REPORTABLE

CASE NO.: SA 31/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

DANIEL FERECIANO **Appellant**

and

THE STATE **Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ and MAINGA JA

Heard: **14 July 2016**

Delivered: **22 August 2016**

APPEAL JUDGMENT

MAINGA JA (SHIVUTE CJ and DAMASEB DCJ concurring):

[1] This appeal concerns the appellant's application for condonation for the late filing of a notice of appeal and re-instatement of the appeal.

[2] The appellant was arraigned in the Regional Court, Windhoek on two counts of rape in contravention of s 2(1)(*a*), read with ss 1, 2(2), 3, 4, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 (the Act). He had pleaded innocence to both counts but after a trial he was on 16 August 2009 convicted on count 2 and found

not guilty on count 1 and discharged. He was sentenced on 21 August 2009 to ten (10) years imprisonment of which four (4) years were suspended for five (5) years on good behaviour.

[3] He appealed the conviction and sentence to the High Court. A purported notice of appeal is dated 25 January 2010, that is five months after the appellant was sentenced. The notice was accompanied by an unsworn affidavit purporting to explain why it was filed out of time. The reason advanced for the late filing of the notice of appeal is that the appellant as an unrepresented layman, was not aware that he had to file the notice of appeal within fourteen (14) days. This assertion is at odds with the record as at the end of the sentence imposed on the appellant the following appears:

> 'Accused it is your right to appeal within (14) fourteen days. In that event you must file a notice of appeal stating your grounds of appeal and if your notice of appeal is filed out of time then you must also apply for condonation stating sufficient grounds as to why your notice of appeal was lodged out of the prescribed period of 14 (fourteen) days.'

[4] The High Court dismissed the condonation application and struck the appeal from the roll for the following reasons.

(a) The explanation for the delay in filing the notice of appeal was not reasonable more so that appellant misled the court when he alleged that he was not aware that he should have given notice of appeal within 14 days when the explanation of his rights to appeal is apparent from the record.

(b) There are no reasonable prospects of success as the crime against the complainant was proved beyond reasonable doubt.

[5] Subsequent to this judgment, the appellant lodged another application in the High Court seeking the appeal to be re-instated. That application was also struck from the roll for the reason that the court was *functus officio.*

[6] Appellant comes to this court as of right. See *S v Arubertus* 2011 (1) NR 157 (SC) at 159C-160A-B, *S v Absolom* 1989 (3) SA 154 (A). In what is purported to be a petition to the Chief Justice he says the High Court did not give him the opportunity to argue his application for condonation as to why it was filed out of time. He further states that the High Court erred when the learned judges did not hear him on the merits of the case and therefore he was not given a fair hearing. Especially that the learned judges should have considered that he was not represented. He has reasonable prospects of success on appeal, so he says; in that the Regional Court magistrate erred when he convicted him on the evidence of the black coat; the evidence of the complainant's assailant carrying a gun when his employer testified that he had no access to his weapon. He further says that the Regional Court misdirected itself when it rejected and admitted some evidence of the complainant. He suggested that the trial court should have drawn a negative inference from the failure of the police to take him for medical examination immediately after his arrest and the State's failure to call the medical practitioner who allegedly examined the complainant.

[7] The issue which arises for determination is whether the High Court erred or misdirected itself when it dismissed the appellant's application for condonation. It is common cause that the appellant noted his appeal five months out of time. In terms of s 309 of the Criminal Procedure Act 51 of 1977 read with rule 67 of the Magistrates' Courts Rules, appellant should have delivered a written notice of appeal to the Clerk of Court, Katutura within 14 days of the date of the conviction, sentence or order. Rule 27(3) of the old High Court Rules provides that 'the court may, on good cause shown, condone any non-compliance with these rules'. In *Federated Insurance Co of South Africa Ltd v Malawana* 1984 (3) SA 489 (E) at 495H Zietsman J said the following:

> 'It is clear from rule 27(3) and from rule 30(3) that a breach of the Rules is not necessarily visited with a nullity, and can be condoned. The court has a discretion which must be exercised judicially after considering the relevant circumstances and deciding what will be fair to both sides.'

[8] Appellant's explanation for the delay to timeously file the notice of appeal is that he was unrepresented and a layman, and that he was not aware of the time period of 14 days. The explanation is false as he was properly informed of his rights to appeal. The fact that he was unrepresented was the choice he made. He declined to apply for legal aid in the trial court. He chose to represent himself in the High Court, so just as he did in this court, despite the willingness of the legal aid directorate to assist him. The appellant further states that he was denied the opportunity to argue his application and yet in his oral argument in this court he said he was given the opportunity to address the court. He was indeed given that

opportunity when regard is had to the penultimate paragraph of the court *a quo's* judgment where the following is recorded:

> 'There is only one other matter which requires mentioning and that is that the appellant had applied for legal aid but when he appeared he indicated that he did not want to pursue that application and would want to represent himself. He was then invited to address the aspect relating to the application for condonation, especially those raised by counsel for the State in which it had been referred to in this judgment.'

[9] The other grounds of appeal he raised in his purported petition to the Chief Justice are also without substance. For example, the evidence of the complainant's assailant carrying a gun when his employer testified that he had no access to his weapon is not relevant to the count he was convicted on; that evidence was relevant to the count he was acquitted. The failure of the State to call a medical practitioner who examined the complainant was as a result of his admission of the medical report. In any case, s 212 (7A)(*a*) of the Criminal Procedure Act 51 of 1977 provides that:

> 'Any document purporting to be a medical record prepared by a medical practitioner who treated or observed a person who is a victim of an offence with which the accused in criminal proceedings is charged, is admissible at that proceeding and *prima facie* proof that the victim concerned suffered the injuries recorded in the document.'

[10] On the merits of the case, I find it unnecessary to repeat the evidence, as presented in the trial court. Suffices it to say his identity was proved beyond

reasonable doubt. The complainant and her sister knew the appellant and they identified him without any difficulties. In this regard the learned Smuts J stated:

> 'But as was also pointed out by Ms Nyoni for the State, the appeal also lacks any prospects of success. We agree with that submission it is quite clear from the evidence. That the complainant Ms Uiras was able to identify the appellant. Her evidence of the rape was also undisturbed. And was in fact also corroborated by her sister Ms Eva Uiras.
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> The identification of the accused, the appellant in this matter, also occurred with the police officer who effected the arrest. The evidence thus against the appellant was thus compelling and there is clearly a lack of any prospects of success as well. Both components of the requirement for condonation have thus not been met.'

[11] It is trite that an extension of time within which to file the notice of appeal is an indulgence which will be granted upon good cause shown for the non-compliance and upon the existence of good prospects of success on appeal see *Arubertus* at 160C-D.

[12] Thus, the appellant's application for condonation was correctly refused and it fails in this court as well.

[13] In the result I make the following order.

1. The appeal is dismissed.

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MAINGA JA

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SHIVUTE CJ

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DAMASEB DCJ

APPEARANCES:

Appellant:	In Person
Respondent:	I M Nyoni For the State