IN THE SUPREME COURT OF NAMIBIA

Case No. SA 6/95

In the matter between

IMMANUEL SHIKUNGA FIRST APPELLANT

and

THE STATE FIRST RESPONDENT

Coram: Mahomed CJ, et Dumbutshena, A.J.A, et Hannah A.J.A.

Heard on: 1996/04/23 and 24

Delivered on: 1997/08/20

JUDGMENT

Mahomed CJ

Before Strydom JP, in the court *a quo,* two persons appeared on a charge of murdering one Ian Scheepers ("the deceased") and a second charge of robbery of the deceased. The first accused

was Asser Singanda whom I shall continue to refer to as "the first accused". The second accused was Immanuel Shikunga, and I shall continue to refer to him as the "second accused".

At the conclusion of a long trial the first accused was acquitted on the count of murder but convicted on the count of robbery and sentenced to 12 years imprisonment. There was an appeal by the State, to this court, against the acquittal of the first accused on the murder count. I am in respectful agreement with the judgement given by my brother Hannah upholding the appeal of the State against the acquittal of the first accused, and the order which he has proposed arising therefrom.

The second accused was convicted on both counts by Strydom JP. On the count of murder he was sentenced to life imprisonment and on the robbery count he was sentenced to 16 years imprisonment. He appeals against both these convictions and the sentences. This judgment deals with the case sought to be made on behalf of the second accused in this appeal.

The material facts in support of the case sought to be made out by the State were indeed common cause at the trial. The second accused had been working for the deceased. That employment was terminated on 5 January 1993. Both accused had entered the house of the deceased on 30 July 1993. The second

accused inflicted a number of stab wounds on the deceased in consequence of which the deceased died. A post-mortem examination showed that the deceased had been stabbed 23 times. Both of the accused thereafter caused various goods belonging to the deceased to be loaded onto the back of a van which also belonged to the deceased. That van was later abandoned outside Omaruru and when it was discovered by the police blood stains were found in the driver's compartment. The justification offered by the second accused for his conduct in

killing the deceased was that he had acted in self-defence.

His evidence was that he had visited the house of the deceased simply to collect certain moneys which were owing to him. The deceased had, however, acted violently by attacking him and he had to stab the deceased to defend himself. He did not dispute taking the goods belonging to the deceased, but his explanation was that this was done in compensation of the claim which he had against the deceased.

In my view the evidence and the objective circumstances do not support the case of the second accused based on self-defence.*(S vDe Oliveira* 1993 (2) SACR 59 (A) at 63 h-i; *S* v *Motleleni* 1976 (1) SA 403 (A) at 406C; *SvNtuli* 1975 (1) SA 429 (A) at 436D-E; *S* v *Goliath,* 1972 (3) SA 1 (A) at 11C; Burchell and Hunt, *SA Criminal Law and Procedure,* vol. 1 at 278; Burchell and Milton *Principles of Criminal Law* 1st Ed, 1991 at 117.)..

In the first place the second accused was a robust young man who was only 23 years old , the deceased was much older. In a physical contest between the two the deceased would have been at a disadvantage. Second: on the version given by the second accused the deceased used his fists in attacking the accused. A knife which the deceased still had in his hand when he was interrupted in his dinner was never used by the deceased at

all, it fell from the hand of the deceased during the scuffle and was used by the second accused to stab and kill the deceased. In the third place it was the second accused who had the advantage of surprise, not the deceased. The second accused was not expected by the deceased at all. Fourthly, the second accused was not alone when the confrontation between him and the deceased developed. Although there was a dispute as to precisely what role the first accused played, what is clear is that he was always in a position

at least to assist the second accused in combatting any aggression by the deceased. In the fifth place, the quantity of stab wounds inflicted on the deceased and the viciousness of the attack on him is inconsistent with just a defensive measure undertaken by an accused person spontaneously in a state of self-defence. Sixthly, the conduct of the second accused after the deceased was left lying in blood on the floor also appears to be inconsistent with the defence. The fact that the second accused did not seek to assist the deceased or to report what had happened to the police or any other stranger might perhaps be explicable on the basis that he and his companion panicked and fled, but was is not easy to explain is why they should proceed systematically to load the belongings of the deceased onto a van and then attempt to sell a part of what was stolen to somebody else. Seventhly, the second accused also pointed out certain spots which were at least consistent with the case sought to be made against him.

Although the State case included reliance on a purported confession made by the second accused pursuant to the provisions of s 217 of Act 51 of 1977, none of the seven circumstances which I have referred to are in any way dependent upon the evidence contained in the purported confession. They are all facts or circumstances which emerge from evidence *aliunde,* from facts and inferences properly drawn from the evidence of other witnesses and from the

explanation offered on behalf of the second accused in explanation of his plea.

In the circumstances, therefore, I find that the State has discharged its onus of proving beyond a reasonable doubt that the second accused was guilty of the charge of murder.

It was submitted on behalf of the second accused, however, that the appeal should succeed because the trial Judge in fact allowed a purported confession made by the second accused to be

admitted in evidence against him and because in the proceedings to determine the admissibility of the confession he relied on the provisions of section 217(l)(b)(ii) of Act 51 of 1977 which had the effect of burdening the accused with the onus of proving that a confession made to a magistrate and reduced in writing was not freely and voluntarily made "if it appears from the document in which the confession is contained that the confession was made freely and voluntarily".

It was submitted that the provisions of section 217(l)(b)(ii) were unconstitutional and that the trial Judge erred in allowing the disputed confession relied upon by the State to be admitted in evidence against the second accused.

These submissions raise a number of issues.

The first issue is whether s 217(l)(b)(ii) is indeed unconstitutional in terms of the Constitution of Namibia. The second issue is whether if that section is indeed unconstitutional, this can be of assistance to the second accused to escape his conviction, in the circumstances of the present case.

The constitutionality- of s 217(b)(ii)

Strydom JP held that he was bound by the decision of a full bench consisting of two judges in the case of *S v Titus* 1995

(3) BCLR 263 (Nm.H) in which it was held that the impugned section was not inconsistent with the Constitution.

. It is unnecessary for us to consider whether the learned Judge was bound by the decision of the

High Court in the case of *Titus.* It is common cause that the Supreme Court is not so bound. The relevant question is whether the conclusion arrived at in the case of *Titus* was indeed correct.

Section 217(l)(b)(ii) of Act 51 of 1977 provides that:

> "(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 person at criminal proceedings relating to such offence: Provided -(a)
>
> (b) that where the confession is made to a magistrate and reduced to writing by him,
>
> the confession shall, upon the mere production thereof at the proceedings in question -(i)
>
> (ii)be presumed, unless the contrary 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, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such

> person in his sound and sober senses and without having been unduly influenced thereto."

The effect of this section is clear: even if the prosecution has failed to prove that a written confession made by an accused person was made freely and voluntarily in his or her sound and sober senses and without being unduly influenced thereto, this is presumed to be the truth (as long as this appears from the document containing the confession) unless the contrary is proved by the accused.

In a case where the only material evidence against an accused person is a written confession made to a magistrate, the section would therefore permit a conviction based on that confession, even if the prosecution has been unable to establish that that confession was freely and voluntarily made. A court which had reasonable doubt as to whether the confession was freely and voluntarily made, and therefore whether the guilt of the accused was established beyond reasonable doubt, would in the circumstances nevertheless be permitted to find him or her guilty. The accused, could in these circumstances, be held to be guilty of an offence, in respect of which guilt has not been established beyond a reasonable doubt.

The question which accordingly arises is whether a section which permits such a result is Constitutionally permissible.

Relevant in this regard are the provisions of Articles 7 and 12 of the Constitution of Namibia.

Article 7 provides that no person shall be deprived of personal liberty except according to procedures established by law.

.Article 12(l)(a) makes it clear that in the determination of

any criminal charges against them, all persons are entitled to a fair hearing by an independent, impartial and competent Court or Tribunal established by law.

.Article 12(l)(d) directs that all persons charged with an offence shall be presumed innocent until proven guilty according to law.

Art icle 12(l)(f) protects an accused person from any compulsion to give evidence against himself or herself.

In my view Section 217(l)(b)(ii) of Act 51 of 1977 offends these provisions of the Constitution because it permits a court, in certain circumstances, to convict an accused person whose guilt has not been established beyond reasonable doubt. A person convicted of an offence in these circumstances cannot be said to have had a "fair trial" in which he or she was "presumed innocent until proven guilty".

At common law, a confession made by an accused person is not admissible against him or her unless it is established that it was freely and voluntarily made, and that he or she was in sound and sober senses and not unduly influenced thereto. This is a crucial requirement in a fair system of justice. It goes to the heart of the rights expressly protected by Article 12 of the Constitution. A statute which invades that right subverts the very essence of the right to a "fair trial" and the incidents of that right articulated in Article 12(l)(a), (d) and (f). Section 217(l)(b)(ii) constitutes such an invasion. *(S v Zuma and others* 1995 (2) SA 642 (CC) at para 33 on page 659).

In the case of *S v Titus {supra)* the High Court relied inter

alia on the provisions of section 209 of Act 51 of HT to come to a different conclusion. Section 209 simply provides that an accused could only be convicted on the basis of a confession if the confession was confirmed in a material respect or if the offence was proved by evidence other than the confession to have been actually committed. In my view section 209 cannot assist the prosecution to rescue section 217(l)(b)(ii). Section 209 does not necessarily require any evidence to support any admission in the confession to the effect that the relevant offence was committed by the person making the confession. The

objection to which I have previously referred remains intact: the only evidence connecting the *accused* person with the offence involved could be the confession, and if the prosecution had failed to establish that that confession was freely and voluntarily made, a conviction of the accused could result notwithstanding the fact that his or her guilt was not established beyond a reasonable doubt. In my view such an accused could not be said to have received a fair hearing within the meaning of Article 12 of the Constitution. The accused has the right to require the State to prove his or her guilt beyond a reasonable doubt. The effect of section 217(l)(b)(ii) is to imperil that right.

It therefore follows that the case of *S* v *Titus (supra)* was wrongly decided and should not be followed.

The consequence which follows from the invalidity of section 217(l)(b)(ii)

During argument, the court raised with counsel for the second accused the issue as to whether
or not the conviction of the second accused could be upheld if there had been a constitutional
irregularity which had been committed during the course of the trial. Counsel for the second
accused contended that the decision of the trial court to
admit the confession pursuant to the

provisions of section 217(l)(b)(ii) was a fatal constitutional irregularity which should vitiate the conviction.

There appears to be a tension between two important considerations of public interest and policy in the resolution of this problem. The first consideration is that accused persons who are manifestly and demonstrably guilty should not be allowed to escape punishment simply because some constitutional irregularity was committed in the course of the proceedings, but in

circumstances which showed clearly that the conviction of the accused would inevitably have followed even if the constitutional irregularity relied upon had not been committed. (This is exactly what transpired in the present case. Although the confession was admitted in terms of section 217(l)(b)(ii) the trial court was able to correctly justify the conviction of the second accused without any reliance on the confession). There is however a competing consideration of public interest involved. It is this: the public interest in the legal system is not confined to the punishment of guilty persons, it extends to the importance of insisting that the procedures adopted in securing such punishments are fair and constitutional and that the public interest is prejudiced when they are not.

The courts in various countries have repeatedly addressed themselves to the tensions contained between these two different considerations.

South African authority at common law

There is considerable learning about this question in decisions from South African courts which were of application to Namibia before its own independence. The approach that has

been adopted in assessing the effect of an irregularity in terms of the common law is one that asks essentially whether or not a failure of justice has resulted from the irregularity or defect. To this effect two categories in relation to trial irregularities or defects have been delineated (as set out in *The State v* A *foodie* 1961 (4) SA 752 (A) at 756D-F); a general and an exceptional category:

A. General category:

In *S v Tuge* 1966 (4) SA 565 (A) at 56SB the court articulated the test as follows: the question

is "whether, on the evidence and the findings of credibility unaffected by the irregularity or defect,

there is proof of guilt beyond a reasonable doubt." (The *Tuge* approach was accepted by the AD in *S vMnyamana and Another* 1990 (1) SACR 137 (A) at 141; and *SvMkhise; SvMosia; S* v *Jones; S* v *Le Roux* 1988 (2) SA 868 (A) at 872 A-B).(This formulation of the test is a development of the general test in *Moodie (supra)* which stated that a failure of justice occurs if the court cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity.)

B. Exceptional category:

In *Moodie s case (supra)* the court stated that an irregularity can be of such a nature as to amount to a failure of justice *per se,* and to be so held, without applying the general test. The court in *Moodie* stated further that whether an irregularity can be classified as falling within the ambit of the general or the exceptional test depends on the nature and the degree of the irregularity. This was elaborated on in *kfkhise (supra)* where the court stated that in order to decide whether an irregularity falls into the exceptional category the enquiry is whether the nature of the irregularity is so fundamental and serious that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred.

The consequences of categorising an irregularity as falling within the ambit of the general or the exceptional category

is indicated by the varying remedies. If an irregularity is so fundamental that it falls into the realm of the exceptional test the court might set aside the conviction without reference to the merits, and the accused can be retried. On the other hand where an irregularity falls into the general category, if'but for' the irregularity there is not proof of guilt beyond a reasonable doubt, then the accused is acquitted on the merits and cannot subsequently be re-tried. Similarly if 'but for' the irregularity there is proof of guilt beyond a reasonable doubt then the

c onviction stands, on the merits.(77*e *State vNaidoo* 1962 (4) SA 348 (A) at 354D-H.)

Thus, according to this test, when one is confronted with a non-constitutional irregularity or defect, the first issue that needs to be resolved is whether the irregularity falls into the general or the exceptional category.

However, it should be noted that this test was defined prior to the constitutional entrenchment of fundamental rights and freedoms. Does it make any difference where the right in issue has now been articulated in the Bill of Rights forming part of the Constitution? Essentially what would have to be considered is whether the common law test regarding irregularities can be applied to irregularities of a constitutional nature. To this effect the approach taken by other jurisdictions in dealing with non-constitutional and constitutional irregularities respectively is instructive as it indicates the methods through which courts in foreign jurisdictions have attempted to distinguish between irregularities of differing natures. I will, therefore, take a cursory glance at the approaches adopted in some other jurisdictions as to the effect of constitutional and non-constitutional errors.

Canada

The Canadian approach to non-constitutional errors is similar

to that of our common law. Where it is found that a trial judge has made an error, the question that is asked is whether there is any reasonable possibility that if the error had not been committed a judge, or a properly instructed jury, would have acquitted the accused. This was the test applied by Major J in *R v Bevan* [1993] 2 SCR 599. The approach to constitutional errors is demonstrated by the decision of Lamer CJ in *R v Tran* [1994] 2 SCR 951 which was concerned with s 14 of the Canadian Charter which

guarantees the right to the assistance of an interpreter. The court held that that right had been invaded in that case and proceeded to enquire into what was the appropriate remedy in terms of section 24(1) of the Canadian Charter which in general terms authorised the court to tailor the remedy having regard to the particular circumstances of the case. Lamer CJ distinguished between an interpretation which had prejudiced the accused and which was serious and one which was not. It was held that in this case it was prejudicial to the accused and for this reason the appeal was allowed and a new trial was directed. (See also *R v Hardy* 6 CRR (2d) 1992, 164 and *Porter* v *The Queen* 17 CRR 19S6, 379.)

United States

The United States courts provide some assistance in the distinction between the approach to be applied to constitutional and non-constitutional errors respectively. In a lecture entitled 'To En- is Human, but Not always Harmless' Judge Edwards distinguishes between the approach applied to constitutional and non-constitutional errors. In relation to non-constitutional errors the test that is applied is that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded", (fh 2 at 4). This test was explained, or refined in *Kotteakos v United States* 328 US 750 (1945) where (at 764-5) the court stated that essentially what this test entails is that:

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgement should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgement was not

> substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

As Judge Edwards points out, essentially the rule in *Kotteakos* was that: "errors are to be disregarded only if the reviewing court can say with fair assurance that the error had no substantial effect on the verdict that was rendered"(at 10).

Regarding constitutional errors, as is evident from the above quotation from *Kotteakos,* "departures from "constitutional norms" originally received different treatment under the harmless-error rule. Following *Kotteakos,* law7ers, courts, and commentators appear often to have accepted that there could be no harmless constitutional error, and numerous Supreme Court opinions supported this assumption. An academic stated "The Supreme Court initially applied the new federal harmless error rule only to non-constitutional errors, and prior to 1967, the Supreme Court routinely reversed convictions upon a finding of constitutional error." (Charles J Ogletree, Jr "Arizona v Fulminate: the Harm of Applying Harmless Error to Coerced Confessions' 105 *Han-ard Law Review* (1991) 152 at 157) However,

in the 1967 case *of Chapman* v *California* 3S6 US IS (1967), the Supreme Court for the first time stated that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may ... be deemed harmless, not requiring the automatic reversal of the conviction" (at 22). The court also stated that other "constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless ..."(at 23). For a constitutional error to be harmless,

the test, per *Chapman* v *California,* is whether a court "is able to declare a belief that it was harmless beyond a reasonable doubt" (at 24; and see also Michael T Fisher "Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line" *SS Columbia Law Review (\9$S) Van 2* 129S, 1302). In *O'Neal vMcAnich* 115 S.Ct 992 (1995) the Court, per Justice Breyer, seems to have applied the *Kotteakos* test to errors of a constitutional dimension. Dealing with the narrow situation in which the court cannot say with fair assurance that the error is harmless, but is in grave doubt regarding its harmlessness - that is, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error" - then the majority stated that such an error should be treated as if it were not harmless. It should also be noted that in *Arizona v Fulminante* 499 US 269 (1990) Rehnquist CJ (dissenting) distinguished between what he referred to as "trial errors" and "structural" errors. The former take place "during the presentation of the case to the jury, and ... may therefore be quantitatively assessed in the context of other evidence presented in order to

determine whether its admission was harmless beyond a reasonable doubt" (at 307-S). The latter, on the other hand, cannot be subjected to the harmless error test as the "entire conduct of the trial from beginning to end is obviously affected ... [and it follows that a trial of this kind] cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair"(at 309-10, citing *Rose v Clark,* 478 US 570, at 577-S).

Jamaica

A case which debates the issue of how to deal with a constitutional irregularity or error is demonstrated in the Privy Council decision of *Robinson v Tlie Queen* (163) (19S5) AC- an appeal from the court of appeal of Jamaica. In this, case the court had to consider the effect of the

appellant's not being represented by counsel on the charge of murder. The first question that the court asked was whether the accused's constitutional rights had been violated, which question it answered in the negative asserting that the right to legal representation was not absolute (at 967). Having stated that there was no violation of the accused's constitutional right the court then asked whether there was a miscarriage of justice - in answering this question the test that seems to be applied is whether the presence of a legal practitioner would have made any difference. This question too was answered in the negative. The minority came to a different conclusion. In its view there was a violation of the constitutional right which was sufficient to allow the appeal and order a new trial. On that view it would have been irrelevant to enquire whether or not the accused had been prejudiced by the breach of the constitutional right. To quote from the minority judgment at 974B-E:

> "The effect of his [the trial judge's] decision to continue the trial without adjournment after the withdrawal of the defendant's counsel was to deny the defendant the option to which the Constitution entitled him. Indeed, it is difficult to imagine a more serious turn of events for an accused facing a capital charge than to be abandoned mid-trial by his legal advisers and to be denied by the court the opportunity of replacing them. It has been suggested, however, that the absence of legal representation would have made no difference to the outcome of the trial. In our view this is no answer to an infringement of constitutional right. We reject the suggestion, however, for a further reason also. A new trial can be ordered under Jamaican law: and this is the course which in our view should be taken. But we must add

that we do not accept that the result of the trial would necessarily have been the same even if counsel had acted for the defendant. No one can tell what would have been the impact upon the jury of the alibi defence had the defendant had the advantage of counsel's advise on evidence and conduct of the defence. Nor does it follow from the lack of success of Gibson's counsel in cross-examination that counsel instructed by the defendant would necessarily have failed to destroy the credibility of the witness who implicated him as well as Gibson in the killing. We would, therefore, advise that the appeal be allowed and a new trial ordered."

Australia

The Australian courts differentiate between irregularities that per *se* constitute a miscarriage of justice and irregularities that are less fundamental in nature and only result in a miscarriage of justice if it can be said that as a result of the irregularity the accused lost out on a real chance of acquittal in that it cannot be said that in the absence of the irregularity a jury would inevitably have acquitted. This is illustrated by the case of *Wilde v The Queen* (198S) 164 CLR 365 FC where Brennan J stated the following at 372-3:

> "However, it was submitted that the question whether a reasonable jury would inevitably have convicted does not arise where the error in the conduct of the trial is fundamental. In such a case, it was submitted, it does not matter what the strength of the prosecution case or the weakness of the defence case was. Reliance was placed upon what was said by Gibbs J. in *Ouartermaine* v. *The Queen* (1980) 143 CLR 595 at 600-601...
>
> 'Ordinarily, when there has been a misdirection of law, the proviso to s 689 *[Criminal Code* W.A.] will be applied if the Crown establishes that if there had been no misdirection the jury would (or must) have come to the same conclusion.
>
> However, Wickham J., who delivered the judgment of the Court of Criminal Appeal in the present case, recognized that even if this were established 'there might still be a substantial miscarriage of justice if the trial was so irregular that no proper trial had taken place, in that "there had been a serious departure from the essential requirements of the law". The Court of Criminal Appeal was right in taking that view of the law...'
>
> This view is undoubtedly correct...The proviso has no application where an irregularity

> has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice."

In the case of *Dietrich v Ilic Queen* (1992) 177 CLR 292 FC the High Court of Australia in considering an appeal by a person who was convicted without being represented by counsel expressed similar views. Mason CJ and McHugh J describe the approach taken by the court when dealing with an error of a non-fundamental nature. At para 29 they stated that the essential question is whether there has been a miscarriage of justice in that the appellant lost a real chance of acquittal as a result of the irregularity. Deane J summarises the Australian position in the

following terms at para 17:

> "Statutory provisions which enable an appellate court to dismiss an otherwise successful appeal by a convicted person, who maintains his innocence, on the ground that there was no substantial miscarriage of justice do not authorize an appellate court to find that there' has been no substantial miscarriage of justice in a case where error, impropriety or unfairness has pervaded the trial and infected the verdict to an extent that the conviction was not the outcome of a fair trial...Such statutory provisions providing for dismissal of an appeal on the ground that there was no substantial miscarriage of justice extend only to cases where it can be seen either that any error, impropriety or unfairness did not prejudice the overall trial to an extent that it made it an unfair trial or that the residual effect (i.e. viewed in the context of the overall trial) of any such error, impropriety or unfairness could not have relevantly infected the verdict in the sense that it could not have adversely influenced the jury in reaching their verdict on the charge or charges upon which the accused was convicted and in respect of which the appeal to the appellate court is brought."

The proper approach

There can be no doubt from these authorities that a non-constitutional irregularity committed during a trial does not *per se* constitute sufficient justification to set aside a conviction on appeal. The nature of the irregularity and its effect on the result of the trial has to be examined.

Should the approach be different where the error arises from a constitutional breach? That question assumes that the breach of every constitutional right would have the same consequence. In my view that might be a mistaken assumption and much might

depend on the nature of the right in question. But even if it is assumed that the breach of ever)' constitutional right has the same effect on a conviction which is attacked on appeal, it does not follow that in all cases that consequence should be to set aside the conviction. I am not persuaded that there is justification for setting aside on appeal all convictions following upon a constitutional irregularity committed by a trial court.

It would appear to me that the test that is proposed by cur common lav is adequate in relation to both constitutional and non-constitutional errors. Where the irregularis is so fundamental that it can be said that in effect there was no rial a: all. the convic:icn should be se: aside. Where one is dealing with an irregularity of a less severe nature then, depending or. the impact of the irreguiariry on the verdict, the conviction shouid either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and r.cn-consticutionai irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims - the claim that society has that a guilty persor. should be convicted, and the claim tha: the integrity cf the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irreguiariry. though iess fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such tha: *i: is* not of a fundamental nature and it does not tain: the verdict the former interest prevails. This does not detract from the cauncr. which a ccun cf appeal wcuid ordinarily adcpc in accepting the submission that a clearly established consucudcnai irregularity did no: prejudice the accused in any way or

tain: the conviction which followed thereupon.

Appliczrior. of :heproper approach

Applying this approach to me instant case I can find nc justification to: interfering witr. the conviction of the second accused in the court *a quo.* The oniy irreguiariry a: the trial relied on on behalf cf the second accused was that a confession made by aim :c the magistrate was admitted in evidence by me trial judge in terms of section 217(l)(b)(ii) cf Act 51 of 1977. The effect of tha: *szz-Aor.* was to saddle the second accused with the onus of proving on a balance *of* probabilir.es tha: his confession was not mace freely and voluntarily while he was in his sound and

sober senses and without being unduly influenced thereto.

Circumstances are conceivable where such a confession is wrongly used to convict the accused and there is debatable other evidence to support the conviction, and the court on appeal is nevertheless asked to uphold the conviction on the grounds that it is justified without having any regard to the confession at all. In such cases the court might have to carefully analyse the evidence in order to determine whether it would be safe to uphold the conviction, and it might often be reluctant to come to that conclusion. These are not however the circumstances of the present case. The trial judge admitted the confession because he regarded himself as being bound by a previous decision which upheld the constitutionality of section 217(l)(b)(ii) of Act 51 of 1977, but he was able to convict the second accused without any reliance on the confession at all because of other reliable evidence and because of objective facts which were common cause. The conviction of the second accused could not therefore be said to be unfair. To set aside the conviction in these circumstances would not be to assert the importance of a constitutional right at all: it would amount simply to a substitution of form for substance. There is in my view no justification whatever for that result in this case.

Sentence

It was contended by counsel for the second accused that the court *a quo* erred in finding that the second accused possessed the intention to kill the deceased in the form *of dolus directus.* Rather it was submitted that the second accused's *mens rea* took the form *of dolus eventualis.*

Dolus directus can be described in the following way:

"This is intention in its ordinary grammatical sense: The accused meant to bring about the prohibited circumstance or the criminal consequence. This type of intention will be present where the accused's aim and object was to bring about the unlawful circumstance or the cause the unlawful consequence ...even though the chance of its resulting was small." (Original emphasis deleted)(Burchell and Milton *{supra)* at 247)

Intention in the form *of dolus eventualis* on the other hand can be said to exist:

"...when the accused does not mean to bring about the unlawful circumstance or to cause the unlawful consequence which follows from his or her conduct but foresees the possibility of the circumstance existing or the consequence ensuing and nevertheless proceeds with his or her conduct." (Original emphasis deleted) (Burchell and Milton *(supra)* at 24S)

On the facts of this case I find it impossible to accept the submission that the second accused's *mens rea* took the form *of dolus eventualis.* The stabbing of the deceased was continuous and aimed at the most vulnerable parts of the body. As is stated by Strydom J in his judgment in the court *a quo:*

'"Dr Liebenberg who held the post mortem on the body of

the deceased came to the conclusion that he died as the result of exsanguination from multiple incised and penetrating wounds. Of these wounds nos. 1, 5 and 16 were the most serious. Wounds no. 1 was a 20mm incised wounds on the right cheek. It went through the cheek into the tongue and was 30mm deep. It was serious because blood from this wound was aspirated into the air ways. Wound no. 5, a 20mm deep wound, caused a cut of 5mm into the jugular vein. Wound no. 16 was 30mm in length and cut through the radial artery which is serious because of the lot (sic) of blood caused by it. At least 14 of these wounds were inflicted in the face, neck and upper body of the deceased. Some of the wounds, mainly

> those in the hand of the deceased, were described by the doctor as "defensive wounds. The multiplicity of these wounds gives an indication that the deceased did not succumb without a struggle and it further indicates that the person wielding the knife did not stop until the deceased was overpowered and all resistance overcome. The attack was a continuous one aimed at vulnerable parts of the upper body of the deceased executed with a dangerous weapon, or weapons, which caused serious and perilous injuries to the deceased."

Bearing in mind the vicious nature of the attack that resulted in the death of the deceased it cannot be said that the second accused merely foresaw the possibility of death arising as a result of his conduct and proceeded with such conduct reckless of that result. The objective factors clearly indicate a state of mind that went beyond the foresight of death as a possible consequence of the stabbing. Indeed the infliction of 23 stab wounds, many of which were directed at the vulnerable regions of the deceased's body, patently supports the conclusion that it was the second accused's direct aim and object to bring about the death of his victim.

It is trite law that the issue of sentencing is one which vests a discretion in the trial court. An appeal court will only interfere with the exercise of this discretion where it is felt that the sentence imposed is not a reasonable one, or where the discretion has not been judiciously exercised. The circumstances in which a court of appeal will interfere with the sentence imposed by the trial court are where the trial court has misdirected itself on the facts or the law (*S* v

Rabie 1975 (4) SA 855 (A)), or where the sentence that is imposed is one which is manifestly inappropriate, induces a sense of shock *{S v Snyders* 19S2 (2) SA 694 (A)); or is such that a patent disparity exists between the sentence that was imposed and the sentence that the court of appeal would have imposed *(S w-WT* 1975 (3) SA 214 *{\),SvHlapezida and Others* 1965 (4) SA 439 (A); *S v Van llyk* 1992(1) SACR 147(NmS)at 165d-g; *S v De Jager and Another* 1965 (2) SA 616 (A) at 629A-B; *Rex v Zulu and Others* 1951 (I) SA 4S9 (N) at 497C-D, 5 v *Bolus and Another* 1966 (4) SA 575 (A) at 5SIE-H; *S v Petkar* 19SS (3) SA 571 (A) at 574 C); or where there is an over-

emphasis of the gravity of the particular crime and an under-emphasis of Lie accused's personal circumstances *(S v Mcseko* 19S2 (1) 99 (AD) a: 102; 5 v *Colles* 1990 (1) CR ac 465).

On the facts of this case and in accordance with the abovementioned principles resuiatins the replacement of a sentence issued by the court *c quo* I perceive no grounds for interfering with as sentence imposed by Strydom J?.

Order

In Lhe rssuit the 30Deai of the second accused against his convictions and sentence is dismissed.

I Mahomed CJ

I agree:

E Dumbutshena
AJA

I agree:

ON BEHALF OF THE FIRST APPELLANT: ADV. H. GEIER

Instructed by: LEGAL AID

ON BEHALF OF THE FIRST RESPONDENT: ADV. D.F. SMALL

Instructed by: Prosecutor-General