CASE NO.: SA 1/2000

IN THE SUPREME COURT OF NAMIBIA

In the matter between

DAVID SILUNGA

APPELLANT

And

THE STATE

RESPONDENT

CORAM: Strydom, C.J., O'Linn A.J.A. *et*, Manyarara A.J.A.

HEARD ON: 2000/10/11

DELIVERED ON: 2000/12/08

APPEAL JUDGMENT

O'LINN, A.J.A.:

A. INTRODUCTION

The appellant was convicted in the Court *a quo* on several charges being:

1. Murder
2. Contravention of section 1 of Act 75 of 1969 as amended - possession of a firearm without a license.
3. Contravention of section 36 of Act 75 of 1969 - possession of ammunition - to wit - two (2) shotgun cartridges.

He was sentenced as follows:

1. Sixteen (16) years imprisonment.
2. Eighteen (18) months.
3. Six (6) months.

Counts 2 and 3 were ordered to run concurrently with the sentence on count 1.

The appellant was represented at his trial by Mr. Christiaans.

The appellant applied for leave to appeal and condonation for the late filing of his application for leave to appeal. The application was refused by the trial judge, Gibson, J.

Subsequent to the dismissal of the application for leave to appeal by the Court *a quo*, this Court granted leave to appeal against both the convictions and sentences.

Mr. Christiaans appeared before us for the appellant at the request of the Court. Ms. Schultz, appeared for the State.

B. <u>THE QUESTION WHETHER THIS COURT HAD THE NECESSARY JURISDICTION TO GRANT LEAVE TO APPEAL AGAINST CONVICTION AND TO CONSIDER AND DECIDE ON SUCH AN APPEAL</u>

After counsel had argued the appeal against both conviction and sentence and whilst considering this judgment, I realized that the order of this Court in so far as it granted leave to appeal not only against sentence but also against conviction, may be a nullity in the light of several authoritative decisions.

The essence of these decisions is that when an accused asks the trial judge for leave to appeal against sentence as in this case and that is refused, this Court has no jurisdiction to grant leave to appeal also against conviction. If such leave is granted, the order granting it is to that extent a nullity and consequently any order made by this Court on appeal in pursuance of the order granting leave to appeal against conviction, is also a nullity.[1]

At the outset it is necessary to explain why this Court granted leave to appeal also against conviction, however erroneous that decision may have been.

When the accused applied to the Court *a quo* for leave to appeal, the appellant was no longer assisted by a legal practitioner. In his application, he repeatedly complained that the conviction was wrong in that he did not have the necessary intention to kill and that in the result, he should only have been convicted of culpable homicide. He nevertheless asserted that he only wanted to appeal against sentence. The Court *a quo* consequently treated the application as an application for leave to appeal only against

[1] *S v Absalom*, 1989(3) SA 154 (AD) at 162B - 166D
S v Tsedi, 1984(1) SA 565 AD
S v Cassidy, 1978(1) SA 687 (AD)
S v Gopal, 1993(2) SACR 584 (AD) at 585 c - d

sentence and then rejected the application for leave to appeal against sentence.

The appellant then petitioned this Court for leave to appeal. The judges who considered the petition, so I am informed, held the *prima facie* view that the appellant in substance complained against both conviction and sentence and that his application for leave to appeal should have been dealt with by the Court *a quo* as an application for leave to appeal against both conviction and sentence. Furthermore, the *prima facie* view was that there were several defects in the judgement of the Court *a quo* regarding conviction which justified the granting of leave to appeal also against conviction.

The point that the appeal against conviction was not properly before this Court was not raised by any of the parties or their counsel. This Court also failed to raise the point *mero motu*.

This Court consequently heard full argument on the merits of the conviction as well as the sentence.

Notwithstanding the fact that the granting of leave to appeal against conviction is a nullity, it would in my view, not be an exercise in futility to consider the merits of the conviction, because the merits can be decisive for this Court in deciding on the course to be followed which would best serve the interest of justice[2].

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[2] *State v Langa & Others,* 1981(3) SA 186 AD, at 190 A - 191 A.

So e.g. if there was merit in an appeal against conviction, this Court may have considered postponing the final decision on the appeal as it stands to give the appellant the opportunity to apply to the Court *a quo* also for leave to appeal against conviction. If leave is then granted by the Court *a quo*, the appeal to this Court on both conviction and sentence can then be placed on the roll for further hearing by this Court. If leave is not granted by the Court *a quo* against conviction, then the appellant, if so advised, can petition this Court for leave to appeal against conviction. Such a course would obviously cause a long delay before finality can be reached on the issue of the correctness of the judgment of the Court *a quo* relating to conviction and sentence.

In the circumstances I embarked on a consideration of the merits of the conviction as well as sentence in order to decide what course should be followed. If this Court concludes that there is no merit in an appeal against conviction, it would be a waste of time to follow the course set out above.

C. MERITS OF THE CONVICTION

Mr. Christiaans contended that the appellant should only have been convicted of culpable homicide on the murder charge but did not contest the convictions on the two other charges. According to him, the Court *a quo* should in the result only have imposed a sentence of imprisonment, wholly suspended. Ms. Schultz on the other hand supported the convictions and sentences on all the charges.

There was no dispute in the Court *a quo* in regard to the fact that the accused had killed the deceased by shooting him with a shotgun and that the accused was in the unlawful possession of a shotgun and two shotgun cartridges.

The only dispute in the Court *a quo* in regard to the murder charge was whether or not the State had proved beyond reasonable doubt that the accused had the necessary intention to kill and if so, did not act in self-defence, alternatively, exceeded the bounds of self-defence well knowing that he was exceeding the reasonable bounds of self-defence, alternatively at least foresaw the reasonable possibility that he was exceeding the bounds of self-defence and nevertheless proceeded, regardless of whether or not he was exceeding the bounds of self-defence.[3]

Gibson, J., the presiding judge at appellant's trial in the High Court, motivated the convictions as follows:

> "I do not accept therefor the accused's account of this particular story. Neither do I accept the accused's account of a quarrel before the shooting on the day of this particular incident. The accused version is totally inconsistent with the evidence of Abner Ingungula, who's evidence was reliable and believable. In my view although suggestions were made that Abner might have missed the conversation there really is no substance in it.

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[3] *Criminal Law,* by C R Snyman, 3rd ed. 102, point 5 up to end of point 6, p. 106;
S v Beukes & An, 1988(1) SA 511 AD at 522 B - G;
S v Van Wyk, 1993 NR 426 at 439 B - 442 H;
S v Naftali, 1992 NR 299 at 303 F - 304 E
S v Shimooshili, NmHC, 30/10/92, unreported*;*
Raymond Landsberg v The State,
S v Whitham, NmHC, 17/09/1992, unreported

As Abner indicated the conversations took place a mere four metres away from him and there was no particular noise to compete against any such quarrel he couldn't have missed that quarrel.

However, the accused described an altercation earlier that day with the deceased when he was on his way to look for the cattle. Well I have great doubts about that story. I cannot rule it out altogether because of the way in which, and the circumstances in which the shooting is said to have occurred on the description of Abner Ingungula. The attitude of the accused at the approach of the deceased upon the deceased's arrival would appear to suggest a resumption of an earlier unfinished business. According to Abner Ingungula the accused called out to Absalom Sylvanus not to come near him or else he will shoot. The fact that the accused was apprehensive about the approach of the deceased towards him does tend to suggest some animosity between the parties.

Why would the accused if, as Abner stated, these words were uttered so calmly, why would the accused have been so anxious to stop the deceased's approach unless there was something threatening before him. Abner's description of the deased's approach was that in his mind he merely thought the deceased was approaching to greet the accused. So in itself there was nothing in the approach which could give the impression of aggression on the part of the deceased. However, it seems that

> such was the state of mind of the accused that he immediately reacted to prevent that approach. It would seem therefor from these facts that the accused may have believed in his own mind that the deceased was approaching him in an aggressive mood and therefor acted quite unreasonably to protect himself. However, in electing to use a shotgun in the circumstances presented before him the accused undoubtedly exceeded the bounds of reasonable self-defence. The deceased was not armed with any weapon as he approached the accused. So in firing the shotgun at the deceased the accused not only exceeded the bounds of reasonable self-defence but he did so grossly and immoderately. And given those circumstances the accused foresaw in my view the possibility that the shot will result in the death of the deceased, but, the accused, being reckless to that consequence, fired nevertheless.
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> The accused is therefore found guilty of murder with constructive intent, in count one. He is also found guilty of possession of a fire-arm without a license in count two and unlawful possession of ammunition in count three."

Mr. Christiaans relied heavily on a passage from the judgment for submitting that the findings of the Court *a quo* supported a conviction of culpable homicide, rather than murder. The passage relied on by him for the conviction reads as follows:

> "It would seem therefore from the facts that the accused may have believed in his own mind that the deceased was approaching him in an aggressive mood and therefore acted quite unreasonably to protect himself."

According to Mr. Christiaans the aforesaid passage shows that the learned judge "ruled that the accused believed that he was acting in self-defence, but that the belief was unreasonable".

There is substance in this contention.

The learned trial judge unfortunately did not deal at all with the correct legal approach when "self-defence" becomes an issue in a trial of an accused on a charge of murder. She correctly dealt with the issue of the accused's intention to kill and correctly held that the accused had the intention to kill, at least in the form of *dolus eventualis*. She apparently also held that the accused may have acted in "self-defence", but that he had in any event "not only exceeded the bounds of self-defence but did so grossly and immoderately".

The Court thus correctly concluded the first leg of the enquiry - where an objective test had to be applied.

However, before a conviction for murder could ensue, the Court had to embark on the second leg of the enquiry where the test is subjective in that it deals with the *mens rea* of the accused in relation to the killing - more particularly the question of whether or not the state had proved beyond

reasonable doubt that the accused knew that his action exceeded the reasonable bounds of self-defence, alternatively foresaw the reasonable possibility that his action exceeded the reasonable bounds of self-defence and nevertheless proceeded, regardless of whether or not his action exceeded the bounds of self-defence.

Where the State succeeds in proving this element, the verdict of murder is justified. Where it fails to do so, but nevertheless succeeds in proving that the accused acted recklessly or negligently in not knowing that his action exceeded the bounds of reasonable self-defence or in not foreseeing the reasonable possibility of his action exceeding the reasonable bounds of self-defence, a verdict of culpable homicide is justified.

A careful reading of the judgment leads to the conclusion that the Court *a quo* never embarked on the aforesaid second leg of the enquiry. As it stands, a verdict of culpable homicide was justified, but not one of murder. The court thus misdirected itself in its approach and reasoning. That however, does not mean that the appeal would have succeeded and a conviction for culpable homicide substituted for that of murder, if the appeal against conviction was properly before this Court. In that event, this Court would have been entitled to reconsider the evidence on record, including findings of credibility of the judge *a quo*, to come to its own conclusion regarding the correct verdict.

The question also arises as to whether or not the Court did not misdirect itself when it failed to consider and to decide *mero motu* to call Martha Mupetannie as a witness.

This person was originally brought to Court as a state witness because she was on the scene when the fatal shooting took place and apparently saw and heard what transpired immediately before the shooting. It transpired at the hearing that she was probably in a better position than the main state witness Abner Ingungula to have seen and heard what happened. This appears from the following part of the cross-examination of Abner by Mr. Christiaans:

"Q" Now on that particular day there at the cuca shop, can you recall, was there a certain Martha Mupetannie also present?

A: Yes, my lady. She was there, this is a girl of age under 20.

Q: Was she also there?

A: Yes, she was outside there.

Q: Now, if she comes and tell the Court that there was in fact a conversation, will she be lying?

A: My lady, that I would not know. If she would come and testify to that effect, that is true. That is her version, because she was near the accused David. That I will not dispute.

Q: Was he closer to them that you were?

A: Yes.

Q: Now, after the shot was fired and you looked around and you saw the deceased moving a few paces, you probably would not know when the shot was fired, how the rifle was pointed and what happened when the shot was fired, how

the rifle was pointed and what happened there between the two of them?

A: Correct my lady. I did not witness the actual shooting."

Notwithstanding the fact that Martha was in a better position than Abner to see and hear what happened at the crucial stage, state counsel, Ms. Duvenhage, closed the prosecution case without calling Martha and offered her as a witness to the defence.

After the accused had testified, Mr. Christiaans indicated that he intended to call Martha and said: "I think it is important that she be called. She was also present and therefore I wish to call her.".

Mr. Christiaans then informed the Court that Martha had been sitting in Court for a short while when Mr. Andreas Shivute was testifying on issues relating to whether or not he had given permission to the accused to take the shotgun and had nothing to do with the events at the cuca shop where the shooting took place. Counsel for the State then indicated that she was unable to say when Martha was in Court.

Thereupon the presiding Judge said: "But this is very improper, wasn't it? To let a witness remain during the proceedings and the evidence before she gave evidence.". After considerable further exchanges between the presiding Judge and Mr. Christiaans, the presiding Judge said: "But anyway, call her and we will see what we have got perhaps for new evidence.". Mr. Christiaans retorted: "Then in that case, I will not call her.".

Mr. Christiaans persisted in his attitude notwithstanding that the presiding Judge assured him that he could call the witness but that her having been in Court at some stage may affect the weight of her evidence. Mr. Christiaans then closed his case without calling Martha. She was the only eyewitness who saw the actual shooting and who probably heard what was said between the accused and the deceased at that crucial stage.

This was a typical case where the presiding Judge, as administrator of justice, should have considered calling the witness *mero motu* to testify in accordance with section 167 read with section 186 of the Criminal Procedure Act No. 51 of 1977

The need to follow the guidelines in *S v van den Berg* was again emphasized in the recent decision of this Court in *State v K*[4].

In *Katamba's* case the Court also emphasized the Court's constitutional duty also "to protect the fundamental rights of victims" and in this regard "also to consider and give some weight to the contemporary norms, views and opinions of Namibian society".[5]

Any failure by a Court to follow the aforesaid approach, may deprive the trial Court of the benefit of having heard all the available relevant evidence and of considering such evidence and in addition, deprives this Court on appeal of a complete record of the available relevant evidence. Such failure by the trial Court may amount to a misdirection or even an irregularity in the

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[4] *S v K,* 2000(4) BCLR 405 NmS 426 C - E
S v V.d. Berg, 1995(4) bclr 479 Nm at 523 A - 531 A also reported in 1996(1) SACR 19 at 63g - 72 c and the decisions referred to therein.

[5] *IBID*, 419 D and the decisions referred to in footnote 9 of the report.

proceedings, causing prejudice to either the State or the accused or the victim and as a consequence a miscarriage of justice - necessitating a setting aside of the verdict, with or without an order referring the matter back to the Court *a quo* for the application of a proper procedure and/or for reconsidering the verdict. In most instances of the aforesaid failure, unnecessary and inexcusable delays will be caused in reaching finality, which in itself undermines the administration of justice.

The decisions referred to adequately sets out the correct position, but because of its importance, it is justified to repeat the following aspects:

(i) Sections 167 and 186 of the Criminal Procedure Act 51 of 1977 provide as follows:

> S.167: "The Court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined in such proceedings, and the Court shall examine, or recall and re-examine, the person concerned if his evidence appears to the Court essential to the just decision in the case."
> (My emphasis added.)

It is clear from the above that the first part of the section allows a discretion, which must be judicially exercised but the second part makes it mandatory to examine, or recall and re-examine the person concerned, once the said evidence appears to the Court, in the exercise of a judicial discretion, to be essential to the just decision in the case.

S. 186: "The Court <u>may</u> at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the Court <u>shall</u> so subpoena a witness or so cause a witness to be subpoenaed <u>if the evidence of such witness appears to the Court essential to the just decision of a case.</u>" (My emphasis added.)

This section as in the case of section 167, provides in the first part for a discretionary power, but in the second part for a power that is mandatory, once the evidence appears to the Court to be "essential to the just decision in the case".

As pointed out in the *v.d. Berg*-decision, the above provisions of the 1977 Act "are the equivalent of similar sections in the Criminal Procedure Acts preceding Act 51 of 1977. The main difference is that in Act 51 of 1977 the recalling and examining of an accused person, once such person has testified for the defence is spelled out, whereas in some earlier acts that had to be implied".

(ii) <u>The role of the Courts in Namibia and South Africa in regard to Criminal Procedure, is partly adversarial and partly inquisitorial compared e.g. to the United Kingdom, where until now, the role has been adversarial and the rest of the continent of Europe, where the role is inquisitorial</u>.

The aforesaid role was already succinctly stated in 1928 by the Appellate Division of the South African Supreme Court where the learned judge Curlewis, J.A., defined the position as follows:

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other and the Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of Justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognized rules of procedure, but to see that justice is done."[6]

The manner in which Wessels, C.J., applied this approach in 1935 in the decision of the Appellate Division of the South African Supreme Court in *R v Omar* is instructive. He said:

> "It is not necessary to hear Mr. Beardmore. In this matter the attorney-general suggested to the presiding Judge in the court below to call a witness after the case for the defence had closed. He stated that the man he wished to have called had only been found in the early hours of the morning and that he had not had the opportunity of calling him at the proper time. The Judge exercised his discretion under section 247 and called the witness, whose evidence went to the merits of the case. It has been contended that section 247 should be confined to those cases where there has been an omission of a technical nature, not where the evidence goes to the merits of the case. As I read the section it has exactly the opposite meaning - namely to see that substantial justice is done, to see that an innocent person is not punished and that a guilty man does not escape punishment. That is why the section is in the widest possible terms. If at any stage of the case the Judge thinks a witness ought to be called he may use his discretion to call a witness to give evidence, but when it appears that evidence is essential to the proper decision of the case, then the Judge has no discretion - he must call the witness. In these circumstances the question must be answered in favour of the Crown."[7]

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7 *R v Omar,* 1935 AD 230 See also
R v Kubeka, 1953(3) SA 691 (T) at 695 G, the judgment of Ramsbottom, J.
R v Hongwane, 1982(4) SA 321 at 323 A - 324 C
S v von Molendorf, 1987(1) SA 135(T) at 149 B - 151 H
R v Beck, 1949(2) SA 626(N)
S v Dawid, 1991(1) SACR, 375 NmHC at 381d - 383c
S v du Raan, NmHC 22/9/1994, unreported
Duminy v The State, NmHC, 12/11/92, unreported
S v Kwant, NmHC, 26/10/1994, unreported

It often happens that the prosecutor declines to call a witness because that witness may contradict the whole or part of the state case and the prosecutor do not wish to be in a position where he/she cannot controvert the unfavourable part because the prosecution may not cross-examine its own witness. Similarly, the defence may decide not to call a witness as its witness, essentially for the same reasons. These reasons are not necessarily based on the known or suspected untruthfulness of the witness. The result may be that a witness is not called who may have been able to tell the truth and thus contribute to the Court's function to establish the truth.

In cases where both the prosecution and defence decline to call an available witness, it may assist the Court in making a decision whether or not to call the witness, if the Court is informed in general terms what the nature of such evidence is going to be or if the witness's statement is handed up for the Court's assistance by consent.

Where however, there is sufficient evidence on record indicating that the witness can assist the Court in its abovementioned function, there can be no difficulty for the Court in exercising its discretion in terms of section 186, to come to a decision.

In the instant case however, it cannot be said that the circumstances were such that the Court was compelled to call the witness Martha Mupetannie.

The appellant gave the following explanation in his testimony:

> "My lady, when the deceased came to that cuca shop, he greeted everybody there, including myself. … the deceased my lady was leaning on a pole whereby he greeted me. I then said to him you should not greet me. What you did to me in the morning, is enough. … Then afterwards he answered me that what can I do to him? I then also told him, there is nothing I can do to you, but you should not come near to me. And while I was telling him not to get nearer to me, he was get closer to me, very near closer to me. Then he was pointing at me maybe with the intention of grabbing me. I then told him that you should not come near to me, otherwise he would bring problems to me. … Then the deceased said to me, what can you do to me with your rifle? You with your rifle. … and while the deceased was pointing at me, my lady, I then fired a shot that went to struck him on his arm. But then I did not know where else on his body that I struck him..."

Abner testified that he had heard the appellant say to the deceased just before the shooting: "Come out, I will shoot you today".

This statement was not denied by the appellant under cross-examination. The said words do not necessarily contradict appellant's testimony about what was said immediately before the shooting, but rather supplements it. I will accept consequently that when appellant warned the deceased not to come nearer - he used words to that effect - "come out - I will shoot you today".

It was common cause that the appellant shot the deceased with a shotgun, a lethal weapon at a distance of 2 - 4 meters and/or paces and that the appellant knew at all times that the shotgun was a lethal weapon. It was also conceded that the deceased did not have any weapon in his hand when he approached the appellant.

The defence of self-defence was only tentatively raised during the appellant's testimony as appears in the abovequoted passages from the

appellant's testimony. The maximum threat appears to be contained in the words: "Then he was pointing at me - maybe with the intention of grabbing me.".

At the section 119 proceedings - the appellant pleaded guilty to the charge of murder and did not say or suggest that there was any form of attack on him and that he was acting in self-defence or believed that he was doing so. On the specific question - "Why did you shoot the deceased?" the appellant answered: "I shot the deceased because he was always accusing that my mother does always have an affair with his father and also that all children of my mother does not belong to my father." The accused's plea explanation at his trial was not given by him but orally by his legal representative Mr. Christiaans. There was no written explanation of plea, by the accused himself as was the practice in the Namibian High Court for many years. It is not proper for a plea explanation to be given by the legal representative unless confirmed by the accused. Presiding judicial officers should ensure that the above-stated practice is adhered to.

The version of Mr. Christiaans, as given orally, did not amount to a plea of self-defence. Mr. Christiaans said: "...the accused will admit that he did in fact shot (shoot) the deceased and that that shot killed the deceased. However, it was not his intention to kill the deceased, but only to hurt him and to scare him away because the deceased came towards him. And also because of threats earlier and on that particular occasion he was under the impression that the deceased was about to attack him."

Whether Mr. Christiaans meant that the accused was under the impression at the time of the shooting that the deceased was about to attack him or whether he was under the impression on a previous occasion is not clear. But unfortunately the presiding judge failed to obtain any clarification from Mr. Christiaans or from the accused. Furthermore she failed to obtain any confirmation from the accused in regard to the plea explanation offered by Mr. Christiaans as was the correct practice in the High Court.

In her judgment, the presiding judge did not mention the section 119-plea explanation. She apparently gave no consideration to the important piece of evidential material which amounted to an important admission.

This plea explanation was inconsistent with any defence of self-defence. It was a strong indication that the appellant not only did not act in self-defence, but knew full well that he was not acting in self-defence. The accused at the time was not represented by a legal representative, but any person -even without any schooling - would have told the Court when pertinently asked why he had shot the deceased, that he shot the deceased because he was attacked by the deceased if that was the case. Furthermore, this appellant had reached grade X at school and his failure to state that he was attacked, cannot be excused on the ground of lack of schooling or intelligence. To mention that he shot the deceased because he was attacked would have been a natural and obvious response for any person in his position.

His explanation amounts to a plea that he and his parents were grossly insulted by the deceased on previous occasions and he wanted to injure the

deceased because of the aforesaid provocation. His only real defence was consequently that he intended to injure and not to kill and that he acted under provocation.

The Court misdirected itself by failing to give any consideration to the section 119 proceedings. This misdirection is similar to the one referred to in the recent decision of this Court in *S v K*[8]. In this case the misdirection favoured the appellant but there was no prejudice to the state or to the interests of the victim as the appellant was at any event convicted of murder.

In my view, the accused was correctly convicted of the crime of murder. In the light of

the evidence and admissible evidential material, the accused intended to kill at least, on the basis of *dolus eventualis*. He did not act in self-defence and he knew it. Alternatively,

he grossly exceeded the bounds of self-defence and knew it. In the further alternative, he foresaw the reasonable possibility that he was exceeding the bounds of self-defence and proceeded nevertheless - regardless of whether or not he was exceeding the bounds of self-defence.

There is consequently no prospects of success for an appeal against conviction if properly noted and prosecuted and it would therefore be futile to follow the course suggested in Section B, *supra*.

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[8] *S v K,* BCLR 2000(4) 405 (NmS) at 423 I - 424 D.

D. THE SENTENCE

The approach of a Court of Appeal in regard to appeals against sentence was again reiterated in the recent decision of this Court in *Andries Gaseb & 2 Others v The State*. The Court stated:

> "It is trite law that a Court of Appeal can only interfere with the discretion of the trial Court regarding sentence on very limited grounds, *viz*: When the trial Court has not exercised its discretion judiciously or properly. This occurs when the trial Court has misdirected itself on facts material to sentencing or on legal principles relevant to sentencing This will also be inferred where the trial Court acted unreasonably and it can be said that the sentence induces a sense of shock or there exists a striking disparity between the sentence passed and the sentence this Court would have passed or if the sentence appealed against appear to this Court to be so startlingly or disturbingly inappropriate as to warrant interference by this Court."[9]

If this Court had substituted a conviction for culpable homicide for that of murder, this Court could have and would have interfered with the sentence. But not only must the conviction for murder stand, but there are no reasonable prospects of such an appeal

succeeding if properly noted and prosecuted.

The Court *a quo* did not misdirect itself on any matter relating to sentence. The sentence of 16 years imprisonment for murder does not appear to be unreasonable in the circumstances and certainly not such that it induces a sense of shock, or can be said to be startlingly or disturbingly inappropriate.

The same applies to the sentences imposed on the further two charges.

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[9] *Andries Gaseb & 2 O v The State,* delivered on 09/08/2000, unreported, (NmS)

In the result:

1. The order of this Court granting leave to appeal against conviction is declared a nullity.

2. The appeal against sentence is dismissed.

(signed) O'LINN, A.J.A.

I agree.

(signed) STRYDOM, C.J.

I agree.

(signed) MANYARARA, A.J.A.
/mv

COUNSEL ON BEHALF OF THE APPELLANT: Adv. W.T. Christiaans
(Legal Aid)

COUNSEL ON BEHALF OF THE RESPONDENT: Adv. S. Schultz
(Prosecutor-General)