REPORTABLE

CASE NO: SA 10/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PROGRESS KENYOKA MUNUMA	**1st Appellant**
SHINE SAMULANDELA SAMULANDELA	**2nd Appellant**
MAKENDANO MANUEL MANEPELO	**3rd Appellant**
ALEX SINJABATA MUSHAKWA	**4th Appellant**
DIAMOND SAMUNZALA SALUFU	**5th Appellant**
FREDERICK NTAMBILWA ISAKA	**6th Appellant**
HOSTER SIMASIKU NTOMBO	**7th Appellant**
BOSTER MUBUYEATA SAMUELE	**8th Appellant**
JOHN MAZILA TEMBWE	**9th Appellant**
ALEX MAFWILA LISWANI	**10th Appellant**

and

THE STATE	**Respondent**

Coram: SHIVUTE, CJ, MARITZ,JA and STRYDOM AJA

Heard: **23 March 2012**

Delivered: **15 July 2013**

APPEAL JUDGMENT

STRYDOM AJA (SHIVUTE CJ and MARITZ JA concurring)

[1] The appellants were part of a group of twelve people who were deported by the authorities in Botswana during September and December 2002 and who were arrested by the Namibian Police when they set foot in Namibia. They were arraigned before a Judge of the High Court and charged with:

1. High Treason;
2. Sedition;
3. Public Violence; and
4. Three charges related to offences committed under the Arms and Ammunition Act, Act No. 7 of 1996 in contravention of s 29(1)(a),(e) and (b) respectively.

Background

[2] After a protracted trial in which more than 60 witnesses testified,all but two of the appellants were convicted of the crime of High Treason. In regard to the two

accused persons, namely accused 4 and 5, the State conceded that it did not prove their complicity in the crime and they were found not guilty and were discharged.

[3] As described by MrTjombe, who appeared for the appellants in this Court, the trial was a tumultuous affair. It started off by appellant No. 10 refusing to accept the legal representative appointed for him by the Legal Aid Directorate because this person was in the employ of the State. The Court ordered that a private Legal Practitioner be appointed for the appellant. This was done and all the accused persons were then represented by Mr. Grobler and MrNdauendapo.

[4] The next step was a challenge to the jurisdiction of the Court in terms of s106(3) of the Criminal Procedure Act, Act No. 51 of 1977. Special pleas were entered by all the accused persons with the exception of accused No. 8, i.e. appellant No 6. During the proceedings concerning the jurisdictional challengethe appellants, with the exception of accused No. 11 (appellant No. 9),gave evidence in which they stated that they sought, and were granted, political asylum in Botswana. Most of them were accommodated in a refugee camp at Dukwe. They also testified that, at the time, it had been explained to them that it would be a breach of the conditionsof their status as political refugees should they ever return to Namibia. They stated that since their entry into Botswana they never returned to Namibia. They further claimed that they had been abducted from Botswana and that the authorities in Namibia and Botswana connived to achieve their return to Namibia. The State also presented evidence and Cst. Kambungostated that they, i.e. the State, had available evidence

that the appellants did return to Namibia between the dates when they had left Namibia and were deported.

[5] The Court dismissed the jurisdiction plea of the appellants and found that, in terms of this Court's decision in *S v Mushwena and Others*2004 NR 276(SC), the High Court had jurisdiction to hear the matter. Thereupon all the appellants, with the exception of appellant No. 6, i.e. accused No. 8,applied for leave to appeal to this Court. The Court *a quo* struck the application from the roll as ill-conceived and irregular.

[6] Because of certain findings of the learned Judge in his judgment dismissing the plea of jurisdiction, all the appellants then applied for his recusal. This application was refused and the accused's application for leave to appeal against the Judge's refusal to recuse himself, also met a similar fate.

[7] The stage was then set for the trial to begin. All the accused refused to plead to the charges and pleas of 'not guilty' were recorded in respect of each of them. At this stage the appellants also had some dispute with their legal representatives and they promptly terminated their mandates. From this stage on the appellants started to disruptthe court proceedings. Whenever they appeared in Court they started to sing and to chant slogans and they demonstrated disrespect for the Court. At one stage they were convicted of contempt of Court and were sentenced to 30 days imprisonment each. Their conduct in Court was such that the Judge had no choice

but to have them removed from the courtroom and to conduct the proceedings in their absence. They were from time to time brought back into Court when their rights were explained and, on each occasion, they were invited and given a further opportunity to attend the proceedings. They, however, did not desist from their disruptive conduct.

[8] After the appellants had been convicted and sentenced, they applied in the High Court for leave to appeal to this Court. The applications in regard to their convictions were refused but they were granted leave to appeal against the sentences imposed by the Court *a quo.* They then petitioned the Chief Justice for leave to appeal also against their convictions. General leave to appeal was refused but leave was granted to appeal as follows:

> 'That leave to appeal is hereby granted to all the Petitioners to appeal against their conviction on the ground that a material irregularity affecting the fairness and validity of the trial proceedings before the Court *a quo*occurred pursuant to the refusal by the Presiding Judge to recuse himself on the grounds relied on by the petitioners' application for recusal.'

[9] As previously stated Mr. Tjombe represented all the appellants in this Court whereas Mr. Small, assisted by Ms. Lategan, appeared for the State. Counsel representing the State also appeared in the trial whereas Mr. Tjombe was not involved in the trial.

[10] During argument we allowed Mr. Tjombe to go much wider than the "*grounds relied on by the petitioner's application for recusal."* (e.g. see *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*1996 (3) SA 1 (AD).)

The Law

[11] Until the decisions in *Monnig and Others v Council of Review and Others* 1989 (4) SA 866(C) and *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) there was some uncertainty as to what the correct approach was in order to establish a plea of bias on the part of a presiding officer. Two tests were applied. The one test required that a complainant would have to show that there was '*a real likelihood'* of bias occurring whereas the other test required only a *'reasonable suspicion'* that bias would occur. From the use of these expressions it is clear that in the instance of the 'reasonable suspicion' test the emphasis was on what a reasonable litigant would suspect. It was also said that the first test was more exacting. (See *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union and Anothersupra,* at p. 691).

[12] In the *BTR*-case, Hoexter JA reviewed various South African cases as well as cases in English law and the old Roman Dutch writers. The learned Judge concluded that for South African law the correct test to apply was the reasonable suspicion test. At page 695 the learned Judge stated the following:

> 'It is the right of the public to have their cases decided by persons who are free not only from fear but also from favour. In the end the only guarantee of impartiality on the

> part of the courts is conspicuous impartiality. To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root of the principle, deeply embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice. It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the de minimis principle) he is disqualified, no matter how small the interest may be. See in this regard the remarks of Lush J in *Sergeant and Others v Dale* (1877) 2 QBD 558 at 567. The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended then that is an end to the matter.'

[13] This exposition of the law was overall accepted, also by the Constitutional Court of South Africa. (See,*inter alia, Moch v Nedtravel, supra*; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147(CC)(1999 (7) BCLR 725); *S v Khala*1995 1 SACR 246 and *S v Basson*2007 (1) SACR 566 (CC). In the latter instance the Court was of the opinion that it would be more correct to formulate the test as a ‘reasonable apprehension’ of bias rather than a ‘reasonable suspicion’ because of the many nuances associated with the word ‘suspicion’.

[14] On the basis of these and other authorities this Court,too, concluded in *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others*2008 (2) NR 753 (SC) 769 *in fine* at par [32] that the test for the recusal of a Judge is ‘whether

a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case'.Art. 12 of our Constitution clearly lays down that all persons shall be entitled to have their disputes adjudicated upon by an impartial and independent Court. That goes for civil as well as criminal cases. The reason for this is not far to seek. Impartiality and objectivity of Judges lie at the root of the independence of the judiciary and the respect it commands as an organ of State. The application of the principle justice must not only be done but also be seen to be done has over many years formed the cornerstone of judicial approachfor Judges in fulfilling of their arduous duties, even before the advent of Bills of Rights. It is against this backdrop, and seen in the light of emerging constitutional provisions safeguarding specifically the rights of persons, that the less exacting test of a reasonable apprehension finds its niche, more so than the more exact test of a real likelihood of bias. In the *BTR*-case the learned Judge referred with approval to what was stated in this regard by Edmund Davies LJ in the matter of *Metropolitan Properties Co (FGC) Ltd v Lannon and Others*1968 3 All ER 304 (CA) at 314 C-D, namely:

> 'With profound respect to those who have propounded the "real likelihood"test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged, and any development which appears to emasculate that requirement should be strongly resisted.'

I respectfully agree with what was stated by Edmund Davies LJ.

[15] The onus is on an applicant for recusal to show a reasonable apprehension that the Judge would be biased. (See *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others, ibid;S v Ismail and Others* 2003 (2) SACR 479 at 482i;*South African Commercial Catering and Allied Workers Union v Irvin and Johnson*2000 (3) 705 (CC) at 714A and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others, supra,* at 177.) The test is an objective one and the cases further point out that in order to succeed an applicant will have to show not only that the apprehension is that of a reasonable person but that it is also based on reasonable grounds. The requirement of reasonableness is therefore two pronged. (See SA*Commercial Catering and Allied Workers*–case, *supra,*at para[14].)

[16] In the matter of *Moch, supra,* p 13, the Court stated that judges should, when hearing an application for their recusal, not be unduly sensitive and should not take such application as a personal affront. A Judge should, however, not recuse himself where the reasons for the application are frivolous. (See *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others, supra* at 770D-F para [33];*South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer*1974 (4) SA 808 (T) at 812.)

[17] The cases further draw a clear distinction between instances where the bias arises as a result of outside factors and instances where a litigant complains of the conduct of the Judge during the trial itself. (See *S v Silber*1952 (2) SA 475 (A) at 481

C-H; S *v Khala*1995 (1) SACR 246(A) at 252e and *S v Basson*2007 (1) SACR 566 (CC) at 594h. Because of the presumption of impartiality on the part of the Judge it was stated in the *Basson*-case that such presumption was not easily dislodged and that the instances where bias was claimed as a result of the conduct of the Judge during the trial itself, were indeed rare. (Compare also the dictum of L'Heureux-Dube J and McLachlin J in *R v S (RD)*(1997) 118 CCC (3d) 353 [1997] 3 SCR 484 (SCC); 151 DLR (4th) 193) in para 117 quoted with approval in *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others, supra,* at 769D-G para [32].) In regard to these cases it was also said that a reasonable litigant would be aware of the presumption and would take that into consideration. (See *S v Jaipal*2005 (1) SACR 215 (CC).

The grounds for the recusal application

[18] The words complained of, and which triggered the application for the recusal of the Judge, appeared in the judgment delivered in regard to the challenge to the High Court's jurisdiction. In deciding that the High Court had jurisdiction to try the accused persons, the learned Judge relied on this Court's decision in the matter of*S vMshwena and Others* where a similar challenge was raised against the jurisdiction of the Court. It was there decided that to have jurisdiction a Namibian Court need not enquire into the reasons why the accused personshad been deported from the foreign country or whether that country had complied with its own laws in so deporting the applicants. However, the learned Trial Judge in this appeal matter went on to say –

> 'The impression conveyed by the evidence of the accused and the inference I draw from the omission of dates from accused 11's plea explanation is that they were all untruthful on their whereabouts between the dates of their entry into Botswana and expulsionfrom Botswana. This lends credence to the evidence of the police that they had information of these accuseds' presence in Caprivi during the period that they allege they were in Botswana. Therefore, the balance of probability favours the State version as supported by the documentary evidence.'(My emphasis.)

[19] Accused 1 to 7, 9, 10and 12 filed affidavits in support of the recusal application. In these affidavits they stated, *inter alia*, that the evidence as to their whereabouts after they had entered Botswana was crucial to their defence of an alibi in the main trial. Given the fact that the presiding Judgehad rejected this evidence during the plea-proceedings as 'untruthful', they could not see how he would change his mind and believe them when they would present this evidence again as part of their defencein the main trial. They went on to state that they wereharbouring a reasonable suspicion that the learned judge would be biased against them and that they would not get a fair hearing. Coupled to this objection was also the credibility finding which the presiding Judge had made by implication when he accepted the police evidence that the State had information that the accused persons were in Namibia during the period that they said they were in Botswana.

<u>The submissions by counsel</u>

[20] Mr. Tjombe submitted that the finding by the Court in the preliminary proceedings that the appellants had been untruthful about their whereabouts after entering Botswana and when they were deported from Botswana, dealt a 'final blow'

to their defence of an alibi which they were to raise in the trial. With reference to various cases Mr. Tjombe submitted that the inquiry should be whether the finding of the trial Judge during the preliminary proceedings would leave a right-thinking observer or litigant with the impression that the trial Judge would be biased when considering the veracity of their alibi-defence to be raised at the trial. Counsel further submitted that where the trial Judge had made anadverse finding on the credibility of the appellants and afavourablefinding on the credibility of the State witnesses during the jurisdiction application, and thus effectively dismissing the intended defence of the appellants of an alibi, the appellants were reasonable in their apprehension that the trial Judge would not be impartial for the remainder of the trial, particularly on the crucial aspect of their defence even before it was properly tested under cross-examination. Although counsel conceded that this Court would be entitled to look at all the evidence presented in the matter and then decide the issues, he also submitted that the damage done by the finding of the Court *a quo*to the appellants' right to a fair trial was irreparable. In this regard counsel referred the Court to cases such as *R v Milne and Erleigh (6)* 1951 (1) SA 1 (A) at 6H and *S v Molimi* 2008 (2) SACR 76 (CC). It seems to me that counsel's concession must be read subject to the qualification that this was an instance where this Court could not sever the bad from the good as the adverse findings by the Court *a quo* were in breach of a fundamental principle, namely the right to a fair trial.

[21] Various other points were also raised by MrTjombe in support of his submission that there was a reasonable apprehension that the Judge would be

biased against the appellants. Because of the conclusion to which I have come it is not necessary for me to deal with these issues.It, nevertheless, seems to me that there would have been more force in the submissions of counsel had the issues complained of by him been raised by the appellants when they were recalled to the Court.However, on being questioned by the Court, they stated either that the case had nothing to do with them or that they should have been granted legal representation. In regard to the latter reason, it must be noted that they knew full well that they could apply to the Director of Legal Aid to provide them with legal representation. The Court even gave them an opportunity to do so but they squandered it by applying for a legal representative to sue the Government of Namibia and not for someone to represent them in the criminal trial. This was a case which was heard over a period of some years. However, the appellants, through their conduct and their attitude completely divorced themselves from the trial and failed to make any meaningful contribution. To that extent they have only themselves to blame.

[22] Mr Small, appearing for the respondent, devoted much of his time setting at rest the other so called irregularities on which MrTjombesought to rely to demonstrate and to support his submission that the Judge was biased. In regard to the findings of the Judge that the appellants were untruthful concerning their whereabouts after they had entered Botswana and when they were deported by that Country, counsel submitted that the Court of Appeal should look at all the evidence and, if it nevertheless came to the conclusion that the trial had been fair, then it should not set

aside the proceedings. This it must do by excising the bad parts and, if what remained, still proved beyond reasonable doubt that the accused had committed the crimes charged, to give effect to that finding. This was illustrated by counsel by saying that, although there might have been a reasonable suspicion that the Judge would be biased, that perception might have been wrong and,for that reason, the Court of Appeal must look at all the evidence and if it concluded that the trial was fair *caeditquestio.* Secondly, counsel submitted that the issue of the alibis of the appellants was not part of the jurisdiction proceedings and that the Court *a quo* merely mentioned this in passing as it was completely unnecessary to make such a finding in the jurisdiction proceedings. Counsel further submitted that it was explained by the Court, in its recusal judgment, that the State had to prove the accused'scommission of the crimes beyond reasonable doubt. There was no onus on the appellants and, if there was a reasonable possibility that their evidence might be true, they would be entitled to be acquitted. Thirdly, counsel submitted that the indictment alleged that high treason was committed during the period from September 1998 up to 12 December 2003. From their affidavits in the jurisdiction proceedings it appeared that during September 1998 they were all still in Namibia. Therefore, so counsel submitted, they were covered by the period alleged in the charge sheet, whereas their so-called alibi evidence did not cover them for this whole period.Consequently, so it was submitted, the finding of the Court *a quo* did not even give rise to a reasonable perception of bias and the application for recusal was merely a technical application brought after a judgment had been given against them. If I understood counsel correctly, he submitted that if the appellants were proved to

have been in Namibia still during the period covered by the indictment, but prior to their entryinto Botswana,then their claim to an alibi was of no assistance to them and the finding of the Court *a quo* in this regard had no effect upon their defence.

[23] During argument Mr Small conceded that the sentencing proceedings in the Court *a quo* were irregular and counsel requested the Court to refer that part of the proceedings back to the High Court to hear evidence and/or argument in regard to those proceedings. Because of the conclusion to which I have come, I need not deal with the third point of argument raised by Mr Small.

The findings by the Court *a quo.*

[24] Mr. Ndauendapo who, at the time of the recusal application, still represented some of the appellants in the Court, relied on *S v Dawid*1991 (1) SACR 375 (Nm) and, so it seems, as a case in point where the Judge recused himself because of a prior adverse finding on the credibility of the accused who had previously been a witness in a different case. Although the Judge found that the *Dawid*-case covered all the points and arguments advanced for and against his recusal, he concluded that the case was distinguishable on various points. With reference to the words complained of in the jurisdiction judgment, the Judge stated that the excerpt was quoted out of context and the Judge went on to quote the full paragraph which the excerpt formed part of. Furthermore, the Judge stated that the appellants completely misunderstood and confused the nature of the jurisdiction proceedings. Their evidence that they had not left the refugee camps in Botswana or that they had not entered or re-entered

Namibia during their stay as refugees in Botswana was totally irrelevant to the issue for determination in the jurisdiction proceedings. The jurisdiction proceedings were not a trial and to have drawn any conclusion that thefindings relied on by the accused to suggest that the Court might be biased was consequently wrong.The Court stated that in the trial to come it would not be necessary to change his mind about his finding in the jurisdiction proceedings because that finding was water under the bridge. It seems that the Judge was here referring to his finding that the Court had jurisdiction to hear the matter. The Judge stated that what the State would have to prove in the main trial was that the accused persons were present at the scene where the offence was committed. The Judge stated that where the accused might or might not have been would be totally irrelevant. Consequently, the accused's concern about their credibility on the question of their whereabouts at the relevant time or times was unfounded. The Judge referred to the principle that in a criminal trial there was no onus on an accused and if there was a reasonable possibility that his evidence might be true, he should be acquitted. The Judge went on to say that it was therefore irrelevant whether the evidence of the accused was believed or not believed, unless the evidence was beyond reasonable doubt proved to be false, there was still the possibility of an acquittal. The Judge then concluded that there was no substance in the application for his recusal. The application was fanciful and was not rooted in reasonable perceptions of bias. A Court should guard against an application which is based on whims or sudden fancies, so the trial court concluded.

Should the Trial Judge have recused himself?

[25] In my opinion this is an instance where the Judge should have recused himself. After the appellants had given evidence in the jurisdiction proceedings, it must have been clear that their main defence was that they could not have committed the crimes for which they were charged because, once they had entered Botswana, they did not leave again and they never returned to Namibia during the period mentioned in the indictment. It was specifically on this evidence that the Judge came to the conclusion that theyhad all been untruthful. This finding was made by the Judge immediately after he had dealt with the evidence of the appellants so that the chance that this was only a passing remark could be ruled out. This was a specific finding on the truthfulness of the appellants in regard to their evidence that after their entry into Botswana they did not return to Namibia.It was of no comfort to them to be told later during the recusal judgment that they need not concern themselves with this finding because, even if they had been lying there was still the possibility of an acquittal because there was no onus on them and their story might still be accepted as reasonably possibly true.

[26] It seems to me that in an instance where the finding of untruthfulness made at the outset of a trial on an issue whichis at the heart of an accused's defence,the dividing line between what is false and what may reasonably be true becomes somewhat blurredfrom the perspective of an accused person. In my opinion it is also a fallacy to argue that, because the finding of untruthfulness was irrelevant to the particular issue which the Court had to decide in the jurisdiction proceedings, it may simply be ignored. In the circumstances of this case, the finding of the Court cannot

be compartmentalised and the books closed on the finding that the Court had jurisdiction. The jurisdiction proceedings were part and parcel of the main trial. The Judge who sat in the jurisdiction proceedings also sat in the main trial and the accused in those proceedings were still the same in the main trial and so was their defence.

[27] This brings me to the case of *S v Dawid.*In this case the presiding Judge (O'Linn J) sometime, after the commencement of the case, realised that the accused, who was charged with murder, was the same person who had earlier given evidence in a diamond trapping case (*S v Da Costa and Others)* -which had also been heard by the learned Judge and in respect of whom the learned Judgehad made an adverse finding of credibility. Because the credibility of Dawid was an issue in the *Da Costa*-case and was again a crucial issue in the murder case,the learned Judge came to the conclusion that in the circumstances the accused could harbour a reasonable fear that the trial Judge would perhaps again be inclined to reject his evidence in his own trial. The Judge thereupon recused himself.

[28] The Judge *a quo* decided that there were some important factors which distinguished the *Dawid* case from the present matter. These were:

> 'Firstly, the *Dawid*case concerned the issue of credibility in two separate trials presided over by the same judge.

> Secondly, the proceedings in both the *Da Costa* and the *Dawid* cases were criminal trials in which the innocence or guilt of the accused was the sole issue and the result dependent on the credibility of Dawid.
>
> By contrast, the present matter concerns a judgment by which the Court dismissed the accused's special pleas on jurisdiction and the question of the innocence or guilt of the accused applicants on any offence did not arise because this was not the purpose of the hearing.
>
> Thirdly, Dawid's credibility was crucial in the *Da Costa* trial because in that trial he had given evidence as a State witness. His credibility was equally crucial in his own trial because he was an only witness and he testified that he killed in self-defence. The learned Judge's involvement in the *Da Costa* trial did not involve giving an opinion in the course of the trial but returning a positive finding dependent largely if not solely on Dawid's credibility as a State witness.'

[29] With due respect to the finding by the learned Judge, I am satisfied that in principle there is no basis on which to distinguish the *Dawid*–case from the present case.The fact that in the *Dawid*–case the findings of credibility were made in two separate cases does not distinguish the case from the present case. If by that it is said that when the findings of credibility concern the same case it would not have the same effect, then I cannot agree. (See *S v Somciza* 1990 (1) SA 361 (A).) In my opinion the case is stronger where the adverse credibility findings were made in the same case because it showed an attitude which was applicable to the further adjudication of that very case. The second distinguishing feature referred to by the Court has to do with the notion that the complained words were part of a judgment which did not directly deal with credibility and which was not the issue in that part of the trial. I have already dealt with that issue herein before and in my opinion an

adverse finding on the credibility of the appellants cannot be ignored simply because it formed part of a separate judgment more particularly because that very issue was still to be decided. The finding may not have been relevant to the issue of jurisdiction but it was relevant to the trial where the same Judge had to decide the credibility of the same accused persons whose defence was the same. The third distinguishing factor is again based on the fact that the previous issue was only a findingby the Court in an interlocutory matter and did not involve positive findings on credibility. I cannot agree that this would distinguish the present case from the *Dawid*–case as far as the issue of an apprehension of bias is concerned.

[30] The Court *a quo* also relied on the case of *R v T*1953 (2) SA 479 (A)in which it was held that 'there is no rule in South Africa which lays down that a Judge in cases other than appeals from his judgments is disqualified from sitting in a case merely because in the course of his judicial duties he has previously expressed an opinion in that case'(482G-H). In the matter of *SA Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) at para [37] doubt was expressed whether what was stated in *R v T* was still good law today where a judicial officer 'had already in the earlier trial decided an issue that was "live and significant" in the second trial'. I, with respect, share this viewwhere findings of fact had been made.

[31] The submission by Mr Small that the affidavits of the appellants in the jurisdiction proceedings showed that they only left Namibia after the date alleged in

the charge sheet, namely September 1998, and that they could therefore not have raised a reasonable perception of bias cannot be accepted. In this regard the learned Judge made a specific finding that their evidence as to where they had been during the period between the dates when they left Namibia and were deported back to Namibia was untruthful. The finding therefore covers specifically the period that they said they had not been in Namibia.

[32] Mr Small's submission that, even where a reasonable perception of bias exists, that perception may be proved to be wrong after the appellatecourt,having considered all the evidence, comes to the conclusion that the trial was fair in every respect, and should then uphold the conviction, is in my opinion an application of the overly stringent 'real likelihood' of bias test. It negates the principle that justice must manifestly be done. As was stated in *S v Roberts*1999 (2) SACR 243(A) at 253b-c the real likelihood test depends on the view from the Bench whereas the reasonable apprehension test depends on the view from the dock.

[33] I agree with the law as submitted by MrTjombe and I have therefore come to the conclusion that in the mind of a reasonable litigant,the finding by the Court that the appellants were untruthful as to their whereabouts after they had entered Botswana and were deported to Namibia,would raisea reasonable apprehension that the Court would be biased against them when the same issue would again be raised during their defenceon the merits against the charges. I am also satisfied that this apprehension was based on reasonable grounds.

[34] The question that remains is whether the damage done is irreparable to such an extent that it vitiates the whole proceedings or whether the Appellate Court can sever the bad from the good and, after re-assessment of the remaining evidence,besatisfied that the evidence remaining still proves the complicity of the appellants in the commission of the crime, dismiss the appeal. (See *Take & Save Trading (CC) and Others v Standard Bank SA Ltd*2004 (4) SA 1 (A) at par[4].)

[35] This is not an instance where the Court *a quo* expressed itself during the proceedings in regard to the credibility of a single witness and where the Court of Appeal could then excise such evidence and look at what remained in order to decide the appeal. (See*S v Molefe*1962 (4) 533 (A) and*S v Shikunga and Another*1997 NR 156 (SC).) In this instance the finding of the Court *a quo* concerns the evidence of the appellants which evidence sets out their defence to the charges against them. Under the circumstances I am of the opinion that it would not be possible for this Court to sever the good from the bad to see if what remained still proved the complicity of the appellants in the commission of the crime. A further complication is the fact that, after the dismissal of their recusal application, the appellants completely distanced themselves from the trial and did not give evidence in their defence.

[35] I have herein before mentioned the fact that an allegation of bias which has arisen during the proceedings is rarely upheld because of the presumption of impartiality of the Judge. This is illustrated by cases such as *R v Silber, supra,* and *S*

*v Basson, supra.*To this I must add that neither of these cases concerns a premature expression in respect of the credibility of the accused or their witnesses.

[36] In any event the above test can only apply in circumstances where the damage done is not irreparable to such an extent that it vitiates the whole proceedings. Where the proceedings are vitiated it matters not that the evidence may prove the commission and complicity of the appellant in the crime charged. There can be no re-assessment of the evidence where that is the case. Under what circumstances then will a Court of Appeal hold that the damage done was irreparable in a particular instance?

[37] In the matter of *S v Somciza, supra,* the accused was convicted by the magistrate but before sentence was imposed the matter went on appeal. The appeal succeeded and the matter was referred back to the magistrate's court to be heard *de novo.* The magistrate who sat in first instance was of the opinion that he was competent to sit again after the matter was referred back. There was another appeal and the proceedings were again set aside. The Court of Appeal set aside the proceedings on the basis that the magistrate had made some strong findings of credibility in regard to the State's witnesses, whose evidence the magistrate had accepted when he convicted the accusedin the first trial. In upholding the appeal the Appeal Court stated (at 365H – 366A)as follows:

> 'However dispassionately the magistrate might feel he would be able, because of his judicial training, to weigh up the evidence afresh once he has heard the appellant's

> evidence, the appellant is, understandably, unlikely to feel complacent about his prospects of receiving a fair trial before that magistrate.'

[38] A further matter which is in my opinion relevant in this regard is the case of *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson.* The facts of the case are correctly set out in the headnote which reads as follows:

> ‘Certain of the respondent's employees had participated in industrial action (the first matter), which resulted in some being dismissed and others being given final written warnings. Subsequent thereto there was protest action against these dismissals (the second matter), which resulted in further dismissals, including employees to whom final warnings had been given. Separate proceedings arising out of this action were instituted in the industrial court. Both matters were then referred to the Labour Appeal Court (LAC), with the second matter being heard first. The LAC found in favour of the respondent, with the Court reciting evidence which was uncontested in that case, but which was in issue in the first matter. When the first matter came before the LAC, two of the Judges who had heard the second matter were due to preside over the appeal. The applicants brought an application for the recusal of those Judges. The application was refused, with the LAC finding, inter alia, that the issues in the two cases were not identical. The applicants then applied for a certificate to apply for leave to appeal to the Constitutional Court, but were granted a negative certificate by the LAC. They then lodged an application for leave to appeal to that Court, which heard the application together with the merits of the appeal. During the course of argument the applicants advanced different grounds for recusal from those advanced before the LAC.’

[39] In their application for leave to appeal the applicants in the *Irvin and Johnson*-case alleged that the issues decided in the second trial and the witnesses were identical to thosebefore the LAC in the first trial. It was also alleged that in the first trial the evidence ofone Ms Holland, an official of the Union, was rejected. The applicants

also widened the scope of their attack by referring to certain remarks expressed in the judgment of the first trial which they said amounted to criticism of the Union. On appeal the Constitutional Court found that it was not permissible to advance different grounds for recusal from those advanced before the LAC as the LAC had no opportunity to deal with the new issues. It further found that the issues in the second trial were not identical to those of the first trial and that those issues were left uncontested in the first trial. The Court further found that although the evidence of Ms Holland was criticisedin the first trial, it was not rejected. The Constitutional Court consequently allowed the applicants leave to appeal but dismissed the appeal.

[40] During the course of his judgment Cameron AJ, who wrote the majority judgment, referred with approval to the case of the High Court of Australia, namely *Livesey v The New South Wales Bar Association*(1983) l5l CLR 288 and remarked that this case illustrated how high the threshold was that a litigant had to pass in order to succeed with an application of bias based on conduct of a Judge during the proceedings. In para[32] the Court said the following:

> ‘The high threshold a litigant must pass in a trial alleged to involve the same issues or witnesses was usefully formulated in*Livesey v The New South Wales Bar Association*, where "the central issues" in the case had already been determined by the Judges whose recusal was sought, and they had expressed a "strong view" destructive of the credibility of a witness crucial to both hearings. In finding that the Judges in question should have recused themselves, the High Court of Australia stated as far as trial proceedings are concerned that a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment

> ". . . if a Judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact."(p 300).'

(The test for bias in Australia is the same as that laid down by the cases here and in South Africa, although they also favour the word 'apprehension' over the word 'suspicion'. See the *Livesey*-case, *supra*, at 293 to 294.)

[41] Referring to the test in the *Livesey*-case, and applying that test, the learned Judge remarked as follows in para [33]:

> '[33] As will appear below, this test cannot be applied without reservation to appellate proceedings, where the presumption of impartiality has an added practical force. Assuming, however, in favour of the applicants that the test for trial proceedings is applicable, the question is whether there is "a live and significant issue" in the pending appeal on which (or about the credibility of a witness significant to which) the Judges in question expressed "clear views" in Nomoyi. The answer must, in my view, be No. The logic of the Labour Appeal Court's ruling that the issues in the two cases are not identical, and that credibility findings directly adverse to the union were not made in Nomoyi, is difficult to assail and MrBrassey made only a circumspect attempt to do so.'

The reference to Nomoyiis a reference to the first trial. The reservation mentioned by the learned Judge in regard to appellate proceedings had to do with the nature of such proceedings and the fact that such Judgeswere more experienced. As a result the presumption of impartiality applies with added force in the case where an application for recusal is brought concerning an Appellate Judge or Judges. (See

paras [41] and [42] of the judgment.) In the present matter this reservation is not relevant.

[42] The principle which was established in the *SA Commercial Catering*-case as well as in the *S v Somciza*-case is that a Judge should recuse himself if he had previously expressed himself in regard to an issue or the credibility of a witness which was still live and which was of real or significant importance in the matter now before him. (See also *Take & Save Trading (CC) and Others v Standard Bank of South Africa Ltd, supra,* para 17 and *S v Dawid.)*

[43] There can in my opinion not be any doubt that the issue of the defence of the appellants was still alive issue and that it was important and significant. The finding concerned the credibility of the appellants in regard to their evidence that they were not in Namibia since they had left the country for Botswana and until they were deported by that country, and that they could therefore not have committed the crimes with which they were charged. That the Court's finding in this regard was not one made *per incuriam* is further clear from the fact that the learned Judge did not state so in his recusal judgment and further that this finding was used to elevate the hearsay evidence of Cst. Kambungo, namely that there was evidence that the appellants had been back in Namibia after their departure from the Country, to real and believable evidence. The Court accepted that Kambungo was telling the truth when he said so. The Court therefore not only rejected the alibi evidence of the

appellants but also accepted that, in contrast to what they said, the State had at its disposal evidence to the contrary.

[44] The impartiality of a Judge goes to the heart of a matter and is fundamental to a fair trial. In the matter of *S v le Grange and Others*2009 (1) SACR 125 (A) at 151a it was stated that bias denotes a mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues and not perfectly open to conviction. In my research I have not come across a case where the Judge has, during the proceedings, made an adverse credibility finding which directly affects the defence of an accused whilst that issue was still live and it seems to me that no re-assessment of the evidence is, first of all, possible and secondly would cure the damage done thereby. I am therefore of the opinion that the refusal by the Judge to recuse himself render the continuing of the proceedings a nullity and that the appeal must therefore succeed.

[45] The question is now whether this Court must refer the matter back to the High Court to start proceedings afresh or whether it should be left to the Prosecutor-General to decide what to do. In the *Le Grange*-case, *supra,* the Court referred to what was said by Holmes JA, in regard to irregularities committed during the proceedings, in *S v Naidoo*1962 (4) SA 348(A) at 354D-F, as follows:

> ‘Broadly speaking they fall into two categories. There are irregularities (fortunately rare) which are of so gross a nature as *per se* to vitiate the trial. In such a case the Court of Appeal sets aside the conviction without reference to the merits. There

remains thus neither a conviction nor an acquittal on the merits, and the accused can be re-tried in terms of sec 370(c) [now s 324] of the Criminal Code. That was theposition in *Moodie*'s case, in which the irregularity of the deputy sheriff remaining closeted with the jury throughout their two hour deliberation was regarded as so gross as to vitiate the whole trial.

On the other hand there are irregularities of a lesser nature (and happily even these are not frequent) in which the Court of Appeal is able to separate the bad from the good, and to consider the merits of the case, including any findings as to the credibility of witnesses. If in the result it comes to the conclusion that a reasonable trial Court, properly directing itself, would inevitably have convicted, it dismisses the appeal, and the conviction stands as one on the merits. But if, on the merits, it cannot come to that conclusion, it sets aside the conviction, and this amounts to an acquittal on the merits. In such a case sec 370(c) of the Code does not permit of a re-trial.'

In the *Le Grange* matter the Court then continued to state at p156 para [21]:

'Plainly, the irregularity encountered here falls into the first category alluded to by Holmes JA in *Naidoo*. The possibility of double jeopardy thus does not arise and the institution of a new trial will not infringe s 35(3)(m) of the Constitution. There remains a pressing societal demand for and compelling public interest in, what after all is a case involving a most serious charge. The right of an accused to a fair trial, as the Constitutional Court has observed in *S v Jaipal*, "requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime." There will accordingly be a miscarriage of justice should a proper trial not ensue. It follows that the matter must be remitted to the High Court for retrial in accordance with s 324 of the Criminal Code.'

(See also our s 324 of Act No 51 of 1977, which seems to be to the same effect.)

[46] What was stated in regard to the type of irregularity in the *Le Grange*-case is also relevant to the present case. Here also the irregularity falls within the first category mentioned by Holmes, JA, in the *Naidoo*-case. In deciding on the most appropriate course of action to follow, this Court must be mindful that the crime of high treason with which the appellants were charged is of a very serious nature. It is generally acknowledged (amongst others, by Milton in *The South African Criminal Law and Procedure*, Vol. 2 (3rd ed.) pp 2-3) that it isthe '(f)irst among public crimes, in order of origin and gravity' and that society hascriminalised treasonous conduct to protect its members,that collectivelyconstitute the State, from violent attack; to protect the organs and institutions of State from violence and coercion and, finally, to protect the democratic character of the State and its constitution from destruction. This consideration must be accorded due weight in considering whether it may not be in the interest of justice to remit the matter to the High Court for retrial.

[47] However, this is not the only consideration. I have also considered the duration of the appellants' detention as trial-awaiting suspects and as accused persons during the trial itself - as well as the period of their incarceration after the conviction to be set aside by this judgment –in assessing the most appropriate course to follow. I have no doubt that the limitation of their freedom for that period has caused – and is still causing – them great hardship.This consideration raises the question whether it would not be more appropriate to simply allow the appeal and leave it to the Prosecutor-General to decide whether they (or any one or more of them) should be

prosecuted again and, if so, on which charges. In that event, the appellants would be entitled to their immediate release from custody.

[48] After reflection on these and other considerations, I have concluded that, in the interest of the administration of justice, the considerations of personal liberty must in this instance yield to the interest of society, as a collective, in the security of the State, its organs and institutions; in the safety of its people and in upholding the constitutional values that unify us as a Nation. In arriving at this conclusion, I had to consider that the charges formulated in the indictment are not mere allegations but that it is also evident that the State possessesstatements by numerous witnesses*prima facie* implicating the appellants. I must hasten to say that, although an important consideration in determining the appropriate course of action to be taken by this Court, the veracity of that evidence must still be tested under cross-examination and be assessed within the totality of evidence to be adduced – including those of the appellants, if any – in the course of a fair trial by an independent, impartial and competent Court. Our Constitution demands no less. However, given the inevitable delay to be occasioned by the retrial of the appellants,the High Court must be urged to enroll the matter as soon as possible and to take such measures as it may deem appropriate to expedite the trial.

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

1. The appeal succeeds.

2. The convictions and sentences imposed on each of the appellants are set aside.

3. The matter is remitted to the High Court for trial before another Judge on the original charges, suitably amended where necessary, or upon any other additional charges as if the appellants had not previously been arraigned, tried and convicted.

4. The registrar of the High Court is directed to re-enroll the matter by no later than 1 August 2013 and the appellants are to remain in custody until then.

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STRYDOM AJA

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SHIVUTE CJ

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MARITZ JA

APPEARANCES

APPELLANTS	NTjombe
	Instructed by the Directorate of Legal Aid
RESPONDENT:	D F Small (with him A Lategan)
	For the State