REPORTABLE

CASE NO.: CA 120/10

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BRIAN KUKURI **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **SHIVUTE J, NAMANDJE AJ**

Heard on: 29 October 2010

Delivered on: 12 November 2010

APPEAL JUDGMENT

NAMANDJE, AJ.: [1] The appellant was charged with and convicted in the Regional Court of rape. He was resultantly sentenced to 15 years imprisonment. He was not represented by a legal practitioner during his trial and at the hearing of this appeal, for he attempted to obtain legal assistance through the Directorate of Legal Aid but to no avail.

[2] The appellant was sentenced on 2 February 2009. Subsequent to his conviction and sentence he, on 25 February 2009 prepared a notice of appeal addressed to the High Court of Namibia. The notice appears to have been also served upon the Clerk of Court.[1]

[3] The State was represented at the hearing of this appeal by Mrs Nyoni. During the course of the preparation for the hearing of this appeal I caused a notice to be given, through the office of the Registrar, to the State's counsel requiring her to argue the appeal on merits in respect of the appellant's conviction in the event of her points *in limine* not being upheld. This was because in her written heads of argument she only addressed the points *in limine* and appellant's appeal against sentence despite the fact that the appellant was evidently also appealing against his conviction. Mrs Nyoni positively responded to the notice and addressed the court, in details, regarding the appellant's conviction. The court heard arguments in respect of both preliminary points and the merits and reserved judgment.

[4] In her written heads of argument Mrs Nyoni raised a number of preliminary points *inter alia* that the appellant's notice of appeal was not filed within 14 (fourteen) days of his conviction and sentence and further that the notice of appeal is a nullity in that it does not comply with Rule 67(1) of the Magistrate's Court "*Rule* 67*(1)*" which provides that:

> "*A convicted person desiring to appeal shall within 14 (fourteen) days after the date of conviction, sentence or order in question, lodge* ***with the Clerk of Court*** *a notice of appeal in writing in which he shall set out* ***clearly*** *and* ***specifically*** *the*

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[1] It is not clear as to when it was received by the Clerk of the Magistrate's Court as the date stamp on the notice is illegible. It was however delivered to the Registrar of the High Court on the 14th of April 2009.

grounds, whether a fact or law or both facts and law on which the appeal is based."

[5] The State's attack on the appellant's notice of appeal was two pronged; firstly that it was not filed within 14 (fourteen) days of his conviction and sentence and, secondly, that it did not set out clearly and specifically the grounds on which the appellant's appeal is based as required in terms of Rule 67(1). *Ex facie* the appellant's purported notice of appeal may not strictly meet the requirements of Rule 67(1). Its formulation leaves much to be desired and may be confusing. While the notice's heading indicates that the appeal is against sentence, it is evident from the content of the notice that the appellant was not only appealing against his sentence but also against the conviction for he specifically:

(i) attacks the contradictions and inconsistencies in relation to the photo plan produced as evidence by the State as opposed to what he observed the date of the incident, in particular the complainant's clothing;

(ii) points out that the complainant after leaving his house first went home wash herself and change her clothing before she reported the rape charges;

(iii) remarks that if the complainant was indeed sexually assaulted she had an opportunity to have alerted the appellant's grandmother who was outside the appellant's house when the complainant left;

(iv) attacks his conviction on the basis that the charges were made up by the complainant because the complainant asked for N$100.00 which the appellant did not have; and he finally points out that the place pointed out as the scene of crime by the crime is accessible to members of public, who move around from time to time.

[6] The appellant filed an affidavit four days before the date of hearing of the appeal in which he sought condonation for non-compliance with Rule 67(1). He further filed handwritten heads of argument in which he specifically challenged the evidence produced by the State at the trial as insufficient to sustain a conviction.[2] Taking together all the appellant's grounds of appeal, the appellant's ground of appeal is essentially that the State did not prove its case as required.

[8] It is trite that a presiding officer in a criminal trial has a general duty to assist an unrepresented accused person[3]. The court *a quo* explained the right of appeal to the appellant in the following terms:

> "*Should you feel that the sentence is harsh or is not in terms of justice you are entitled to launch[4] an appeal within 14 (fourteen) days from the day of this pronouncement. You have a right to appeal against a conviction as well as sentence.*"

[9] A critical look at the above rudimentary explanation by the trial court immediately reveals deficiencies in material respects. It does not qualify as a sufficient and proper explanation by a trial court to an unrepresented particularly in cases where, such as in this case, there is no evidence on the record that the accused is of a reasonable degree of sophistication to understand legal proceedings or to access and interpret statutes on his own.

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[2] The appellant's handwritten heads of argument and his application for condonation for the late filing of the appeal while same were placed on the court file, were not received by the State Counsel as she only came to know of the existence of the heads of argument and the application for condonation during the hearing. She, however after being given an opportunity to read and peruse same indicated that she was ready to proceed with her arguments.

[3] See S v Soabeb and Others, 1992 NR 280 (HC).

[4] I am prepared to assume that the Magistrate intended to use the word "*lodge*" and not "*launch*".

[10] The first sentence of the court *a quo's* above explanation of the rights to appeal against conviction or sentence pertains to the period within which an appeal should be lodged. It is however apparent that the court *a quo* did not mention the word "*conviction*" in that sentence.[5] She, in the first sentence of her explanation, only refered to an appeal if the appellant felt that the sentence was harsh or if it was not in accordance with justice. That, in my opinion, may also mean that only the appeal against sentence is limited in terms of the period within it must be lodged. The fact that the appeal against conviction was mentioned in the last sentence does not fully alert the unrepresented appellant that the 14 (fourteen) days within which one is required to lodge an appeal pertains to both an appeal against sentence and conviction for the court *a quo's* explanation pertaining to the period within which to lodge an appeal only mentioned an appeal against sentence. Conviction was only mentioned in the last sentence of the explanation. The trial court adopted a carefree approach in this regard.

[11] The court *a quo's* explanation is further disturbingly unfair and utterly insufficient in that it did not inform the appellant that he is required to set out clearly and specifically the grounds on which his appeal is based. One is not required only to lodge a notice of appeal. The notice should **specifically** and **clearly** set out the grounds upon which the appeal is based. It is therefore the duty of the trial court in criminal trials in the lower courts to meaningfully and fully explain the requirements of Rule 67(1) to an unrepresented accused. For it will be unfair for an accused to be criticized at the hearing of his/her appeal in the High Court for want of specific and clear grounds on which his/her appeal is based when it was the trial court that omitted to advise him of such requirements.

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[5] First sentence of the Magistrate's explanation above under paragraph 8 hereof.

[12] We should not be naïve, to act as if we are oblivious of the fact that many of the accused brought before courts of law in this country are, in many cases, unrepresented and regrettably of negligible educational standard. They usually do not have access to laws nor do they understand them in the first place. In my view failure to fully explain the requirements provided for in Rule 67(1), in cases such as this one amounts to an irregularity by the trial court not during the trial, but an irregularity attendant to the post conviction and sentence phase of the trial.[6] Further the notice of appeal is required in terms of Rule 67(1) to be lodged with the Clerk of the court. There is nothing in the explanation by the trial court that informed the appellant that his notice of appeal should be lodged with the Clerk of the court. No wonder the appellant's notice of appeal was addressed to the Registrar of the High Court, and not to the Clerk of court.

[13] In making submissions that the appellant's notice of appeal is a nullity counsel for the State referred to The State v T Kakololo[7] and many other judgments of this court in which this court ruled that a notice of appeal which does not specifically and clearly set out the grounds upon which the appeal is based is a nullity. In my opinion such a general rule should be carefully applied on a case by case basis.

[14] In the Kakololo matter the appellant was represented by a legal practitioner who drafted the notice of appeal. I am of the view that once it is found that an unrepresented appellant was not properly informed of the requirements of Rule 67(1) it would be a traversity of justice if the court of appeal were, notwithstanding such a failure by the trial court, to strike his appeal from the court's roll without giving an opportunity, with sufficient assistance, to properly note his/her appeal, or in appropriate cases, where the grounds of appeal could be gleaned from the less than perfect notice of appeal, to

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[6] It is an irregularity that does not taint the conviction and sentence.
[7] 2004 NR 7.

condone the non-compliance and hear the appeal's merits. Each case should however be assessed on its own facts. It is trite that in condonation application the appellant is not only required to show a reasonable cause for non-compliance but also to show reasonable prospect of success on the merits. I am of the opinion that where the trial court is found not to have explained the rights to appeal to an unrepresented accused or having done so improperly, this court has discretionary powers to condone the non-compliance without the appellant having to show reasonable prospects of success on the merits. This is because the rights to appeal in terms of Rule 67(1) were not explained or the explanation was improper or insufficient. The record of appeal in this matter is about hundred pages only. The State was fully able to argue the merits. Accordingly it shall be just and fair to condone the appellant's non-compliance with Rule 67(1) and hear the appeal. I now proceed to consider the appellant's appeal against conviction.

[15] The appellant's ground of appeal against his conviction, if one takes the cumulative meaning of the grounds of appeal as appearing in his notice it is clear that, is essentially pointing out that the State did not prove its case. Counsel for the State, in details, both in fact and in law argued against the appellant's appeal against conviction and submits that same does not enjoy merits.

[16] The appellant was charged in terms of section 2 of the Combating of Rape Act.[8] It was alleged that on 12 June 2005, at Okahandja, he wrongfully, unlawfully and intentionally under coercive circumstances committed a sexual act with the complainant by inserting his penis into her vagina. When the charges were put to the appellant he, in terms of section 115 of the Criminal Procedure Act,[9] disclosed the basis of his defence. He stated that he met the complainant at a public drinking place. They agreed to have

[8] Act 8 of 2000.
[9] Act 51 of 1977 as amended.

sex at the appellant's house. He further stated that after having sex, the complainant went to the police the next day and opened a criminal case. He, in his section 115 statement, therefore admitted a sexual act, and pleads a justification in a form of a consent by the complainant.

[17] The complainant testified that on the date in question she went out to enjoy herself at a local drinking place until the early morning hours. She met the appellant at that place. The appellant proposed love to her which she rejected. She testified that she did not know the appellant before. In the early morning hours she decided to leave the place by walking home. While walking home two persons came from behind and grabbed her. She was physically assaulted and dragged into the bushes. Initially the two assailants were asking for money which she said she did not have. She was ordered to lie down and her underwear was removed. At that point it was dark and she could not see the two persons' faces. One of them had sexual intercourse with her. While the first one had sexual intercourse with her the other one was waiting for the first one to finish. Once the first one finished the second person also had sexual intercourse with her. She described sexual intercourse in the terms that the two persons inserted their respective penises into her vagina. One of the persons who later turned out to be the appellant thereafter carried the complainant to his house. At the appellant's house the complainant clearly recognized the appellant as the person she was with earlier at a nightclub. At the appellant's house the appellant again wanted to have sexual intercourse with the complainant. She pleaded with him not to. The appellant did not succeed to have sexual intercourse with her at that stage. She had to wait until the appellant fell asleep. When the appellant slept she left. She went home, changed her dress and proceeded to the police to open a case.

[18] The complainant upon being informed of the appellant's plea explanation in terms of section 115 of the Criminal Procedure Act, during her testimony, unshakably stuck to her version that the appellant under coercive circumstances committed a sexual act at a place where the appellant was accompanied by another person and not in the appellant's house. During cross-examination the appellant put it to the complainant that she voluntarily went to his house. Initially he put it to the complainant that he did not have sexual intercourse with her as they only slept together at his house. However further in his cross-examination he freely reconstructed his cross-examination by denying the allegations that the sexual act was committed in the bushes and putting it to the complainant that they had a consensual sexual intercourse at the appellant's house. He put it to the complainant that the only reason why the complainant opened a police case was because the appellant did not have money the complainant asked for. A police officer that visited the scene of the crime testified that at the place pointed out by the complainant as the scene of the crime he observed signs of dragging and wrestling. This observation was consistent with the evidence of the complainant.

[19] A police officer who consulted the complainant on the morning she reported the case with the police observed that her hair was full of grass and further observed some scratch marks on her legs. The medical legal report handed in as an Exhibit indicates that on the morning the complainant reported the case to the police the doctor who examined her observed multiple bruises on her legs. The above evidence corroborates the complainant's version that she was physically attacked before she was raped and further that she was dragged into the bushes. The State has a duty to prove guilty of the appellant beyond reasonable doubt. It must however be remembered that our legal system is an adversarial one. Once the State has produced sufficient evidence

sufficiently covering all the elements of an offence an accused who fail to produce evidence to rebut such a case may be at a risk of a conviction.[10]

[20] In *casu* the appellant having admitted in terms of section 115 that he indeed had sexual intercourse with the complainant and having further put it to the appellant in cross-examination that they had sexual intercourse, save that he alleged that such occurred at his house whilst the complainant alleged that such occurred in the bushes was under obligation when he opted to give evidence to lead evidence consistent with the basis of his defence in terms of section 115 and the case he put to the complainant. The appellant overwhelmed by the temptations to reconstruct his case as and when it suits him shot himself in the foot by giving evidence contrary to the version put to the complainant and further contrary to his statement in terms of section 115. It must be remembered that cross-examination is not only a right it also comes with a duty.[11] I am of the opinion that there is less, if nothing at all, value in the appellant's evidence. This is because the State witness in particular the complainant was made to comment on the appellant's supposed version which the appellant decided not to pursue when he later testified in defence.

[21] Considering all the facts and the totality of the evidence I am satisfied that the State proved its case beyond reasonable doubt that the appellant committed an unlawful sexual act. It is regrettable that another person who may have committed such a serious crime was not prosecuted as the complainant due to the circumstances in which she was at the time of the conclusion of the crime could not recognize him.

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[10] S v Katari, 2006 (1) NR 205 (HC) at p 210 and Osman and Another v Attorney-General, Transvaal, 1998 (4) SA 1224 (CC).

[11] See President of the Republic of South Africa and Others v South African Rugby Football Union and Others, 2000 (1) SA 1 (CC) at p 1.

[22] I now consider the appellant's appeal against sentence. The defenseless complainant was dragged into the bushes, physically assaulted and eventually raped. The fact that two persons could prey upon a defenseless woman after having physically assaulted her is aggravating. The trial court opted for a minimum sentence of 15 years having found that there were no exceptional circumstances as contemplated in terms of the Combating of Rape Act. This court can only interfere with the sentence if the sentence was startlingly inappropriate and shocking or in case where an irregularity during sentence occurred.[12]

[23] In my opinion no irregularities occurred whether in law or on facts when the trial court considered the sentence in this matter. Further the record indicates that the trial court considered all the triad of sentencing. That being the case the appellant's appeal against sentence is without merit and should be dismissed. In the result I accordingly make the following order:

(1) The appellant's application for condonation for non-compliance with Rule 67(1) of the Magistrate's Court is granted.

(2) The appellant's appeal against both conviction and sentence is dismissed.

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[12] See S v Simon, 2007 (2) NR 500 (HC).

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NAMANDJE, AJ.

I agree

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SHIVUTE, J

ON BEHALF OF THE APPELLANT:	IN PERSON
INSTRUCTED BY:	
ON BEHALF OF THE RESPONDENT:	MRS IM NYONI
INSTRUCTED BY:	OFFICE OF THE PROSECUTOR-GENERAL