REPORTABLE

CASE NOs: SA 65/2011

SA 72/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FANUEL FESTUS SHIPANGA **FIRST APPELLANT**

PAULUS KAMATI **SECOND APPELLANT**

And

THE STATE **RESPONDENT**

Neutral Citation: Shipanga v The State (SA 65-2011 SA72-2011) [2014] NASC (31 October 2014)

Coram: SHIVUTE CJ, MARITZ JA and MAINGA JA

Heard on: **31 October 2012**

Delivered on: **31 October 2014**

APPEAL JUDGMENT

MAINGA JA (SHIVUTE CJ and MARITZ JA concurring):

[1] This is an appeal with the leave of this court granted after the court below had refused the appellants leave to appeal. The appellants were arraigned in the

High Court on five counts including: (1) murder; (2) robbery with aggravating circumstances as defined in s 1 of the Criminal Procedure Act 51 of 1977; (3) kidnapping; (4) possession of firearms without a licence in contravention of s 2; and (5) possession of ammunition in contravention of s 33 read with sections 1, 8, 10, 38 and 39 of Act 7 of 1996.

[2] All five offences were committed in the district of Windhoek, counts 1 to 3 on 8 July 2007 and counts 4 and 5 in the period of 6 – 8 July 2007. On the count of murder, it was alleged that the appellants had murdered Johannes Peter Fellinger, an adult male person. On the second count of robbery with aggravating circumstances, that they had forced the deceased Johannes Peter Fellinger and his wife Elke Maria Gobel Fellinger into submission by shooting the deceased in the head with a firearm and had assaulted Ms Fellinger by hitting her on the head with a firearm and/or threatened to kill her and/or pointed a firearm(s) at her with the intent to steal and taken from them a Toyota double cab motor vehicle with registration number SVJ 708 GP with a roof tent and ignition key, as well as N$2 700, 00 and at least €1 000, 00 cash money, a Canon digital camera (model: PowerShot S 80), a JD Jendigital digital camera (model: 5.0z3c serial number CJP 71003538) with a memory card, property of or in the lawful possession of the Fellingers. It is alleged that aggravating circumstances as defined in s 1 of Act 51 of 1977 were present. In relation to the third count of kidnapping, it is alleged that Ms Fellinger was deprived of her liberty of movement by being forced into the Toyota pick-up referred to in count 2 and ‘imprisoned’. In respect of counts 4 and 5, it is alleged that the appellants were in possession of firearms without a licence

and ammunition without being in the lawful possession of a firearm capable of firing the same.

[3] The appellants were convicted on all five counts after a trial which commenced on 3 June 2010 and, with intermittent adjournments, concluded on 25 March 2011. On 26 May 2011, the appellants were sentenced as follows:

Count 1	Murder: 30 years imprisonment each.
Count 2	Robbery with aggravating circumstances: 12 years imprisonment each, of which 2 years were ordered to run concurrently with the sentence on count 1.
Count 3	Kidnapping: 6 years imprisonment each, 2 years of which were ordered to run concurrently with the sentence on count 1.
Count 4	Possession of firearms: 1 year imprisonment each.
Count 5	Possession of ammunition: 1 year imprisonment each.

[4] An application for leave to appeal to this court against their respective convictions and sentences failed. Leave to appeal to this court, as already stated, was granted on petition.

[5] The facts that gave rise to the convictions and sentences can be stated as follows:

5.1 On Sunday 8 July 2007, the deceased, Mr Fellinger, and his wife Ms Fellinger, arrived in Namibia on a flight from Germany. At the Hosea Kutako International Airport, they hired a Toyota pick-up vehicle and drove to the Windhoek city centre and, from there, further westwards in the direction of Khomas Hochland with the intention to go to Swakopmund. At or near the Francois Feste Stone ruins, the couple stopped and alighted from the vehicle. The deceased walked in the direction of the ruins where he saw a number of monkeys and wanted to take photos of them. Ms Fellinger remained at the vehicle to guard their luggage which she thought was not properly secured. The deceased returned to the vehicle as the monkeys had disappeared but, as he arrived back at the vehicle, over his shoulder he again noticed the monkeys a distance away. The deceased requested his wife to remain at the vehicle again while he approached the animals to take photos of them.

5.2 While Ms Fellinger was at the vehicle, a man, whom she later identified in court as the first appellant, suddenly approached her and demanded money. When she said she did not have money, he produced a firearm and repeated the demand. Ms Fellinger cried out for help. The man hit her at the back of the head with the firearm and told her to stop crying out for help. He then grabbed her and dragged her towards a bush. During these events, Ms Fellinger dropped the keys of the vehicle on the ground. The man demanded the keys and, when she could not produce them, called his colleague whom he

instructed to search for the keys. The second man, whom Ms Fellinger later identified in Court as the second appellant, found and picked up the keys. The latter remained with Ms Fellinger while the former returned to the vehicle. He got into the vehicle and turned it about to face in the direction of Windhoek. It was at that moment that the deceased returned to the vehicle. Ms Fellinger could not warn him of the danger that had befallen them because the second man was guarding her in a depression next to the road. The man who was guarding her searched her moon bag for money.

5.3 Suddenly, she heard a gunshot. When the sound of the shot faded, the man who was guarding her ran up the incline on the side of the road, leaving her behind. She also ran up the incline to stop and seek help from the driver of a vehicle which she saw approaching from the direction of Windhoek. Apparently, the driver did not see her and drove on. The two men pursued her to the Toyota pickup where she found her deceased husband. He was on the rear seat of the vehicle with his body slanting diagonally downwards. She called him by his name but the man who had approached her first, informed her that he was dead. Ms Fellinger was forced to sit on the seat next to her dead husband as the first man drove off in the direction of Windhoek. As they proceeded along the road, the driver executed a number of twists and turns so that she eventually lost direction as to where they might be heading. They went through two farm gates and, at the third gate, the driver suddenly stopped. The one who

appeared to her as the older of the two and was later identified by her as the first appellant, instructed her to search the pockets of her dead husband. She was further instructed to disembark from the vehicle so that the first appellant could conduct a body search on her. In her chest pocket he found a small camera, which he removed and placed in his own pocket. The second man took one of the Fellingers' travelling bags, removed some photos and camera accessories and placed Ms Fellinger's clothes into it.

5.4 Ms Fellinger was instructed to enter the vehicle again. She was blindfolded and made to lie on top of the deceased. They drove off and later stopped. She was then taken out of the vehicle and led along a footpath and made to sit down. She could hear them dragging something. After a while they returned and made her enter the vehicle and lie down on the rear seat which she could feel was wet. She could hear them counting money which they had removed from her pocket. It was about €1000. They then demanded the Fellingers' credit and debit cards and the associated PIN numbers. Ms Fellinger could only recall the PIN of her own debit card and not that of the deceased's. Then two or one of them informed her that they were going to drive to the bank to verify the PIN that she had provided and that if it was wrong they were going to kill her.

5.5 The journey to the bank commenced. She felt that the vehicle was gathering speed. She inferred from the exchanges between them

that they had noticed something. The vehicle went faster and faster. Suddenly, it overturned. There was silence and she found herself alone in the vehicle. She disembarked unsteadily and found that she was standing next to the road. A moment later, a German speaking man who introduced himself as Wolfgang Pfeifer stopped by with his vehicle.

5.6 Mr Pfeifer farms at Farm Okariro No. 282 in the Khomas Hochland. When he left his farm to return to Windhoek, he noticed a Toyota vehicle ahead of him on the road. As he was driving behind this vehicle, he became suspicious and tried to stop the vehicle. He drove up next to the vehicle and indicated to the driver to stop but to no avail. He alerted farmers in the vicinity of this vehicle by radio and continued to follow the vehicle until the point where it overturned. When he arrived at the scene, he saw the driver assisting the other male passenger who was bleeding heavily either from his head or shoulder. The two got out of the vehicle and disappeared amongst the bushes. He saw firearms lying outside the passenger door of the overturned Toyota vehicle. Two other vehicles stopped on the scene. One belonged to Dr Burger, who immediately examined Ms Fellinger and was satisfied with her condition. When Ms Fellinger informed them that her husband had been killed and that she had no idea where his corpse had been dumped, Mr Pfeifer said that he had an idea as to where the corpse might be. Mr Pfeifer, Dr Burger and one Schickerling drove back to the place where Mr Pfeifer had first

noticed the vehicle. They stopped 100 metres away and walked on foot and saw tracks leading towards the riverbed. As they advanced they saw blood. They followed the trail of blood and came upon the body of the deceased. Stones were placed on the head of the corpse. Dr Burger removed the stones and examined the body for any life but there was none. They returned to where the vehicle had overturned and there they met the police who had also arrived at the scene. They led the police to the location of the corpse.

5.7 While Mr Pfeifer and others were busy with investigations between the accident scene and where the deceased's body was recovered, the Kambada family, who runs a guest house in the vicinity, were contacted. They arrived on the scene and took Ms Fellinger to their guest house. They arranged for an ambulance to pick up Ms Fellinger. She was taken to the Roman Catholic Hospital where she was examined by Dr Erna de Villiers in the trauma unit of that hospital on the evening of 8 July 2007. After the treatment, she returned to Germany.

5.8 In the course of subsequent investigations of the offences, numerous samples were collected and taken from the Toyota pick-up and the sites relevant to the crimes. Blood and saliva samples were also taken from the appellants for DNA purposes after their arrests. On the analysis of some of the samples, the State contended that the appellants were connected to the crimes.

[6] The court below convicted the appellants, relying in part on the evidence of Ms Fellinger who identified them in court as the persons who had committed the offences described in para 2 supra. Ms Fellinger asserted that the first appellant, was the person who had approached her first and the elder of the two, and that the second appellant was the person whom the first appellant had called to assist him at the scene. They were also convicted on the DNA evidence. The first appellant was further convicted on the evidence of the camera, which was identified by Ms Fellinger as hers. She testified that it had been taken from her by the first appellant. Another witness, Mr Namugongo, testified that he had received the said camera from the first appellant for safekeeping.

[7] The second appellant was further convicted on the evidence of a confession he made in terms of section 217 of the Criminal Procedure Act of 1977 to Chief Inspector Brune on 17 September 2007 and the recorded video that he had made in the presence of Chief Inspector van Zyl on 19 September 2007. The second appellant was further convicted on the evidence of the injuries he had sustained when the vehicle overturned, witnessed by Mr Pfeifer, who had followed the vehicle and stopped on the scene shortly after it had overturned. The evidence of the injuries was confirmed by Ms Nakale, who saw the second appellant shortly after the incident and rendered assistance by warming up water used by the second appellant to clean the wound.

[8] The appellants' quarrel with their convictions is directed at the evidence above.

[9] Mr Namandje, who appeared for the first appellant, submitted that the evidence of Ms Fellinger identifying the first appellant as the person who attacked and killed the deceased was unreliable. He referred us to what can be termed as discrepancies or deficiencies in her evidence, namely, the failure to give her an opportunity to identify the first appellant at an identification parade; the fact that she had seen pictures of the appellants in some newspapers that reported on their arrest and that the reports assisted her to later identify the appellants; the initial uncertainty expressed by her two days after the incident (10 July 2007) as to whether she would be able to identify the suspects and the seemingly contradictory statement made by her during cross-examination (when asked as to how she was able to identify the two accused as the persons present at the scene), that: '… they were wearing no masks and that the incident was blended in her memory she would never forget their faces'; the fact that she told the police officers that the attackers were black men and that, for a white person, it was difficult to distinguish the features of one black man from another. He also pointed out that Ms Fellinger had stated in her written statement to the police that the attacker who was lighter in complexion than the other had been the one who had shot her husband even though the second appellant was actually lighter in complexion than the first appellant; and that in her evidence she had said that the first appellant had a small face and was aggressive, when earlier during cross-examination she had stated that the first appellant had a 'long face'. He also criticised the fact that she could not tell whether the second appellant was wearing a woollen hat or not; she could not describe the first appellant's haircut or hairstyle as he was wearing a balaclava; she could not say anything about the shoes worn

by the appellants; and she could not say which of the two men had a two-way radio. He drew the court's attention to the fact that Ms Fellinger had admitted to the police in Germany that at times she was unsure of whether she would be able to recognise the suspects; that she had admitted that on the day she testified she was brought into court 15 minutes before the court commenced, and therefore had an opportunity to identify an exhibit (a camera) and to look at the appellants; the suggestibility to her by the police that the camera had been found in the possession of the first appellant; and that she had been shown a photo of the first appellant prior to her identification of the suspect.

[10] Mr Namandje referred to the relevant authorities on the reliability of her evidence relating to the appellants' identity, namely: *Charzen and Another v S* 2006 (2) ALL SA 371 (SCA); *S v Haihambo* 2009 (1) NR 176 (HC); *S v Mthetwa* 1972 (3) SA 766 (A). He submitted that no court of law in this country, given our law of evidence on identification, could or would regard the evidence of Ms Fellinger as reliable and that the reasoning of the court below was confusing and unsupportable both in fact and law.

[11] Mr Kwala for the second appellant submitted that the court below misdirected itself when it failed to disallow the inconsistent evidence of the complainant (Ms Fellinger) as an unreliable witness.

[12] On the issue of identifying evidence, the court below accepted the evidence of Ms Fellinger in whole. The court found that all the witnesses who testified were

independent and impartial and, therefore, honest witnesses. Particularly on the issue of identification, the court below stated that:

> 'On the issue of identification, it is common cause that no identification parade was held in order for the witness Elke Fellinger to identify her attacker.
> That being the case, there is still real evidence which was procured in the form of a camera. The complainant herself has identified the camera, as belonging to her; also identifying copies of the photographs that she said were taken in her country, Germany, prior to their arrival in Namibia. This camera was received as real evidence in this Court.'

[13] Mr Namandje argued that in the above statement the court appears to have reasoned that, as there was no identification parade, not much could be said about the reliability of the witness' identification. However, because of the camera, which the first appellant as a matter of fact gave to Mr Namugongo, the Court considered that the identification of the first appellant was strengthened and that it was reliable. Mr Namandje submitted that both the evidence of identification and that of Mr Namugongo is unreliable for purposes of proving beyond reasonable doubt that the first appellant was the person who had attacked and killed the deceased.

[14] It does not appear that Mr Namandje's argument correctly reflects the reasoning of the court below, for as already mentioned, it appears that that court had accepted or attached substantial weight to Ms Fellinger's evidence on the identification of the two appellants. I understand the reasoning of the court below as quoted in the above passage to acknowledge that there was no identification parade conducted, but there was a measure of objective corroboration in other physical evidence that linked the appellants to the commission of the crimes. In

the statement above, the court below mentioned the digital camera as part of the physical evidence that linked the first appellant to the commission of the crimes. Ms Fellinger identified the camera as hers (this evidence was undisputed) and she testified that the camera had been taken from her by the first appellant. Mr Namugongo testified that he had received the said camera from the first appellant for safekeeping. The court below accepted this evidence.

[15] Courts here and elsewhere have stated and restated in numerous cases the approach to evidence of identification and the danger inherent in mistaken identity. See for example, *S v Haihambo* 2009 (1) NR 176 (HC); *S v Malumo and Others 2006 (2) NR 629 (HC); S v Mthetwa, supra*, *S v Matwa* 2002 (2) SACR 350 (E), [2002] 3 ALL SA 715; *Charzen and Another v S, supra*; *S v Mcasa and Another 2005* (1) SACR 388 (SCA*).* The general approach may be said to amount to this:

> 'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.' See *S v Mthetwa, supra*, at 768A-C.

[16] Ms Fellinger testified that her attackers were two black male persons (which was confirmed by Mr Pfeifer) and that she had physical contact, verbal exchanges and eye contact with them. The whole episode, she testified, was engraved in her memory. The attack occurred in an open space and broad daylight. The latter part of the evidence is undisputed. She must have had proper opportunities to observe the assailants. She testified that they were not wearing masks, but that the driver, whom she later identified as the first appellant, had a balaclava pulled down to his hairline. She was not sure whether the second appellant wore a balaclava as well. She could not testify to the assailants' hairstyle or the shoes they were wearing, but she described their clothes and, in that respect, her evidence was corroborated by Mr Pfeifer. She admitted that she had told the police, both here and in Germany, of her doubts that she would be able to identify her assailants. She also readily admitted that, as a white person, she would have difficulties in distinguishing between the complexions of two black men. She further admitted that she had been inside the courtroom to identify the digital camera before the court proceedings commenced on the date that she testified. It is also apparent from the evidence that Ms Fellinger's memory was prompted when she saw the appellants' photographs in the newspapers. Ms Fellinger had also described the first appellant as lighter in complexion than the second appellant in her police statement and yet, when they appeared in court, the second appellant seemed to have a lighter skin tone than the first appellant. She attributed the mistake to the light that had fallen on them and the optical illusion it had created. She also admitted that she had told the police shortly after the incident that she might not be able to identify her assailants but testified that this uncertainty was due to the

shock she was suffering at the time, and that the memories of her assailants had resurfaced after she had returned to Germany.

[17] Ms Fellinger's evidence does not exist in isolation. If it did, it would have raised an unavoidable doubt about the reliability of the identification when one considers the emotional shock from which she admittedly suffered during the incident (*R v T* 1958 (2) SA 676 (AD)). Moreover, the appellants were strangers to her, and she erred when she described the facial characteristics and complexion of the first appellant shortly after her ordeal. It is common cause that the second appellant had the lighter complexion of the two. There is nothing particularly distinctive about the description she gave of the appellants' features and no evidence was led that fitted the first appellant's appearance perfectly. She readily conceded that she had erred and sought to attribute it to other factors. The fact that there are these weaknesses in her evidence; that an identification parade was not held; and that the weight to be attached to the dock-identification had been compromised by the photographs of the appellants which she had earlier seen of them in newspapers should not mean that her evidence regarding the identities of her assailants should be disregarded altogether where it is corroborated in certain respects by other evidence. The decision to acquit or convict an accused is arrived at after a holistic consideration of the evidence presented. See *S v Haihambo, supra,* at 182C-F; *S v Mcasa and Another, supra,* at 390f; *S v Matwa, supra,* at 355i-356g; *S v van der Meyden* 1999 (1) SACR 447 (W), 1999 (2) SA 79 (W) at 450a-d (SACR), 82C-E (SA).

[18] In *S v Haihambo*, the Court held that dock identification *per se* is not inadmissible, and that the weight a court should attach to such identification depends on the circumstances of each case. In *S v Matwa*, *supra,* which was referred to with approval in *S v Haihambo* at 355i-356g, it is stated as follows:

> '… the question in issue is not the admissibility of the dock identification but the evidential value to be placed thereon. Where a witness identifies an accused in the dock, it forms part of the evidential matter upon which the case must be decided and I see no reason in principle to exclude it solely due to it having been done in court. In many, if not the majority, of cases coming before our courts, the first occasion a witness has to identify the offender is when he or she gives evidence. The admissibility or otherwise of evidence cannot be determined by having regard to the degree of seriousness of the offence upon which an accused is tried, and it is wholly impractical to suggest that the police should, for example, be obliged to hold an identification parade for the material witnesses to attend in each and every minor case of disputed identity in order to render their identification of the accused admissible at a subsequent trial (*cf* May Criminal Evidence 4th ed at 372).
>
> Notwithstanding the dangers attendant thereon, I therefore do not see why a dock identification should be ignored or that it should be regarded as being inadmissible. Interestingly, the position in England appears to be that evidence of a dock identification is legally admissible, although there is a discretion for it to be excluded if the prejudicial effect of the evidence outweighs its probative value (see *May* (*op cit* at 371)). Similarly, in my view, a dock identification is admissible in this country, although the weight which is to be afforded thereto will vary depending upon all the circumstances. A spontaneous identification made by a witness may possibly carry more weight than a case where the prosecutor specifically asks the witness whether the person in the dock is the person who committed the deed. And the evidence of a witness who had but a fleeting glance of an unknown perpetrator in poor conditions of visibility a long time before testifying will, of course, have little, if any, probative value, whereas the evidence of a close friend of the accused in respect of a protracted incident which occurred in conditions of perfect visibility a relatively short time before, may be thoroughly convincing (in this latter scenario, it would, for example, hardly matter that the identifying witness had

> not had the opportunity of identifying the accused again before testifying). No fixed rules can be laid down. In each and every case the judicial officer must decide upon what weight, if any, is to be afforded to the dock identification, regard being had to all the material circumstances - including those prevailing when the initial observation took place as well as those under which the identification in court is made. But to exclude evidence of identity as inadmissible purely on the basis of it being tendered in the presence of the accused in the dock, is, in my respectful view, incorrect.'

[19] In *S v van der Meyden, supra,* at 449g and 450a SACR Nugent J put it thus:

> '… A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. … What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[20] It is with these comments in mind that I turn to consider the evidence related to identification. For unexplained reasons, no identification parade was held at which Ms Fellinger could have been asked to identify the appellants. The photos that were allegedly forwarded to Ms Fellinger to identify the appellants never reached her. In addition, they were of the appellants only, thereby defeating the methodology and purpose of a photo identification. The investigation called for an identification parade once Ms Fellinger was available for the exercise and, in my opinion, it could have been held even shortly before she was required to testify. At the very least, a photo identification should have been conducted.

[21] The failure to hold an identification parade, which appears to have been influenced by the apparent weight of other physical evidence garnered against the appellants, bears the unmistakable hallmark of slovenly police work. It is not for the police to think that they have garnered enough evidence; their role is to pursue every reasonable evidential link against a suspect during an investigation.

[22] Nevertheless, in the light of the comments set out above, the fact that a parade was not held, or that Ms Fellinger was influenced by the photographs of the appellants in the newspapers, does not seem to me to justify the exclusion of her identification of the appellants from the evidential material that the court below was called upon to take into account. It must be remembered that the case against the appellants did not rest solely upon the identification evidence of Ms Fellinger. As mentioned before, it was bolstered by the evidence of Mr Namugongo regarding the camera he had received from the first appellant, which Ms Fellinger later identified as the one that the first appellant had coercively taken from her at the crime scene. That evidence alone undoubtedly connected the first appellant to the crimes committed on Ms Fellinger and her deceased husband. It is in this context that the court below made the finding quoted in paragraph [12] above, which counsel for the first appellant has criticised as confusing and unsupportable both in fact and law. In *S v Charzen and Another,* above, the South African Supreme Court of Appeal reversed the conviction based solely on the identification evidence of the single testimony of the complainant. It justified its conclusion in para 19:

> '[19] This is inevitable, mainly because the only evidence the State called about the robbery was the single testimony of the complainant. There was no physical evidence: not a fingerprint, not a recovered cellphone, nor wallet, nor purse, nor baby seat, nothing to connect the accused to the crime and thus to provide a measure of objective assurance against the pitfalls of subjective identification. The greatest assurance of guilt must lie in such evidence, rather than in identification on its own, which, as this case shows, can be beset by error and misdescription and doubt in which case possibly and even presumably guilty persons must walk free.'

[23] A submission was made by counsel for the appellants that Mr Namugongo is a confessed liar and that his evidence was unreliable. This submission has no substance. Mr Namugongo explained in substantial detail when and how he received the camera from the first appellant and why he had initially denied to the police having ever received a camera from the first appellant. He testified that, when he realised that the case was serious and that he might be arrested, he disclosed in private to Sergeant Ndikoma that he had indeed received a camera from the first appellant. He called Constable Ashipala and informed him that he had received a camera from 'Mufana' (a nickname of the first appellant) and that it was with Ms Aletta Namugongo where it could be collected. There is no reason why he would have implicated his childhood friend, the first appellant, had he received the camera from someone else. He was not a suspect in the case. When the police approached him they asked him whether he had recently bought or sold a camera. He was asked whether he owned a camera and he informed them that he owned two. He was requested to produce the cameras, which he did, but neither was related to the investigation. It was only when he was informed that the first appellant was linked to the crimes under investigation that the seriousness of the matter and the significance of the chain of evidence relating to the camera

dawned on him. Although the reasons why he initially denied having received a camera from the first appellant remain undisclosed, there is a real possibility that he wanted to protect his friend, the first appellant, until he realised the seriousness of the matter and that his shielding of the first appellant could be at the expense of his arrest and incarceration. It was only then that he opened up to the police. This inference is all the more plausible if regard is had to the testimony of Constable Ashipala, who stated that Mr Namugongo had informed him during a telephone conversation that 'Mufana' had warned Mr Namugongo not to say anything to the police.

[24] Alternatively, the appellants' counsel submits that even if it were to be found that the first appellant had indeed given the camera to Mr Namugongo, such a finding by itself does not place him at the scene of the crime and that it cannot constitute proof that he committed the offences because of the possibility that the camera was passed from person to person. In the absence of any evidence by the appellants that they or either one of them received the camera from a person other than Ms Fellinger, this contention is pure speculation. The evidence presented is that the first appellant removed the camera from Ms Fellinger's pocket at the crime scene and placed it in his pocket. Mr Namugongo received it from the first appellant. He, in turn, lent it to his cousin, Ms Aletta Namugongo, who was at the time in the north of Namibia. In the presence of Mr Namugongo at the police station in Windhoek, Constable Alfonso and Sergeant Ndikoma phoned Sergeant Ashipala, who is stationed in northern Namibia. After Mr Namugongo had been given an opportunity to speak to him, they requested that Sgt Ashipala collect the camera from Ms Aletta Namugongo and send it to them in Windhoek. Constable

Ashipala and Constable Shiweda proceeded to the house of Mr Werner Namugongo at Oshigambo. They found Mr Werner Namugongo and Ms Aletta Namugongo at the house. After they had informed them of the reason for their presence, Ms Namugongo gave them the camera, which they took and handed over to the Unit Commander at Ondangwa. Chief Inspector Unandapo later collected the camera from him in Ondangwa. In the absence of any evidence to the contrary, the first appellant is embroiled in the web of that evidence and an inference of his guilt was quite justifiable.

[25] This brings me to the other physical evidence on which the court below convicted the appellants, the DNA (deoxyribonucleic acid) evidence. DNA, as I understand the expert evidence, is a nucleic acid found in all living things that contain genetic patterns unique to each individual thing or person. Also found in the blood, saliva and tissue of human beings, samples thereof subjected to a process of scientific analysis may be used comparatively for purposes of identification – also known as ‘genetic fingerprinting’. The analytical results of samples in this case reveal that the second appellant was the depositor of the genetic material found on a rock (stone) collected at the scene where the vehicle had overturned. More specifically: Ø 5 soil sample (exhibit 15) and Ø11 a swab (exhibit 13) matched the blood on FTA card (K4-1), which had been collected from the second appellant and was a known reference sample bearing the name ‘Paulus Kamati’. The DNA result is coupled to certain statistical values, in this instance, the chance that a randomly selected individual, unrelated to the donor of K4-1 (second appellant), would coincidentally share this profile is estimated to be 1 in 92 billion based on the African American population database.

[26] Counsel for the second appellant made general submissions that the police did not comply with the standing operation procedures in the handling, seizure and disposal of DNA exhibits. It is not for this court to second guess what procedures or police manuals were or were not complied with, these should have formed part of the evidence or exhibits received in the court below for this court to properly consider the alleged non-compliance. This is more the case because the evidence tends to show that the DNA analysis and the testing processes, including the chain of custody and control measures applied, were executed and the results therefrom recorded with sufficient care. These processes constitute the chain by which the appellants are anchored to the commission of the crimes in question. See *S v Maqhina* 2001 (1) SACR 241 (T) and *S v Phiri* 2008 (2) SACR 21 (T). I find counsel's attack on the reliability of that chain of evidence to be without substance.

One of the criticisms advanced was that the control measures applied to the DNA samples relating to the first appellant followed a different protocol from the measures applied to the samples linking the second appellant to the crimes. The samples related to the second appellant were identified, amongst other means, by his name, while those relating to the first appellant did not bear his name. Marlene Swartz, a Chief Forensic Scientist at the National Forensic Science Institute (NFSI), testified that the Institute did not use names but, instead, preferred to use letters and numbers as a means of referencing. Counsel for the first appellant took issue with that protocol. He argued that the donor to the control sample K3-1 (the eventual reference number of a saliva swab allegedly taken from the first appellant at the NFSI) was unknown and that the court below was wrong to find that K3-1

was collected from the first appellant by Ms Swartz at the NFSI. In support of that proposition, counsel argued that Ms Swartz did not know the identity of the donor of the saliva on the swab. Chief Inspector Louw, he claims, must have informed her that the donor of the saliva was the first appellant. Because Chief Inspector Louw did not testify to that effect, counsel contended that Ms Swartz' evidence should be disregarded as inadmissible hearsay on that point. Counsel further submitted that K3-1 might have been a saliva swab from the first appellant but that the evidence collapsed if regard is had to the evidence of Mr Jason Nicolas Moore, the forensic DNA analyst who did the analysis of K3-1. Mr Moore conceded that there was no name linked to the swab and that he did not know the identity of the donor of K3-1. I have difficulties appreciating this last submission. In my view, it follows logically that, if the sample was not marked with the donor's name when taken but was identified using a different protocol, it follows that individuals further along the evidential chain involved in its analysis, such as Mr Moore in this instance, would not necessarily be aware of the identity of the donor. For this reason, it was futile to seek that information from him in cross-examination. In my opinion, if the evidence established by any other means of referencing the control sample K3-1 had been collected from the first appellant, *cadit quaestio*: it matters not if his name was included as part of the referencing protocol or not. With this in mind, I now turn to examine the individual links in the chain of objective evidence on which the Prosecution relies to tie the first appellant to the commission of the crimes. In doing so, I shall almost exclusively focus on the allegation that DNA on a shirt found at the scene of the crime genetically matched that on a swab taken of the first appellant's saliva. To avoid confusion, I shall also refer to exhibits by their forensic exhibit numbers and, where the need arises to distinguish between those

numbers and the numbers or letters of exhibits received in evidence during the trial, refer to the latter as ‘court exhibits’ marked with a particular letter or number.

[27] Chief Inspector Marius Louw, commander of the Windhoek Crime Investigation Unit, arrived at the scene of the crime on the evening of 8 July 2007, almost within the hour after it had been reported. On his way to the scene he met up with two officers of the Serious Crime Unit, Sgt Alfonso and the investigating officer, Sgt Hilundwa. They first visited the scene where the white Toyota vehicle had overturned and from there proceeded to the riverbed where the body of the late Mr Fellinger had been dumped by those who had murdered him. Once there, they waited for a forensic team of the NFSI led by Dr Ludik. After their arrival, the forensic team picked up a number of items that they believed could be relevant to the investigation, sealed these in plastic bags and gave the exhibits to Chief Inspector Louw. Sergeant Alfonso testified that besides those exhibits collected from the scene of the crime which he had earlier received from Chief Inspector Louw, he was also involved at a later stage in the handling of a blood sample and saliva swab of the first appellant, a camera and a rucksack. He explained that on 8 August 2007, he took the first appellant to the late Dr Shangula who drew a vial of blood from him (the first appellant) and sealed it in his presence. Sgt Alfonso marked it as exhibit ‘A’. By then, he was also in possession of a saliva swab (which he marked as exhibit ‘B’) taken from the first appellant two days earlier by Ms Swartz at the NFSI as well as a Kodak Easy File camera and a rucksack (exhibit ‘E’). He took all these exhibits later the same day to the NFSI, where he handed them to Ms Swartz. I interpose to mention that exhibit ‘G’ in court (a form recording the exhibits submitted by him at the NSFI) shows that a dark green

jacket and a short pair of trousers (which Sgt Alfonso had marked as exhibits ‘C’ and ‘D’ respectively) were also submitted together with the other four items to the NFSI although Sgt Alfonso did not mention them in his evidence-in-chief. Under the heading ‘Reasons for submitting exhibits for examination’ of exhibit ‘G’, Sgt Alfonso recorded the following: ‘It is therefore requested that examination is required to determine whether exhibits “A” and “B” (blood and saliva) is of the suspect and “C” “D” “E” belongs to the victims (complainants).’

[28] Ms Swartz confirmed that she had personally taken the saliva swab from the first appellant in compliance with the police regulations a day or two before Dr Shangula took the blood sample from the first appellant. She sealed the swab in a bag numbered NFB05253 in the presence of the first appellant and gave it to Sergeant Alfonso. He kept the sealed saliva swab of the first appellant in safe custody and, after he had marked it as exhibit ‘B’, returned it on 8 August 2007 to the NFSI together with the blood sample taken by Dr Shangula from the first appellant (exhibit ‘A’) and the other items which I have mentioned earlier. All these items together with other exhibits received on 2 August 2007 from Detective Constable Sisamu were duly sealed in individual bags (including exhibit 7 sealed in bag NFE03233) and kept in safe custody by the NFSI. They were later collectively sent to BCIT Forensic Laboratories in Canada by courier in another sealed bag numbered NFE-02357. In his report, Dr Hildebrand of BCIT Forensic Laboratories recorded having received the said bag with exhibits from Ms Swartz on 11 March 2008. The BCIT Forensic Laboratories renumbered the exhibits for purposes of their analyses. For example, the saliva swab in bag NFB05253 (exhibit ‘B’) was renumbered as ‘K3’ and a piece of cloth in bag NFE03233 (exhibit

7) was divided into a number of cloth swatches; the fifth of these was renumbered as ‘Q4’ and results yielded therefrom. The link in the chain of custody demonstrates clearly that D201-K3: swab (NFB05253) was the saliva swab collected from the first appellant. The first appellant is linked to the crimes because Ø4-1, a swatch cloth that was cut from a jacket found on the scene, yielded sufficient human DNA to proceed with STR (Short Tandem Repeat) analysis. The results yielded a mixed profile from at least two individuals (at least one of which was male). The donor of sample K3-1 could not be excluded as the major contributor to the mixture reported for sample Ø4-1. Male 1 (the deceased) and male 2 (the second appellant) were excluded as contributors to that mixture.

[29] Counsel for the first appellant argued that both Mr Moore and Dr Hildebrand conceded during cross-examination that they had no knowledge whether Ø4-1 was a cloth swatch and that Mr Moore could not answer the question of whether Ø4-1 was collected from the scene of the crime, nor answer the question regarding the colour of the cloth. In my opinion, both Mr Moore and Dr Hildebrand were not the witnesses who were expected to inform the court whether Ø4-1 was picked up from the scene or was cut from a garment found on the scene, and it is unfair to have expected them to remember the colour of a piece of cloth. The questions were irrelevant in relation to what was requested from them by the NFSI. The record shows that Ø4-1 was taken from the garment depicted on photograph 20 of volume 1 of the exhibits received in court and it is clearly marked exhibit ‘7(5)’. The argument that they both had no knowledge as to who handled the cloth has no substance. The evidence is that the parcels from the NFSI were addressed to Dr Hildebrand who would then collect them or arrange for them to be

collected by one of her colleagues on her behalf. The parcels were opened and Dr Hildebrand's colleagues, Messrs Moore and Hartsen, conducted the actual scientific analysis of the samples. Dr Hildebrand compiled the reports from their analysis but they reviewed each other's work. The record also shows that Ø4-1 was forwarded to Canada, where it was received, analysed and the results therefrom were recorded. K3-1 and Ø4-1 matched, and the first appellant's guilt is therefore inescapable.

[30] This brings me to the other evidence the second appellant was convicted on or should have been convicted on. Elina Nakale testified that she resided at 2547 Monte Christo Road, Havana location in the Katutura suburb. She knew the second appellant; he is a friend to her boyfriend. On a date that she thought could be between 10–20 July 2007, a Monday, the second appellant arrived at her place at 10h00 in the morning. He had covered his head with a jacket. The second appellant asked her to pay the taxi driver who was waiting outside for him. She walked out and paid the taxi driver N$6. She returned to the house and found the second appellant seated on the bed. The appellant requested her to boil water. He informed her that he was involved in an accident. She enquired how the accident happened. The appellant informed her that he had fallen from a bicycle he was riding and that he had been almost overrun by a vehicle. She warmed water for him and he started cleaning the wound. The wound was on the head. The wound and the head as a whole and the cheek were full of grass and fluffs. The wound was bleeding and it appeared as if the eye closest to the wound was weeping. When she saw him again in the afternoon, he still covered his head with a jacket. He gave her N$100 from which she deducted the N$6 she had paid for him earlier

on. Ms Nakale's testimony is consistent with the evidence of Mr Pfeifer. It will be recalled that Mr Pfeifer was returning to Windhoek from his farm in the Khomas Hochland. He noticed a Toyota double cab vehicle (the subject matter of the robbery count in para [2]) on the road. He became suspicious of that vehicle and gave chase to stop the vehicle but he could not do so. The vehicle went faster and faster, and at one point the driver attempted to force Mr Pfeifer off the road when he came level with the vehicle. He realised it could be dangerous to stop the vehicle. He drove behind the vehicle until he reached the location where the vehicle had overturned. When he stopped at the scene, he saw the driver of that vehicle assisting the passenger from the vehicle, and also saw that the passenger was injured and bleeding from the head or shoulder.

[31] Ms Fransina Beredy, a nurse at Ruacana Clinic, testified that on 8 August 2007, she treated a patient who gave his name as Paulus Iita. Ms Beredy was unable to identify the second appellant in court. However, when the second appellant was arrested, Sergeant Hilundwa and Chief Inspector Unandapo testified that they found a health passport in his possession in the name of Paulus Iita. Ms Beredy identified the handwriting and the signature on the document as hers. Why would the second appellant have sought treatment, firstly, in Ruacana when it appears that he was injured in the Windhoek district, and secondly, under a false name? The conclusion is inescapable that he was covering his tracks following the incident.

[32] The second appellant also confided in his former girlfriend, Ms Josephine Tuliikeni Nashiluwa, that he and his friend had gone to a certain place where they

had met two white persons and taken a vehicle from them. The vehicle overturned and he sustained the injuries on his face.

[33] The second appellant further confessed to Chief Inspector Derek Brune on 17 September 2007 to his involvement in the crimes in question and made a pointing out to Chief Inspector van Zyl on 19 September 2007. The admissibility of the confession and the pointing out was contested in the court below by the second appellant on two grounds, namely:

1. that the recording did not comply with the requirements of s 217 of the Criminal Procedure Act on the basis that it was not freely and voluntarily made but obtained through unconstitutional means, namely the physical assault of the second appellant; and/or

2. that the second appellant's right to legal representation was violated.

At the end of the trial-within-a-trial in which the second appellant did not testify, the court below ruled that the confession and the pointing out were admissible, especially because they were consistent with the evidence of Ms Fellinger.

[34] The two grounds upon which the admissibility of the evidence relating to the alleged confession and pointing out was challenged were repeated with greater fervour in this court. It was argued that the court below misdirected itself when it failed to disallow the evidence of the confession and the pointing out, which the second appellant did not repeat under oath. This argument cannot be supported. A

disputed confession is not only admissible when repeated under oath by an accused. Where the voluntariness of a confession is disputed, as was the case in this matter, a trial-within-a-trial ensues to determine the admissibility of the confession. When found to meet the requirements of s 217(1) of the Criminal Procedure Act, it is admitted, if not, it is excluded.

[35] Section 217(1)(*a*) reads as follows:

> **'217. Admissibility of confession by accused-**
>
> (1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such at criminal proceedings relating to such offence: Provided-
>
> (a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice.'

[36] Section 209 of the Criminal Procedure Act requires a confession to be confirmed by evidence outside of the confession that corroborates it in some material respect (*R v Blyth* 1940 AD 355 at 364) or furnishing evidence aliunde of the commission of the offence. Section 209 provides:

‘209. Conviction may follow on confession by accused-

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.’

[37] In *S v Mcasa and Another, supra,* the South African Supreme Court of Appeal at 394c-d stated:

‘… after ensuring that the person who wishes to make a statement is in his or her sound and sober senses and wishes to make the statement freely and voluntarily without having been unduly influenced thereto, the taking of the statement can be proceeded with. The caveat to consider at all times is of course that the person wishing to make a statement has to be apprised before of his or her rights, and most importantly the right to remain silent.’

[38] The circumstances that led to the taking of the confession and the pointing out are set out briefly as follows:

38.1 The second appellant was arrested on 14 September 2007. In the warning statement received as exhibit ‘DD’, he was warned of his right to legal representation but indicated that ‘I will think as to what to do’ and chose to remain silent. He also chose to answer some questions although he refused to answer questions relating to who was with him on 8 July 2007, the place where he fell from the bicycle, and the owner of the said bicycle.

38.2 He appeared in court on 17 September 2007 escorted by Sergeant Hilundwa, Chief Inspector Unandapo, and other police officers. He indicated to the court that he wished to be represented and assisted to apply for legal aid. After court, he was escorted to Windhoek Police Station and while Sergeant Hilundwa and others were waiting for Chief Inspector Unandapo, the second appellant approached Sergeant Hilundwa and started informing him of his knowledge of the crimes.

38.3 When it appeared to Sergeant Hilundwa that he was confessing to the crimes against him, he referred the second appellant to Chief Inspector Unandapo.

38.4 Chief Inspector Unandapo took the second appellant to his office where he listened to his version, upon which he concluded that he was confessing to the crimes in question and he enquired from him whether he was prepared to confess and point out the scene of crime, to which he answered in the positive.

38.5 As a result of that conversation, Chief Inspector Unandapo contacted Chief Inspectors Derek Brune and van Zyl and requested Chief Inspector Brune to take a confession from the second appellant and Chief Inspector van Zyl to conduct a pointing out. They both obliged.

38.6 Chief Inspector Brune took down the confession at 14h10 the same day that the second appellant first appeared in court. The pointing out was done two days thereafter, on 19 September 2007.

38.7 The second appellant, as earlier stated, did not testify in the trial-within-a-trial but testified in the main trial. He denied approaching Sergeant Hilundwa.

38.8 His version is that after he had attended court on 17 September 2007, he was taken to Chief Inspector Unandapo's office where the Chief Inspector excused the other police officers so that only he remained with the second appellant. He started questioning the second appellant about the incident, involvement in which the second appellant denied. At one point the Chief Inspector left the office and Sergeant Hilundwa came in. The Sergeant urged the second appellant to confess otherwise the Chief Inspector was going to kill him. When the Chief Inspector returned, he brought chains with him. He undressed and chained the second appellant and started beating him. He beat him with his knees, feet, fists and even with an iron bar. During the beating, the second appellant fell all over the office. In his own words he said: '… he just came then undress me and beating me like he was beating a lion.' He was bleeding from the mouth and nose. The Chief Inspector left the office again, and when he returned he brought a wet cloth that he used to wipe off the second appellant. It is not clear what was wiped off. There was blood

all over the Chief Inspector's office. In summary, the beating was so severe that even at the time of the hearing of this case, the second appellant still had pain in the ribs. After this beating, Sergeant Hilundwa took him to the toilet. On their way back they met Chief Inspector Unandapo in the corridor with another set of chains, as the chains he was tied with during the assault had been removed. The Chief Inspector told Sergeant Hilundwa to leave. He informed the second appellant that he would have to accept his orders otherwise the assault would continue. The second appellant still denied knowledge of the crimes. The Chief Inspector then said to him that he was going to tell him something, that the second appellant should remember what he was going to tell him, and that afterwards the second appellant would be taken to other people where he should repeat to them exactly what the Chief Inspector had told him. At that point, they left Chief Inspector Unandapo's office.

38.9 Chief Inspector Unandapo took the second appellant to another office, which appears to be that of Chief Inspector Derek Brune. It was at this point that he realised that he must comply with Chief Inspector Unandpo's orders as the beating was hurtful.

38.10 The second appellant regurgitated to Chief Inspector Brune every detail Chief Inspector Unandapo had told him. The second appellant admits that he was informed about his rights to legal representation but says that he informed Chief Inspector Brune that he had already

applied for legal aid, and that he needed a lawyer before he made the confession.

38.11 After the confession, the second appellant was taken to the airport (Hosea Kutako International) Police Station where he was kept for the night. The next day (18 September 2007), Chief Inspector Unandapo collected the second appellant from the Police Station and took him to the scene of the crime where he pointed out certain points to him which he was told he should point out to the people who would take him to the scene the next day. He was taken back to the airport police station. The next morning (19 September 2007), Sergeant Hilundwa went to fetch the second appellant and he was taken to Chief Inspector Unandapo. Chief Inspector Unandapo informed him that he was going to take him to some people and he must take them to the scene of the crime but he must never tell them that he was taken there the previous day. To cut a long story short, the second appellant was taken to Chief Inspector van Zyl and they eventually proceeded to the scene of crime. The vehicle in front stopped at every location that needed to be pointed out, at which the appellant would be asked whether he could remember that particular place. The second appellant also admitted that Chief Inspector van Zyl explained to him his rights to remain silent and to legal representation. The second appellant said that he informed the Chief Inspector that he needed a legal representative.

[39] I deal with the assault allegations first, as I do not intend to canvass the point in any great detail. The court below rejected the assault allegations and in my opinion it did so correctly. During the trial-within-a-trial, the only part of the second appellant's version that was put to the witnesses called by the State was that the second appellant was not kept at the Windhoek Central Prison, as had been ordered by the district court, but was taken to the Hosea Kutako Police Station and Dordabis with the sole purpose of assaulting and unduly influencing him to confess and make the pointing out. Counsel attempted to prove that point by handing up a document or a detention warrant dated 22 September 2007 to refute the accounts of Sergeant Hilundwa and Chief Inspector Unandapo, who denied that they had any knowledge that the second appellant was kept at the airport police station or at Dordabis. The court below held that in the light of the fact that the second appellant was taken to Dordabis Police Station on 22 September 2007, the assault - if ever it occurred - could not have influenced the confession and the pointing out which were executed prior to the date of 22 September 2007. The court below could at that stage also reject the allegations because the second appellant had not testified during the trial-within-a-trial, and had failed to put to the State witnesses the details of the alleged assault through his counsel, except for the terse or general statement that he was assaulted or unduly influenced to confess and make the pointing out.

[40] When the second appellant testified in the main trial, his version that he was assaulted in Windhoek in the office of Chief Inspector Unandapo differed from what was put to the State witnesses earlier. The assault version, in actual fact the whole version, is fraught with extreme improbabilities. It is extremely improbable

that the second appellant would have been assaulted in the manner he testified, that he was bleeding from the mouth and nose, and that Chief Inspector Unandapo's office was covered in blood. Had that been the case, his clothes would have been soaked in blood or have had some blood on them, and Chief Inspector Brune would have noticed that he had been freshly assaulted. It is also extremely improbable that following court he was interrogated, assaulted, forced to clean the blood from Chief Inspector Unandapo's office, as he testified, and had a seven page confession dictated to him before it was taken down at 14h10. The Windhoek District Court's record of 17 September 2007 shows that the second appellant was in Court between 09h17 and 09h19. He was taken to apply for legal aid and then taken to the Windhoek Police Station. If he was helped immediately by the clerk of court, he should have been at the police station between 10h00 and 11h00, otherwise later. I am therefore satisfied beyond reasonable doubt that the second appellant was not assaulted as he alleged.

[41] I now turn to the second challenge concerning the alleged unconstitutionality of the confession and pointing out. It was argued that the confession and the pointing out were unconstitutional in terms of Article 12 of the Namibian Constitution for the reason that they were obtained from the second appellant after he had already indicated when he appeared in court that he required legal representation. Counsel made reference to various authorities on the right to legal representation and unlawfully obtained evidence, such as *S v Shikunga and Another* 1997 NR 156 (SC); *S v Kau and Others* 1995 NR 1 (SC); *Mwilima and Others v Government of the Republic of Namibia and Othes* 2001 NR 307 (HC); *S v Marx and Another* 1996 (2) SACR 140 (W); *S v Melani and Others*

1996 (1) SACR 335 (E); *Miranda v Arizona* 348 US 436-474 (1996); *S v Minnies and Another* 1991 (3) SA 364 (NmHC) and others.

[42] The question concerns circumstances where an accused has been fully appraised of his right to legal representation at the time of his arrest and at his subsequent appearance in court, and has indicated that he requires legal representation. In those circumstances, would the subsequent obtaining of a confession and/or a pointing out from him, at his own request to reveal the truth, impeach the admissibility of the confession or pointing out in the accused's subsequent criminal trial?

[43] The answer to this question depends to a large extent on whether the accused has been informed of his or her constitutional entitlements in connection to the specific procedure (confession or pointing out) and it is clear that he knowingly chose to proceed to make the confession or the pointing out without his lawyer.

[44] Article 12 of the Constitution of the Republic of Namibia is clearly decisive in that regard. Article 12(1) makes provision for various constitutional entitlements, which, *inter alia,* are:

> '(1)(a) … , all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: ….;
>
> (b) …

(c) …

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, …;

(e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.

(f) No persons shall be compelled to give testimony against themselves or their spouses…"

[45] The only exceptional cases relating to the right to be informed regarding legal representation concern lawyers, the educated and those knowledgeable of the said right. See *S v Kau and Others, supra,* at 7*; S v Bruwer* 1993 NR 219 (HC) at 223C-D; 1993 (2) SACR 306 (Nm) at 309b.

[46] The purpose of the right to legal representation is characterised as follows in the South African case of *S v Melani and Others, supra,* at 348i-249d, referred to at length in *S v Marx and Another* 1996 (2) SACR 140 (W) at 145f-146a and 148a-h:

> 'The purpose of the right to counsel and its corollary to be informed of that right embodied in s 25(1)(c) is thus to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty. Sections 25(2) and 25(3) of the Constitution make it abundantly clear that this protection exists from the inception of the criminal process, that is on arrest, until its culmination up to and during the trial itself. This protection has nothing to do with a need to ensure the reliability of evidence adduced at the trial. It has

everything to do with the need to ensure that an accused is treated fairly in the entire criminal process…. Recognition of this purpose or meaning of s 25(1)(*c*) of the Constitution and its counterparts in ss 25(2) and 25(3), has important consequences as far as the admissibility of evidence obtained in breach of these provisions is concerned. The original value served by the exclusion of involuntary admissions or confessions as evidence in a criminal trial was the removal of the potential unreliability of that evidence. Evidence obtained in breach of the fundamental rights embodied in the specific provisions of ss 25(1), 25(2) and 25(3), already referred to, may well have been obtained voluntarily and be perfectly reliable but the rationale for its exclusion will lie in preserving the fairness of the criminal justice system as a whole and not only with the fairness of the actual trial itself.'

[47] The judgment continues as follows at 350d-g:

'Section 25(1)(*c*) of the Constitution contains no absolute prohibition on questioning an accused or obtaining a statement from an accused or having things pointed out by an accused, without the accused being legally represented. But this can only be done if it is clear that the accused waived his right to consult with his lawyer. A right can only validly be waived if the person who abandons the right knows and understands what he or she is abandoning. In the case of accused 1 and 2 they were apparently informed upon their arrest of their right to legal representation. What this meant and in what sense it was understood by the accused has not been established. When accused No 2 eventually allegedly made his pointing out it was some five days after his arrest and he had in the meantime indicated that he required legal representation. Under those circumstances, I think, he ought to have been informed again of his right to legal representation and that this right included the right to consult his lawyer.'

[48] In *S v Kau and Others, supra,* at 9b, this court per Dumbutshena AJA stated:

‘More often than not indigent accused are rushed to courts because the police have obtained confessions before going to Court. It may be there that the unfair trial started.’

[49] In *S v Melani and Others, supra,* at 347g-i, it is stated as follows:

‘The failure to recognise the importance of informing an accused of his right to consult with a legal adviser during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor, of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness which now informs the right to a fair trial in this country, but also the right to equality before the law. Lack of education, ignorance and poverty will probably result in the underprivileged sections of the community having to bear the brunt of not recognising the right to be informed of the right to consultation with a lawyer.’

[50] In *S v Nombewu* 1996 (2) SACR 396 (E), Erasmus J echoed the sentiments in *S v Melani and Others, supra,* when at 421d-h, he stated:

‘I may mention that this view accords with that expressed in Edward W Cleary (gen ed) *McCormick on Evidence* 3rd ed at 391-2 s 152, namely that the failure on the part of the police to give a person a required warning cannot be 'cured' by the evidence that the suspect was already aware of the substance of the omitted warnings. Our Courts take the opposite view when it comes to irregularities in the proceedings. In a case concerning the failure of a magistrate to advise the accused of his right to legal representation at proceedings in terms of s 119 of the Criminal Procedure Act (*S v Mabaso* (supra)), Hoexter JA stated as follows (at 204D-F):

> 'Whether or not an irregularity has been committed will always hinge upon the peculiar facts of the case; and it need hardly be said that much depends upon the extent of the accused's own knowledge of his rights. *S v Luwane* 1966 (2) SA 433 (A) dealt with the duty of a judicial officer to

> explain to a witness his privilege in relation to self-incrimination. Bearing in mind that distinction, the following observations of Ogilvie Thompson JA (at 440G-H) are nevertheless pertinent also to the duty of a judicial officer to inform an unrepresented accused of his right to representation. Having stressed that the practice of warning a witness against self-incrimination was a well-established one, the learned Judge of Appeal expressed the view that the duty so resting upon a judicial officer was not
>
> > ". . . an absolute duty in the sense that its non-observance will always and inevitably render the witnesses' incriminating statement inadmissible against him in subsequent proceedings. For example, a trained lawyer giving evidence could hardly legitimately complain that he had received no caution, even though a conscientious judicial officer might nevertheless elect to administer a caution even to such a witness.'"

[51] Section 25(1)(*c*) of the Interim Constitution of the Republic of South Africa and section 35(1)(*c*) of the Final Constitution of South Africa are the equivalent of Article 12(f) of the Namibian Constitution and the position of the law as articulated in the *S v Melanie* and *S v Nombewu* cases above applies, in my opinion, with equal force in Namibia. The fact that the second appellant had indicated at the time of his arrest and at his first appearance in court that he wanted to remain silent and/or he desired a legal representative (and was actually assisted to apply for one through legal aid) did not preclude the police from obtaining a confession or a pointing out from the second appellant in circumstances where he voluntarily indicated his willingness to tell the truth.

[52] In *Miranda v Arizona, supra,* the Supreme Court of the United States had this to say:

> ‘In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntary without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.’

[53] The authorities above correctly articulate the position of our law on confessions and pointings out. In the circumstances of this case, where the appellant voluntarily indicated his readiness to offer a confession and pointing out, the police’s obligation was to warn him again of his right to legal representation, which they did, and ensure that if he vacated his right to legal representation, he knew and understood what he was doing. The latter is a question of fact and has to be established.

[54] It is common cause that before the confession was taken down and the pointing out made, the second appellant was informed of his right to legal representation. The challenge lies in the fact that, as regards the confession, in answer to the question contained in the standard form as to whether the second appellant ‘wanted to obtain legal representation’, his reply was ‘yes’ which was crossed out and a ‘No, I don’t want a lawyer’ answer was recorded. In relation to the pointing out, in answer to the same question also contained in the standard

form but phrased slightly differently as ‘Do you want a legal representative?’, the reply recorded is ‘I already applied.’

[55] Counsel for the second appellant argued that once the second appellant had indicated that he had already applied for legal aid, it meant he desired legal representation in the two procedures and interrogation should have been stopped there and then. We were referred to a number of authorities and I might perhaps usefully refer to two. One is *Miranda v Arizona, supra*, where the Supreme Court of the United States held that once an accused indicates that he wishes to consult a lawyer, no questioning may take place, until an attorney is present. The other is *S v Minnies and Another, supra,* where it was held, *inter alia,* that Article 12(1)(*f*) of the Namibian Constitution is peremptory in its terms. That Article provides that a court shall not admit in evidence testimony that has been obtained in violation of Article 8(2)(*b*) of the Constitution. Testimony includes a pointing out done through an admission or a statement and therefore a pointing out obtained in violation of Article 8(2)(*b*) of the Constitution cannot be used in evidence against the accused.

[56] Article 8(2)(*b*) prohibits torture, cruel, inhuman or degrading treatment or punishment. The second appellant was not subjected to any of the prohibitions contained in Article 8(2)(*b*) of the Constitution. In my opinion, the circumstances in both *Minnies and Another a*nd *Miranda v Arizona* are a far cry from the circumstances in this case.

[57] In *Miranda v Arizona,* the accused, an indigent Mexican, was arrested at his home and taken into police custody. While in police custody he was questioned

by two police officers. Two hours later, the officers secured a confession from him that he had signed. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity, and 'with full knowledge of my legal rights, understanding any statement I make may be used against me.' The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. Notwithstanding the admission by the officers, the written confession was admitted into evidence over the objection of defence counsel. Miranda was found guilty of kidnapping and rape and sentenced to imprisonment. On appeal to the Supreme Court of Arizona, that court affirmed his conviction and held that his constitutional rights were not violated. The court emphasised heavily the fact that Miranda did not specifically request counsel. The US Supreme Court reversed, holding that:

> '. . . the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone

> and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.'

[58] The holding above is consistent with the position in our law, both at common law (in relation to the right to remain silent) and in the adage of our constitutionalism. That court was justified to hold as it did in those circumstances. However, in the circumstances of the case before us the Miranda principle relied on by counsel for the second appellant does not find application. The second appellant was informed of his constitutional entitlements and it is apparent that he chose to abandon them knowingly, voluntarily and intelligently.

[59] Interrogation as understood in our domain is best described in *Minnies and Another, supra,* at 366I-367A-D as follows:

> 'But what they could not explain satisfactorily, in my view, was:
>
> (1) why, if they could interrogate Brand at the police station, they could not interrogate Minnies there; and
> (2) why it was necessary to take Minnies (and Mbali, for that matter) to a lonely unlit shed to conduct an interrogation.
>
> I cannot accept that a policeman of the seniority of Chief Inspector Smit is unable to issue the necessary orders and make the necessary arrangements to ensure that he can conduct an interrogation without interruption. It is not understandable why the police team should find it necessary to remove the accused to a lonely unlit shed late at night, away from the convenience of the police station, unless it were for the purpose of having a free hand in extracting a confession by heavy-

> handed methods. But even if there were no direct physical violence, the actions of the police were intimidatory to an extraordinary degree, on the policemen's own evidence. At night six policemen take a handcuffed suspect to an empty shed, put him on a chair under a spotlight, and subject him to four hours' questioning. The suspect has had no food all day, they admit. He does not know where he is. He does not know why he has been removed from the police station. The whole process is one calculated to terrorise and degrade the accused.'

[60] In my opinion, taking down a confession or conducting a pointing out cannot be equated to interrogation as understood in our legal parlance. In *S v Mcasa and Another*, above, at 394C the South African Supreme Court of Appeal stated:

> '. . . an officer, before whom a confession is made, be it a commissioned officer or magistrate, is not expected to embark upon the interrogation of a person wishing to make a statement. Nor is it desirable or permissible to encourage the deponent to speak although aspects which are unclear should of course be clarified.'

Chief Inspectors Brune and van Zyl, were, therefore, not interrogating the second appellant.

[61] The only question that needs to be determined is whether, given the second appellant's responses above on the question of legal representation, he understood what he was doing when he abandoned his right to legal representation and confessed to the crimes and made a pointing out of the scene. In my opinion he did.

[62] Both Chief Inspectors Brune and van Zyl testified that the second appellant understood his constitutional entitlements before he made the statement and the pointing out. Chief Inspector Brune explained eloquently how the 'yes' and 'no'

responses came about. He testified that the second appellant initially answered ‘yes’ to the question. He made sure with the interpreter that this was what the appellant wanted to say. It was at that point that the ‘no I don’t want a lawyer’ answer was recorded. The interpreter Constable Hauwanga testified that the appellant’s answer was ‘no’. In cross-examination, she was asked why her version varied from that of Chief Inspector Brune on that point. Her answer was that she did not know where Chief Inspector Brune got the ‘yes’ answer. Viewed in that light, the ‘yes’ and ‘no’ responses are more of a misunderstanding between the Chief Inspector and the interpreter. Chief Inspector Brune testified candidly, so much that counsel for the second appellant during cross-examination thought he was very smart in theory (whatever that means) and honest. I would have no reason to doubt his explanation on that point. It must be remembered that the second appellant was not only informed of his right to legal representation, but immediately after that question he was informed that Chief Inspector Brune was not part of the investigation team, that he was not obliged to make any statement whatsoever, that if he did the statement would be reduced to writing and may later be used as evidence against him, and that he could not expect any advantages to arise from making any statement (or conducting the pointing out). The second appellant was not assaulted or threatened with assault. He was also not influenced in any way to make the statement or the pointing out.

[63] The second appellant is not a person who could be described as uninformed. When he was arrested, he chose to remain silent and refused to answer questions that he thought were self-incriminating. He specifically informed Sergeant Hilundwa that he was going to speak in Court. There is no other reason

why he did not seize the right to remain silent, as he had done so three days earlier before he decided that he wanted to make the statement and the pointing out. The second appellant claimed that he was severely assaulted immediately before the statement was taken, and that he was told where to go and what to say and to conduct the pointing out. I find these claims to be false beyond reasonable doubt.

[64] All these factors considered together, the second appellant knew what he was doing when he abandoned his right to legal representation, and the court below correctly admitted the evidence.

[65] Accordingly the appeals against the convictions must fail.

[66] I now turn to consider the appeals against the sentences. The first appellant's attack against the sentences is premised on the ground that the sentences are shockingly inappropriate; that the court failed to appreciate that counts 1 – 3 were based on the same series of facts and they should have been taken together for purposes of sentence; that the court erred when it failed to order the whole or at least a substantial part of the sentence on counts 2 – 5 to run concurrently with the sentence on murder, and that the court below overemphasised the seriousness of the offences at the expense of the other factors. In particular, it was argued that the Court gave insufficient regard to the pre-trial incarceration of the appellant and that it failed to consider other mitigating circumstances. The second appellant listed four grounds which amount to one,

that is, the court below failed to adhere to the fundamental principles of sentencing.

[67] Counsel for the first appellant argued that the court below had no appreciation of the difference between suspending part of a sentence and ordering sentences to run concurrently. This criticism is not related to what the court below said or did at the time the sentences appealed against were imposed, but to the utterance that court made during the hearing of the application for leave to appeal. Counsel submitted that because the offences were committed in the same circumstances and at the same time, the court below should have ordered a substantial part of the sentence on count 2 to run concurrently with count 3 and that the court below should have taken the convictions together for purposes of sentencing. Counsel further made a submission which is difficult to understand, and it is that in the event this court dismissed the first appellant's appeal against his conviction, the court below demonstrably committed a misdirection and imposed a sentence on the first appellant which is wholly inappropriate and therefore entitles this court to interfere with the sentence. On behalf of the second appellant, it was submitted without justification that the court below misdirected itself when it moved away from the precedent set out in *S v Rabie* 1975 (4) SA 855 (A):

> 'Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.'

[68] I do not agree with counsel's submissions on this point. A closer reading of the judgment on sentence of the court below bears that the court was alive to the fundamental principles of sentencing. Its judgment is consistent with the other decisions of the High Court in similar crimes. That is so when regard is had to the following extracts of the judgment:

> 'In assessing the appropriate sentences to pass on the accused persons, I will be guided by the decisions that have been made in this Court which emphasise the need for the courts to deter crimes of violence.
> Thus the community expects the court will punish perpetrators of serious crimes severely, but at the same time the community also expects that mitigating factors, including the accused's personal circumstances will be given due consideration . That to my mind is fairness in sentencing.
> The normal tariff of sentences for murder is high for the reasons set out in various judgments of this Court. Particularly for brutal murder, as occurred in this present case and the aim of sentencing is primarily to deter all forms of the unlawful taking of human life.
>
> It has been submitted that both accused are fathers of some children who are still depended on them for the livelihood. However, my view is that shooting an unarmed visitor who has just arrived in a foreign country is so horrendous. I find that the accused persons' personal circumstances are the usual ones, and are not out of the ordinary, and as such no great weight need to be attached to them, except that the accused since their arrest in 2007, have been kept in custody to date.'

[69] Sentencing is entirely a matter for the discretion for the trial court. A court of appeal will not interfere with the sentence imposed on insignificant grounds or merely because it would have imposed a different sentence had it been the court of first instance. It will only do so if it is satisfied that the trial Judge has failed to

exercise his or her sentencing discretion judicially or properly (cf *S v Alexander* 2006 (1) NR 1 (SC) at 4D-5A-E and all other cases collected therein).

[70] Appeal courts have over the years laid down guidelines that justify such interferences. In *S v Tjiho* 1991 NR 361(HC), Levy J set out the following circumstances at 366 A - C:

> ‘(i) the trial court misdirected itself on the facts or on the law;
>
> (ii) an irregularity which was material occurred during the sentence proceedings;
>
> (iii) the trial court failed to take into account material facts or over-emphasised the importance of other facts;
>
> (iv) the sentence imposed is startlingly inappropriate, induces sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.’

[71] Thirty years imprisonment for brutal, senseless murders like the murder in this case has become the exemplary sentence in the High Court, and the court below was consistent with the other precedents in its sentencing approach in this case. Twelve years for robbery with aggravating circumstances, six years for kidnapping, one year for each count for possession of firearms and possession of ammunition cannot be said to have been harsh under the circumstances.

[72] The murder of the deceased can be described as ‘extreme’ or ‘monstrous’, and in these cases society expects the strongest possible judicial condemnation,

S v Tcoeib 1999 NR 24 (SC) at 31, 1996 (1) SACR 390 at 379g; *S v Alexander supra* at 11A-C. The deceased and his wife were foreigners who had just arrived in Namibia, and the deceased was killed for the most ridiculous reason: he did not understand the first appellant. What a flagrant disregard for life, something so precious. The first appellant passed matric, and he was a police officer until he was convicted of fraud, forgery and uttering for which he received two years imprisonment. He must have known that the deceased spoke a foreign language and he could not have killed him for not understanding him. The victims were unarmed. The dead body was dragged to the riverbed like an animal and rocks placed on top of it. As the court below correctly observed, the case demonstrated a 'horrendous' disregard for human life and dignity. The kidnapping was not of an ordinary nature. Ms Fellinger was subjected to cruelty. She was assaulted and blindfolded so that she could not see where they dumped the body of her late husband. She was made to lie on top of the dead body and she could have been killed when the vehicle overturned. When the vehicle overturned, the appellants disappeared from the scene and she was left helpless with multiple injuries. The doctor who examined her at the Roman Catholic Hospital testified that she was lucky to be alive.

[73] In *S v Alexander, supra*, at 156g, this court stated:

> 'The accused was not simply convicted of robbery, but of robbery with aggravating circumstances and, in whichever league one may place a particular robbery, the seriousness with which it is regarded is always significantly increased when a dangerous weapon is used in the course thereof and even more so if the victim is injured or killed in the course thereof.'

[74] In the *S v Alexander* case, the accused snatched sunglasses from the deceased. When the deceased demanded his sunglasses back, the accused stabbed him to death. The trial court had sentenced the accused for robbery with aggravating circumstances to 15 years imprisonment; a Full Bench of the High Court reduced the sentence to 1 year imprisonment. This court found the 1 year sentence to be disturbingly inappropriate and substituted therefore a sentence of 8 years, 5 years of which was ordered to run concurrently with the sentence for murder.

[75] The circumstances in this case are far more severe than those in the *S v Alexander* case. The appellants had already robbed the victims of N$2700, €1000 cash, and a Canon digital camera, but driven by greed they still wanted more money from the account of Ms Fellinger after she had provided her PIN. The vehicle overturned on the way, risking Ms Fellinger's life. She was so traumatised by the incident that even at the time she testified, she suffered a temporary nervous breakdown and had to be admitted to hospital for a night.

[76] The murder, robbery with aggravating circumstances, and the kidnapping indeed occurred within the same matrix of facts, and the violence perpetrated on the deceased and Ms Fellinger constitutes an element of all these crimes. Care has to be taken to avoid a duplication of punishment. But that is not the argument of the first appellant. His argument is that the court below should have suspended some of the sentences, ordered all or some of the sentences or substantial

portions thereof to run concurrently, or should have taken all offences together for the purposes of sentence.

[77] The court below ordered that two years of the robbery sentence and two years of the kidnapping sentence should run concurrently with the sentence on murder. The alleged misdirection in the eyes of the first appellant is that the concurrent sentences were not substantial. That argument cannot be supported. Consider, for example, the robbery. This offence bred the murder and kidnapping offences. The sentence imposed for the robbery offence must reflect the seriousness with which the robbery would have been regarded if the accused had not been and would not be charged with murder. See *S v Alexander, supra,* at 14C and 15A, and the minority judgment in *Maraisana and Another* 1992 (2) SACR 507A at 512g-h preferred in the *S v Alexander* matter. The suggestions made by counsel for the first appellant that the court should have taken all offences together for purposes of sentence is untenable and plays down the seriousness of the crimes. The taking of more than one count together for the purpose of sentence is undesirable, especially if offences are unrelated: *S v Mwebo* 1990 NR 27 (HC). The High Court in *S v Mwebo* referred with approval to the South African case of *S v Immelman* 1978 (3) SA 726 (A), where the following was said at 728E-729A:

> ‘The practice of taking more than one count together for the purpose of sentence (ie the imposition of what I shall, for convenience, term a "globular sentence") was recently commented upon by this Court in the case of *S v Young* 1977 (1) SA 602 (A) where TROLLIP JA stated at (610E - H):
>
> > "That procedure is neither sanctioned nor prohibited by the Criminal Procedure Act 56 of 1955. Where multiple counts are closely connected or

> similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused. But according to several decisions by the Provincial Divisions (see, eg, *S v Nkosi* 1965 (2) SA 414 (C) where the authorities are collected) the practice is undesirable and should only be adopted by lower courts in exceptional circumstances. The main reason for frowning upon the practice mentioned in these cases is the difficulty it might create on appeal or review especially if the convictions on some but not all of the offences were set aside. As any sentence imposed by this Court is definitive, that objection to the practice is, of course, not applicable. However, in the present case I think it conduces to clearer thinking in determining the appropriate sentences to treat each offence separately. Moreover, no risk of duplication of punishment thereby arises for each offence is sufficiently distinct, different and serious; and in the ultimate result the cumulative effect of all the sentences imposed can be otherwise suitably controlled to avoid undue harshness to the appellant."
>
> (See also *S v Mofokeng* 1977 (2) SA 447 (O) at 448-9 where some of the more recent cases are collected.) The present case was tried under the new Criminal Procedure Act 51 of 1977 but that does not affect the appositeness of the above-quoted remarks. In my view, difficulty can also be caused on appeal by the imposition of a globular sentence in respect of dissimilar offences of disparate gravity. The problem that may then confront the Court of appeal is to determine how the trial Court assessed the seriousness of each offence and what moved it to impose the sentence which it did. The globular sentence tends to obscure this.' ''

[78] Equally undesirable is the suggestion that the court below should have imposed or considered a suspended sentence. The first appellant was 41 years old at the time he was sentenced and the second appellant was about 31 years old. If they were to serve the whole of the sentences imposed, the first appellant would be 87 years old and the second appellant 77 years old upon release. It would be undesirable to burden persons of those ages with suspended sentences.

[79] The appellants attacked the appropriateness of their sentence, inter alia, on the ground that the court below overemphasised the seriousness of the crimes at the expense of the other factors. It was argued in particular that the court had paid insufficient regard to the pre-trial incarceration of the appellants and disregarded the other mitigating circumstances. To the contrary, the court specifically stated that it found the personal circumstances of the appellants to be the usual ones and that there was nothing extraordinary about them other than the period they were in custody before sentence. The court emphasised deterrence and rightly so. 'As in many cases of sentencing, the difficulty arises, not so much from the general principles applicable, but from the complicated task of trying to harmonise and balance these principles and to apply them to the facts. The duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the other.' See *S v van Wyk* 1993 NR (SC) at 448B-E.

[80] In *S v Msimanga en 'n Ander* 2005 (1) SACR 377, I refer to the headnote where it is stated at 378i-379a:

> '…Violent conduct in any form is no longer to be tolerated, and courts, by imposing heavier sentences, convey the message, on the one hand, to prospective criminals that such conduct is unacceptable and, on the other hand, to the public that the courts take seriously the restoration and maintenance of safe living conditions. Deterrence is the over-arching and general purpose of punishment. Since no civilised community should have to tolerate barbaric conduct, in cases of crime in particular the deterrence and retribution aims of punishment are to be preferred

> over those of prevention and rehabilitation which in such cases play a subordinate role.'

[81] The crimes committed by the appellants were planned and premeditated, committed out of avarice and greed, which aggravates the seriousness of the crimes further. See *R v Fanuel* 1963 (3) SA 672 (RA) at 674G-H; *S v Ivanisevic and Another* 1967 (4) SA 572 (A) at 575H-576A and *S v Abrahams* 1974 (3) SA 660 (A) at 663H and *S v Alexander, supra,* at 156g. The appellants left Windhoek armed to the tooth and camped overnight to waylay their victims. At an opportune moment, their victims unsuspecting, the appellants struck leaving a trail of destruction. The appellants never showed remorse. Notwithstanding the overwhelming evidence against them, they refused to accept their convictions and whatever sentiments were expressed to that effect were not genuine at all.

[82] The appellants committed serious premeditated crimes. It is so appalling to think that the victims arrived in the country and that by the end of the day one was dead and one survived by the most fortuitous circumstances. I am not persuaded that the court below misdirected itself in any way on the facts or law. The sentences were most appropriate under the circumstances. It follows that the appeals on the sentences should fail as well.

[83] Consequently, I make the following order:

> The appeals of the first and second appellants on convictions and sentences are dismissed.

_____

MAINGA JA

_____

SHIVUTE CJ

_____

MARITZ JA

APPEARANCES:

FIRST APPELLANT:	S Namandje Instructed by Directorate of Legal Aid
SECOND APPELLANT:	F M Kwala Instructed by Directorate of Legal Aid
RESPONDENT:	D F Small Instructed by Prosecutor-General