on his head. He pointed out the place to the police as being behind Supertronics. The man grabbed him by his shirt behind his neck whilst he was seated. The man hit him with a beer bottle he took from a refuse bin. He warded off the blow with his arm and in this process he was scratched on his arm. The man wanted to pick him up and he took his knife out of his pocket and waved it around 3 times. The man ran away and he went to his girlfriend's house. He could not see whether he had stabbed the man. Other than the appellant there were no eye witnesses.

[36] The shoeprint evidence given by Conrad may be legitimately criticised. It was dark and he tracked the prints with the assistance of a cell phone light. No cast was made of the print for the court to compare it with the shoe which was found on top of the roof of the flat where the appellant was found. The area where the body was found carries pedestrian traffic. On the other hand Conrad had no prior information that the

appellant was involved yet he arrived at the flat where he found the appellant in the company of his co-accused who implicated him in the robbery.

[37] In *S v Imene 2007 (2) NR 770 (HC)* the court held that shoeprint evidence was admissible but that such evidence should be treated with caution particularly when it is the only evidence against an accused. The shoeprint evidence was not the only evidence linking the appellant to the robbery and the deceased. The man found lying outside Take Five Bar had a head injury which was consistent with the evidence of the appellant's co-accused that the appellant had stabbed the man on his head with a knife during the robbery. Conrad in fact was able to locate the shoe which carried a similar pattern to the shoeprint he had observed. It is of some significant that these sneakers were thrown on top of the roof. This enabled the court a quo to verify whether the shoe bore a zigzag pattern as described by Conrad as same was handed in as an exhibit. The items which accused 3 testified she removed from the deceased's pocket were found at the flat where the shoeprint led to.

[38] I am satisfied that the court a quo was entitled to rely on the shoeprint evidence as being credible. The court a quo was entitled to accept Conrad's evidence and to infer from his evidence that it was indeed the appellant who left the tracks.

[39] This evidence places the appellant within approximately 4 to 5 meters from where the deceased body was found.

[40] The evidence that the deceased was chased by persons instead of a person and that the deceased had asked for water at a bar constituted hearsay evidence and was therefore inadmissible. Whether or not the court was justified to infer that the appellant had chased the deceased is discussed below.

[41] The appellant during his address before conviction submitted to the court a quo the following: 'I know only that I stabbed the deceased once. And if he was stabbed several times, unless there was somebody else who stab him <u>because a person whom I stab, I stab him only once</u>.'[my emphasis]. This was indicative of the appellant

challenging the fact that his act was the cause of death of the deceased and raised the possibility of *novus actus interveniens*.

[42] Ms Mainga submitted that the court a quo should not have relied on this shoeprint evidence to conclude that the deceased was chased by the person wearing the sneakers.

[43] Conrad inferred from what he had observed that the person wearing the shoe with the distinctive print had pursued the deceased. He did not indicate on what he based his conclusion that the appellant chased the deceased. The evidence of Conrad could under these circumstances only prove that the appellant and the deceased had been leaving their prints up to approximately 4 meters from the place where the deceased had succumbed to his injuries; and that the shoeprints had from this point led to the flat where the appellant was found. The court mistakenly concluded that the one set of prints pursued the other whilst this was not substantiated by the witness. This however does not necessarily mean that the conclusion reached on the totality of the evidence, per se, was incorrect.

[44] The court of appeal can only reject the conclusion of the trial court on a factual question if it is convinced that the conclusion was also wrong.[4] In *R v Dhlumayo and Another, supra* the principles which should guide an appellate court in an appeal purely upon fact were set out. Greenberg JA at page 681stated the following:

> 'I do not propose to seek to define what is meant by a misdirection on a question of fact; it is sufficient for the purposes of this case to say that an omission by a trial court to refer to some fact which is relevant to the question of the guilt of the accused <u>is not necessarily a circumstance which will entitle an appeal court to disregard entirely the findings of the trial court</u> and to seek to retry the case independently of such findings. It is said that in this case there have been such omissions by the trial court as to require us entirely to disregard its findings; as the importance of these omissions can only be appreciated by a consideration of the case as a whole, it is necessary so to consider it'.[my emphasis]

[4]Hiemstra's Criminal Procedure – loose leave addition p 30-45 [Issue 1]

[45] The shoeprint evidence show that the appellant was in close proximity to the deceased. The appellant is the only one who could give an account of what had happened to the man who was robbed and his testimony would have to be considered to establish whether it is reasonably possibly true.

[46] In *S v Johannes 2009 (2) NR 579 (HC)* at paragraph 11 the court, referring to a number of authorities stated that: “It has often been stated that the consideration of the probabilities of a case in order to decide whether the accused's version is reasonably possibly true is permissible. This is done by looking at the probabilities of the case in order to determine whether the accused's version is reasonably possibly true. Only if the version of the accused is so improbable that it cannot be regarded as the truth is it inherently false and it falls to be rejected. It is also accepted that the test is not whether the court disbelieves the accused, but it will acquit him if there is any reasonable possibility that his evidence might be true.”

[47] The appellant’s version was that he was viciously attacked by a man with an object capable of causing a gaping wound on his head and, which blow rendered him unconscious for having called accused 2 to leave the man’s company This man, according to the appellant, was unhurt at this stage. The aggressor does not take advantage of the fact that the appellant is in a weakened position to pursue the attack but wait for him to regain consciousness and allow him to flee. This version is so inherently improbable that it cannot be reasonably possibly true. The evidence adduced by the State supports a more probable finding that it was the victim who fled the scene to escape the unlawful attack by the appellant. The victim would have been in a position to do so after he had resisted the unlawful attack by hitting the appellant on the head. This conclusion would be consistent with the evidence adduced and the only reasonable inference to be drawn from those facts. It is probable that the deceased had sustained the injuries to his head and hands at this stage when he resisted the attack.

[48] It is the appellant's version that he had, in his weakened condition manage to run some distance before the same man caught up with him. According to the appellant the same man launched a fresh attack on him with a broken bottle. All of this was still motivated by the fact that the appellant had called accused 2 to leave the company of this person. The only reasonable explanation tendered by the appellant for the man to launch a second attack, is equally improbable.

[49] The appellant described and demonstrated how he had waved the knife in an attempt to ward off the same man. During his evidence in chief he testified that he was unable to say whether he had stabbed the deceased and if so where on his body he did so as the blood flowing from his head injury impaired his sight. During cross-examination the appellant admitted that he had injured the deceased when he waved his knife. He rectified this by saying that he had learnt about this afterwards. He later during cross-examination testified that he observed that he injured the deceased once on his left ribs although he could not see properly due to the fact that his face was full of blood. It is noted that whilst he was unable to see where he had injured the person, he was perfectly able to observe that the person took a beer bottle from the refuse bin. He further testified that he threw a "stabbing blow" as opposed to waving the knife.

[50] The place where he indicated the second attack took place is at variance with the shoeprint evidence which places him within meters from the deceased. Conrad's evidence in this regard was found to be credible and the appellant's testimony in this regard is found not to be reasonably possibly true. The girlfriend's disposal of his bloodstained clothes and sneakers are furthermore inconsistent with his innocence. This unsatisfactory account of what had transpired is indicative of a version contrived with full knowledge that there are no other eyewitnesses.

[51] The evidence presented by the State was that the sandals of the deceased and jacket were found on the way. It would be pure speculation had to determine what motivated the deceased to do so. It would however be consistent with the proven facts that the appellant had pursued the deceased up to a point within 4 – 5 meters from

where the deceased succumbed to his injuries and that the appellant had thereafter made his way to the flat. The two additional stab wounds to his back could conceivably have been sustained whilst being pursued i.e with his back facing the appellant. The nature of the fatal injury and the force which was applied would justify an inference that the deceased moved only a few paces before he fell down on the ground where he died.

[52] There are no admissible evidences upon which this court can infer that there was a *novus actus interveniens* and such an inference would under these circumstances amount to pure speculation.

[53] Having considered the probabilities weighed in conjunction with the proven facts and the appellant's mendacity as a witness, the only reasonable conclusion is that the appellant had unlawfully inflicted the wounds on the back of the deceased, one of which had caused his death.

[54] When one considers the degree of proof which rests on the State, I consider the following statement in *R v Mlambo 1957 (4) SA 727 (A)* at 738A to be appropriate:

> "In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to the accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused."

[55] Ms Mainga submitted in argument that it was not proven that the appellant had the intention to kill. In *R v Mlambo, supra at* 738B - D the following was stated:

> "Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts, a court will, in suitable cases, be fully justified in rejecting an argument that,

notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so.".

A proper application of this dictum was given in S v *Steynberg* 1983 (3) SA 140 (A). The head note reads as follow;

'The application of the Mlambo approach often has satisfactory and correct results. But the application of this dictum obviously does not mean that, when an accused gives a false explanation about a fatal assault he perpetrated on someone about which he alone is able to give evidence, the inference must be made that he had the intention to kill the deceased. That was not what was decided in the Mlambo case. In the nature of things it is, in general, impossible to devise an exhaustive formula according to which it can be judged whether the particular approach is applicable or not. That depends on the particular circumstances of each case. The nature and extent of the accused's lies are of great importance. In addition, all the other factors which appear, from the evidence, to be relevant to the adjudication of the question whether the inference that the accused had the intention to kill is justified should be placed in the scale; and this adjudication should be undertaken with due observance of the established rules of logic in connection with circumstantial evidence formulated in R v Blom 1939 AD 188 at 202 - 3.'

[56] The appellant who was the sole witness to the murder gave untruthful evidence both in respect of the robbery and how the deceased met his untimely death. He had robbed the deceased and had used a knife. The severity of the stab wounds on his back is indicative of force being applied. The number of wounds is furthermore significant. The appellant should have foreseen that the victim may resist the robbery and had armed himself with a knife. When the deceased indeed resisted and fled, the appellant inflicted wounds which he reasonably should have foreseen could fatally injure the deceased and had reconciled himself with such an outcome. At the very least intent in the form of *dolus eventualis* was present.

[57] The conclusion reached by this court therefore is the same as that of the court a quo i.e that the appellant is guilty of having unlawfully and intentionally killed a human being.

Legal representation

[58] The appellant was arrested on 15 July 2006. He appeared in the regional court on 23 March 2007 for the first time. At this occasion the appellant's right to legal representation was explained and he indicated that he understood the explanation. He opted on this occasion to conduct his own defence. The matter was postponed several times. On 28 April 2008 shortly before the trial was to commence, the appellant informed the magistrate that he would like to apply for legal aid. He explained that he did not properly understand that he was not required to pay for a lawyer who was appointed by the Directorate of Legal Aid. He only came to learn this after his last appearance but did not take any steps to apply. He first wanted to explain to the court that he had changed his mind. The magistrate informed him that he was of the view that the request was merely an attempt by the appellant to delay the proceedings. He was advised to apply after the adjournment of the trial so that the legal practitioner could represent him at a later stage. The matter was adjourned after the plea and plea explanations of all three accused were given, to 29 May 2009. On 29 May 2009 the appellant proceeded with representing himself.

[59] The magistrate stated in his reasons that he concedes that he should have granted the postponement but was of the view that his failure to do so did not vitiate the proceedings. The magistrate was confronted with a request for a postponement and should have made every effort to obtain all the relevant information which could have guided the magistrate in determining whether he should grant a postponement or not. The importance of an accused's right to legal representation has been stressed in numerous cases particularly when an accused has been charged with serious offences. It has also been held that the right to legal representation is not without limitations. Where an accused is obstructive; deploy delaying tactics; or unreasonably

procrastinates, he could forfeit his right to legal representation. A proper exercise of the magistrate's discretion would have enabled him to determine whether or not the appellant should have been afforded the opportunity to apply for legal aid.

[60] In *S v Shikunga and Another 1997 NR 156 (SC*) it was held that the test proposed by the common law was adequate in relation to both constitutional and non-constitutional errors. Where the irregularity was so fundamental that it could be said that in effect there had been no trial at all, the conviction should be set aside. Where the irregularity was of a less severe nature, then, depending on the impact of the irregularity on the verdict, the conviction should either stand or an acquittal on the merits should be substituted therefor. The essential question was whether the verdict had been tainted by the irregularity. Two equally compelling claims had to be balanced: the claim of society that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity was of a fundamental nature or where the irregularity, though less fundamental, tainted the conviction, the latter interest prevailed. Where, however, the irregularity was not of a fundamental nature and did not taint the verdict, the former interest prevailed.

[61] In the circumstances of this matter however the appellant was afforded time to apply for legal aid after the first day of trial. His failure to do so was tantamount to a waiver of his right to legal representation. The magistrate, on the first day of trial properly explained to the appellant the charges he was facing and the competent verdicts. The magistrate explained the appellant's constitutional right not to incriminate himself. During the proceedings the appellant's right to cross-examine, to address the court before conviction and to mitigate were adequately explained Under these circumstances I am of the view that the irregularity which occurred herein did not taint the conviction.

Sentence

Robbery

[62] The appellant's grounds were that the learned magistrate erred when he did not consider the personal circumstances and the fact that he was a youthful offender. He submitted that the sentence imposed was shocking and harsh under the circumstances. The magistrate in his response admitted that it was not apparent from the record of the proceedings that he took the appellant's personal circumstances into account but opined that the sentences imposed in each count was within the range of a sentence any other Court would have imposed in the circumstances of the case. This court gave notice to the parties to submit argument as to why the sentence in the first count should not be increased.

[63] Ms Mainga contended that the appellant was a youthful offender at the age of 23. I am in agreement with the magistrate who stated in his reasons that the appellant can hardly be described as a youthful offender. Not only was the appellant an adult but he was not a first offender. Although a court always has to consider the personal circumstances of an accused a balance must be struck between his personal circumstances, the offence he committed and the interest of society whilst bearing in mind the objectives of punishment. As correctly pointed out by Mr Shileka, robbery is a very serious crime and this court has imposed increasingly harsher sentences which are aimed at general deterrence and retribution The appellant has shown that he is not a good candidate for a sentence aimed at reform. The magistrate clearly felt that, although the appellant's co-accused were youthful first offenders that their conduct was on par if not more reprehensible than that of the appellant who was not a first offender. The only difference the court a quo intended to make between the accused and his co-accused was to put into operation the suspended sentence of a previous case.

[64] The putting into operation of the suspended sentence forms one of the grounds raised by the appellant. The prosecutor applied that the court a quo put into operation the suspended sentence imposed by the district court in a previous case. The relevant parts of section 297 (9)(*a*) of the Criminal Procedure Act, 51 of 1977 provides as follow:

'If any condition imposed under this section is not complied with, the person concerned may upon the order of any court be arrested or detained and, where the condition in question-

(i) …

(ii) was imposed under subsection (1)(*b*), (4) or (5), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction,

and such court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such postponement or suspension, may then, …in the case of subparagraph (ii), put into operation the sentence which was suspended."

[65] In *S v Fans 2009 (1) NR 356 (HC)* Muller J in paragraph 4, stated the following:

> "Normally, when the State wants to put a previous conviction into operation, it would bring an application, during which proceedings the accused is afforded an opportunity to oppose it. Such an application should be made in respect of the particular case in which the suspended sentence was imposed"[my emphasis]

Although the court, in terms of the provisions of section 297 of the Act, was competent to put the sentence into operation it should have done so on the record of the case in which the sentence was imposed. There was no indication that the record of that case was placed before the court and that the putting into operation of the suspended sentence was recorded therein. Without having had the benefit of the record of the court which imposed the sentence, the court a quo would not have been in a position to see whether the previous case was reviewable and if so whether it was confirmed or set aside on review. As was pointed out in *S v Frans, supra,* the procedure adopted was irregular.

[66] A further irregularity is that the appellant was not afforded the opportunity to oppose this application. In *S v Hoffman 1992 (2) SACR 56 (C)* at page 63 A-B, the following was said in this regard: "When a court considers whether or not to put a

suspended sentence into operation, it is required to exercise a judicial discretion. The accused has to be apprised of his right to lead evidence and to advance argument to the court with a view to resisting the putting into operation of the suspended sentence or to advance reasons for a further suspension of the sentence." The court was further of the view that it was undesirable to put into operation a sentence until such time as the conviction and sentence which constitute the breach of the condition, has been confirmed on review or when the time for lodging an appeal has lapsed. To do so before this may be prejudicial to the appellant whose conviction in the later case may be set aside either on review or on appeal.

[67] The procedure adopted by the court *a quo* in putting the sentence into operation of the suspended sentence is therefore clearly irregular particularly as this infringed the appellant's right to a fair trial. The decision taken by the magistrate is not appealable as an accused "may appeal against such conviction and against any resultant sentence" (See *Gasa E v Regional Magistrate for the Regional Division of Natal 1979 (4) SA 729 (N)*). The appellant therefore can not succeed on this ground of appeal.

[68] This irregularity has however been brought to the attention of this court and we are of the view that it may be dealt with in terms of section 304(4) (See S v S 1999 (1) SACR 608 (W).

[69] Although the sentence imposed for the robbery appears to be rather lenient, sight must not be lost that these two crimes are interlinked. The sentence in my view is appropriate when one views the cumulative effect of the sentence imposed. There is thus no reason for this court to upset the sentences which the court *a quo* imposed herein. The irregular procedure adopted in the court *a quo* when it put into operation the suspended sentence in another case is not in accordance with justice and stands to be set aside.

[70] The appellant has not succeeded in showing that there are reasonable prospects of success and the application for condonation herein cannot be entertained.

[71] In the result the following order is made:

1. Condonation for the late noting of the appeal is refused
2 The matter is struck from the roll
3. The putting into operation of the suspended sentence in case no 596A/2000 is set aside

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MA Tommasi

Judge

JC Liebenberg

Judge

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APPEARANCES

APPELLANT:	I Mainga
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RESPONDENT:	R Shileka
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