REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 14/2013

In the matter between:

SIBUKU SIBUKU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Sibuku v The State* (CA 14/2013) [2014] NAHCMD 30 (31 January 2014)

Coram: DAMASEB, JP et SHIVUTE, J
Heard: **15 November 2013**
Delivered: **31 January 2014**

Flynote: Criminal procedure – Fair Trial - Unrepresented accused – Duty of presiding officer emphasised – Presiding officer in the trial of an undefended accused is required to take a more active part to in some measure redress the disadvantage an undefended accused may suffer from lack of legal representation – The value to an undefended accused of, and the benefit he derives from, judicial assistance emphasises the

importance of protecting the undefended accused. A judicial officer, already at the pleading stage, is obliged to examine the charge-sheet, ascertain whether the essential elements of the alleged offence(s) have been averred with reasonable clarity and certainty and then give the accused an adequate and readily intelligible exposition of the charge(s) against him or her. The accused should be informed by the presiding officer or the prosecutor of the operation of any presumption he or she may have to rebut, and the prosecutor should inform the court and the accused of the content of the evidence he intends to lead. If an offence involves proof of a particular circumstance which serves as an aggravating factor justifying the imposition of a particularly severe penalty or the availability of a lesser sentence than would otherwise be the case if an extenuating circumstance is shown by the accused, it is necessary (a) to allege that circumstance in the charge sheet and (b) to draw the accused's attention thereto before he or she pleads guilty as (c) failure to do so may render the trial unfair.

ORDER

I make the following order:

a) The application for condonation for the late filing of the appeal is granted;

b) The appeal succeeds; and

c) The convictions and sentences of both accused are set aside and both accused are set free.

JUDGMENT

DAMASEB, JP (Shivute J concurring):

[1] The present appellant was accused 2 in the proceedings in the court below. He was charged with another man, Nalumino Hastin Nawa, who was accused 1 in the trial court. Both accused were found guilty of three counts of rape with 'coercive circumstances' and sentenced to 15 years on each count although ten years of the one count were made to run concurrently with another count. The result is that each accused was sentenced to an effective term of 35 years imprisonment. In this judgment I will refer to the present appellant as accused 2 and his co-accused in the court below as accused 1.

[2] It is common cause that accused 2 noted his appeal out of time - 14 months after sentencing to be precise. He filed what is, it is common cause, an inept application for leave to appeal but we need not consider its merits because the State concedes that the prospects of success on the merits are good. I shall deal with that issue presently. Counsel for the State also properly conceded that because the prospects of success are good, this is a proper case for extending the benefit of any favourable finding in respect of accused 2 to accused 1 who had not appealed. The concession is properly made.

The State's further concessions

[3] At the trial, the complainant testified that accused 1 raped her first, followed by accused 2; and again by accused 1. According to the complainant's testimony, therefore, three separate acts of non-consensual sex were perpetrated on her by the two accused. The drift of the evidence, which the trial court found proved beyond reasonable doubt, is that accused 1 committed two acts of rape while accused 2 was responsible for one act of penetration and assisted accused 1 in committing the second act of penetration and that accused 2 threatened the complainant if she did not submit

to accused 1. The two accused were not charged with acting with a common purpose but the learned magistrate approached the issue as if they were and thus convicted each not only for the act of penetration attributed to him but also that allegedly committed by the other. Counsel for the State submitted that, in so doing, the magistrate misdirected himself.

[5] The State submitted that accused 1 should not have been convicted of three counts of rape but only of the two penetrations attributable to him and that accused 2 should have been convicted only of the one act of penetration allegedly perpetrated by him. Given these misdirections, and the magistrate's failure to explain the meaning of ‘substantial and compelling circumstances’ to the accused persons, Mrs Esterhuizen for the State submitted that this court must:

(a) In respect of accused 1, confirm only two convictions for rape and set aside the third conviction;
(b) In respect of accused 2 confirm only the one conviction of rape, set aside the other two; and
(c) In respect of both accused, set aside the sentences and remit the matter to the trial court to proceed afresh with the sentencing procedure.

[6] Mr Heathcote SC, to whom the court is indebted for his industry and for accepting to act in this matter *pro amico*, has submitted helpful heads of argument in which he argues for the setting aside, not only of the convictions and sentences in the way proposed by the State, but the setting aside of the convictions and sentences in their entirety as there was, he forcefully argued, a complete failure of justice rendering the convictions and sentences unsafe.

Issues falling for decision

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[7] The appeal turns on whether the accused received a fair trial, both at the plea stage and during the trial. Given that, by informed choice, they stood trial without legal representation, the appeal raises the issue whether the magistrate who presided in the court a quo failed to meaningfully assist the accused in the conduct of their defence.

[8] This judgment first addresses the question whether the charges which the accused were asked to answer to were defective, whether they were made to understand the charges properly and if any prejudice resulted therefrom. The second part of the judgment will deal with the issue of the overall fairness of the trial.

[9] Given that the overarching issues are (a) whether the undefended accused had a fair trial and (b) if the magistrate in any way contributed to the unfairness of the trial, it is important to first discuss the extent of a trial court's duty to assist an unrepresented accused.

Extend of presiding officer's duty to assist unrepresented accused

[10] A trier of fact has a duty to assist an unrepresented accused. The question is the scope and extent of the assistance to be given to the accused, especially one who takes the conscious decision not to enlist the services of a legal practitioner even at State's expense. The first point to be made is that the conscious decision not to enlist the services of a lawyer should not be used as some kind of punishment against an accused; nor does it offer the trier of fact the licence to leave the accused to his own devices. Secondly, the duty to assist the unrepresented accused does not end with the trier of fact giving formulaic explanations of the procedural rights of the unrepresented accused. Thirdly, the assistance must be of substance and be meaningful: It requires of the trier of fact to be vigilant throughout the trial, remembering always that the State bears the onus to prove the accused's guilt beyond reasonable doubt and that the accused has no duty to prove his innocence, let alone to give any explanation at all. If

during the trial the accused makes any suggestion, or from State's witnesses any evidence emerges which either points towards innocence or throws doubt on the State's case, it is the duty of the trier of fact to direct the accused's attention thereto and to suggest in what way it may possibly assist his or her case.[1]

[11] Did the trial court live up to that standard in the case before us?

The charges

[12] The two accused were charged with three counts of rape of a female under 'coercive circumstances'[2], the charge alleging that at the time of the offences the female complainant was below 14 years old and that the two accused were three years older than her.[3]

[13] Mr Heathcote argued that the first misdirection occurred when the magistrate acted on the charges as presented by the State. According to counsel acting *pro amico*, the magistrate ought not to have accepted the charge as presented as it failed to specify the respective ages of the complainant and the two accused and also failed to provide any particularity of the violence that the two accused are alleged to have visited on the complainant.

[14] *S v Rudman*[4] emphasises the obligation of a presiding officer to ensure that an accused is tried fairly and that justice is done. As far as the charge is concerned, Cooper, J stated[5] that:

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[1]Compare S v Rudman; S v Johnson; S v Xaso; Xaso v van Wyk NO 1989 (3) SA 368 at 377D- 378A.

[2]Combating of Rape Act, 2000 (Act No.8 of 2000), s 2(1) read with sub-sec (2).

[3]Ibid, in particular s 2 (2) (d).

[4] S v Rudman; S v Johnson; S v Xaso; Xaso v van Wyk NO 1989 (3) SA 368 at 377D- 378A.

[5]At 377D.

'A judicial officer, already at the pleading stage, is obliged to examine the charge-sheet, ascertain whether the essential elements of the alleged offence(s) have been averred with reasonable clarity and certainty and then give the accused an adequate and readily intelligible exposition of the charge(s) against him. The accused should be informed by the presiding judicial officer or the prosecutor of the operation of any presumption he may have to rebut, and the prosecutor should inform the court and the accused of the content of the evidence he intends to lead.'

[15] Mr Heathcote argues that the accused were arraigned on defective, confusing and meaningless charges which, probably, prejudiced them. The reason, counsel argues, is that the charge sheet omits the respective ages of the complainant and the accused. He relies on *S v September.*[6] That case is authority for the principle that a charge should be framed with reasonable clarity and certainty before an accused person is called upon to plead and that where a charge is not only uncertain, but meaningless, the possibility, and even the probability, of prejudice to the accused cannot be ruled out.

[16] In *September* supra the charge was framed in the two official languages of South Africa, the first part in Afrikaans and the second part in English. The court said *that* was an unwarranted practice. In addition, the learned judge observed in connection with the charge that:

'[T] he particulars of the charge as framed are . . . . meaningless and senseless. It is alleged, first, that the accused assaulted himself; then the name of the complainant is introduced with doubtful meaning and effect and thereafter the averment is again made that the accused inflicted the injuries on himself. Finally, with reference to the allegation of intent, the name of the person against whom the intention was directed is totally omitted.'[7]

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[6] 1954 (1) SA 574(O).

[7] Ibid at 574F-G.

[17] The court relied on the *dictum* of Ramsbottom, AJ in *R v Zonele and Others*[8] as follows:

'It is desirable that the facts which the Crown intends to prove as constituting aggravating circumstances[9] should be set out in the indictment, as was done in the present case. Without laying down any rule, I venture to suggest, for the consideration of Attorneys-General, that it might be a good practice to go further and, in addition, to allege specifically that the accused is charged with robbery (or with housebreaking with intent to commit an offence) in which aggravating circumstances were present. I believe that a practice of this sort has been adopted in cases in which the accused is charged with theft from a motor vehicle which was properly locked - a fact that affects punishment - and I suggest that it might, with advantage be extended to indictments for robbery or housebreaking with intent to commit an offence.' (My emphasis)

[18] Mr Heathcote also submitted that the trial court failed to explain the meaning of 'coercive circumstances' and 'substantial and compelling circumstances' to the accused before they pleaded. The implication is that since the magistrate did not explain to the accused the import of those phrases, they did not have a fair trial. Counsel relies on *S v Ackerman*[10], a case which involved a charge under s 4 of Act 71 of 1968: Assault with a dangerous weapon. The court held in that case that the charge sheet in connection with that offence should specifically allege that the State will contend that the provisions of the section should be applied to the case. The court reasoned that already at the plea stage the accused should be made aware of the case he was expected to answer. The authority is in point and I adopt it for present purposes.

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[8]1959 (3) SA 319 (A.A) at 323B-C; The ratio in Zonele was applied in S v Ndlovu 1974 (4) SA 567 (N) and in S v Pheka 1975 (4) SA 230 (NC).

[9]Compare s 2 (1) of Act 8 of 2000.

[10] 1972 (1) SA 130.

[19] The principle discernable from the cases is this: If an offence involves proof of a particular circumstance which serves as an aggravating factor justifying the imposition of a particularly severe penalty or the availability of a lesser sentence than would otherwise be the case if an extenuating circumstance is shown by the accused, it is necessary (a) to allege that circumstance in the charge sheet and (b) to draw the accused's attention thereto before he or she pleads guilty as a (c) failure to do so may render the trial unfair.[11] These principles are sound and should be acted on by the courts of Namibia.

The charges are bad in law

[20] Each accused was charged with committing separate acts of rape against the complainant under 'coercive circumstances' which, according to the charge sheet, consisted:

> 'In that on a date unknown to the 19 September 2006 and at or near Katima Mulilo, in the Regional division of Namibia, the accused . . . . did on diverse occasions, wrongfully and intentionally under coercive circumstances commit or continue to commit a sexual act with [the complainant] by inserting his penis into the vagina of the complainant while applying physical force against and or while threatening to apply physical force against the complainant and the complainant being (under the age of 14 years) and perpetrator being was years old being more than three years older than the complainant.'

[21] Both accused represented themselves after their rights to legal representation were explained to them. In the case of accused 2, he was at the time represented by Mr van Vuuren but he terminated counsel's mandate and chose to represent himself. The two confirmed that they understood the charges. How they could have is beyond me. It is anyone's guess how these confusing and misleading charges were translated into native tongue of the accused, even less if they understood it. The trial court was

[11] See also S v Seleke and Another 1976 (1) SA 675 at 676F-H and 677H.

satisfied that they understood. One thing is certain, the charges as framed are apt to mislead: From reading the charges one cannot tell whether the accused knew that they were facing a possible minimum sentence of 10 years in terms of s 3(1) (a) (ii) or a possible minimum 15-year sentence in terms of s 3 (1) (a) (iii).

[22] The respective charges start off by giving the impression that the date when the offence occurred is unknown, only to proceed to name a specific date (19 September 2006) on which the offence allegedly occurred. The charge next lulls the accused into believing that he had sex with a girl of a stated age and that he was of a specified age at the time the alleged offence occurred – only to fail to give the ages of either the alleged victim or the accused – while at the same time suggesting that the complainant's and the accused's ages are material to the outcome of the case. The only reference to the actual age is that the alleged victim was under the age of 14 without the charge stating what the legal relevance of that was.

[23] To compound the problem, the State did not lead any evidence either on the age of the alleged victim or the accused. In my view, there is merit in Mr Heathcote's submission that the charges are confusing and probably misleading. On the *Ackerman* and *Rudman* tests I would have quashed the convictions and sentences on account of the bad charges and the trial court's failure to assist the accused properly understand the charges they faced and the potential defences open to them in avoiding a finding that coercive circumstances were present in the case.

[24] Be that as it may, and in the event it is found that I am wrong in that view, I proceed to consider the further objections raised by Mr Heathcote about the conduct of the trial.

Summary of material facts

[25] First the common cause or undisputed facts: The two accused and the complainant are relatives; they know each other very well. The complainant's testimony that the two accused are her uncles remains undisputed. The grandfather of the victim (first State witness) is also related to the two accused. All the witnesses who testified on behalf of the defence are either relatives or acquaintances of the accused and the complainant.

[26] It is important to set out at the outset what the accused's defences were when called upon to plead. They both pleaded not guilty. Accused 1 stated that he wanted to see the person who saw him commit the offences. Accused 2 stated that the victim knew he did not commit that offence.

[27] According to first State witness Mr Robert Ntelamo, who is the complainant's grandfather, he heard the complainant scream at about 22h00 on 19 September 2006. He went to the complainant's room which, it appears, is a hut separate from where the grandfather lived but forming part of the family homestead, in typical African traditional setting. When he got to the complainant's room, she reported to him that:

> 'Nawa and Sibuku they entered my house whilst holding a knife and they had sexual intercourse with me and they said if I will scream, they will stab me with a knife and cut my throat. The two of them had sexual intercourse with me. After they had left is when I started screaming.'

[28] It needs to be said that the tenor of Mr Ntelamo's evidence is that after hearing the complainant scream, he went to her room and that when he got there the two accused ran away and that thereupon he, and others, chased after the two accused up to the home of accused 2. Accused 1 then 'broke out in the house and ran away'. Mr Ntelamo, assisted by others it appears, then got hold of accused 2 who also ran away but was later arrested. It emerged later in examination-in-chief that Mr Ntelamo did not

see the two accused run away from the complainant's room upon him arriving to answer to her alarm.

[29] Accused 1 chose not to testify but called one witness, Mr Sibuku Sibuku, father of accused 2. In his evidence Mr Sibuku stated that at the relevant time, Mr Ntelamo and others came to his house, looking for the two accused whereupon accused 1 ran away. Accused 2 was then 'arrested' and tied on the leg and to some object and taken away. Mr Ntelamo was the main actor in that respect. Mr Sibuku also testified that he was present when accused 1 was confronted by Mr Ntelamo about the rape of the complainant. According to this witness, the complainant denied having had sex with both accused but that she did so only with accused 1. Mr Sibuku further testified that the complainant also said, there and then, that she had only offered a mat to accused 2 to sleep on – presumably when the two accused were in her room and, in context, while she and accused 1 engaged in romantic activity. Mr Sibuku persisted under cross-examination that the complainant exonerated accused 2 of any rape and that she said that she only had sex with accused 1. Accused 1 in re-examination of Mr Sibuku denied having had sex with the complainant.

[30] Accused 2 testified on his own behalf and called several witnesses. He admitted to coming to the complainant's room with accused 1 who, according to him, was the complainant's boyfriend. After they entered the room he wanted to sleep. The complainant gave him a blanket to sleep on and she disappeared behind the curtain with accused 1. In the morning, the complainant made herself ready for school. Mr Ntelamo, the grandfather, who was then in the nearby shrubs answering to the call of nature saw them. He and accused 1 left for his father's house and slept. Mr Ntelamo then came accompanied by others. Mr Ntelamo demanded that accused 1 come out or he (Mr Ntelamo) would enter and kill him, whereupon accused 1 took flight. Mr Ntelamo asked accused 2 to come with them to discuss the matter. He went along and at Mr

Ntelamo's village he was tied to a chair. The complainant, who was present, was asked by Mr Ntelamo why she had sex with two men. The complainant retorted that she had sex only with accused 1 and that she only gave a blanket to accused 2 to sleep on. Mr Ntelamo than asked for a sjambok in order to whip the complainant. When he was untied at some stage, accused 2 ran away.

[31] In cross-examination, accused 2 was accused of not putting these allegations to the complainant. When challenged that he could not possibly have heard any threat by Mr Ntelamo to the complainant as he had run away, accused 2 stated that he only ran away after having heard Mr Ntelamo's threats. According to accused 2, Mr Ntelamo disliked accused 1 and told the complainant to falsely implicate the two of them.

Irregularities in the conduct of trial

[32] Mr Heathcote attacks the verdict on the basis that the court a quo in explaining to the unrepresented accused the right to cross-examination, relied on a *pro forma* explanation which was wholly inadequate and misleading. For example, Mr Heathcote submitted that the *pro forma* explanation does not explain to the accused that in cross-examining they should put their version to the state witnesses. On behalf of the State it was argued by Mrs Esterhuizen that the explanation given by the magistrate concerning the right of cross-examination was wholly adequate.

[33] I have already explained the duty of a presiding officer to assist an unrepresented accused in conducting meaningful cross-examination. I have made clear that the duty does not end with giving the accused a formulaic explanation of the right. Cooper J stated in *Rudman*[12] that during the State case a presiding judicial officer is at times obliged to assist a floundering undefended accused in his defence. He added that where an undefended accused experiences difficulty in cross-examination the presiding

[12]S v Rudman; S v Johnson; S v Xaso; Xaso v van Wyk NO 1989 (3) SA 368 at 378C-D.

judicial officer is required to assist him in (a) formulating his question, (b) clarifying the issues and (c) properly putting his defence to the State witnesses. The learned judge also added that where, through ignorance or incompetence, an undefended accused fails to cross-examine a State witness on a material issue, the presiding officer should question - not cross-examine - the witness on the issue so as to reduce the risk of a possible failure of justice. The thrust of *Rudman* is that the presiding officer should assist an undefended accused whenever he needs assistance in the presentation of his or her case and should protect the accused from being cross-examined unfairly.

[34] Cross-examination is a right under our adversarial process[13]; a right owed to both 'pauper and prince'.[14] Given that it is a right, where an accused is unrepresented, it imposes an obligation on the presiding officer to assist the accused exercise it meaningfully. Proper cross-examination of State witnesses is the only guarantor the accused has to receiving a fair trial. As Erlich notes about cross- examination:

> 'Cross examination is the most potent weapon known to the law for separating falsehood from truth, hearsay from actual knowledge, things imaginary from things real, opinion from fact, and inference from recollection'.[15]

Thus, so important is the role of cross-examination in our adversarial practice that it cannot be down played or treated in a perfunctory fashion by a trier of fact faced with an unrepresented accused.

[35] The question is, did the *pro forma* explanation fail to meet that standard and if it did, what was its impact on the trial? The view I take of Mr Heathcote's submission on the magistrate's explanation of the right of cross-examination is that the explanation

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[13]President of the RSA v South African Rugby Football Union 2000 (1) SA 1 at 36J-37E.

[14]Ibid at 38, para 65.

[15] Erlich J.W. 1970. *The Lost Art of Cross-Examination.* G.P. Putman's sons, New York, p 15.

appearing on the record is reasonably adequate, although formulaic. The real issue is whether the magistrate, apart from giving a formulaic explanation, meaningfully assisted the accused in exercising the right to cross-examine.

[36] In the following paragraphs I will set out the aspects of the trial on which the accused were entitled to meaningful assistance in their cross-examination of State witnesses but were either not assisted by the magistrate or frustrated by him.

[37] All defence witnesses (Robert Sibuku; Rosemary Nakanga and Lazarus Miti) are either relatives of or acquainted with the complainant and the two accused. (I am not persuaded that Mr Miti could have testified not hearing the assertion by the complainant that she only had sex with accused 1 if, as suggested by the State, he and the defence witness colluded to give false testimony). The result therefore is that three defence witnesses confirmed not only that accused 2 was exonerated by the complainant of committing the crime but that the grandfather threatened the complainant in a manner that gave her the incentive to make a false report. These considerations cast doubt on the credibility of the complainant, a single witness whose evidence of the alleged rape is severely undermined thereby. It is trite that the evidence of a single witness must either be corroborated or be satisfactory and reliable.[16] The magistrate did not approach the complainant's evidence with the necessary caution. That is misdirection. If he did, he would have entertained a doubt about the truth of her allegation of rape.

[38] The two accused[17] and all the defence witnesses in their evidence raised the prospect that the rape allegation against the two accused is a fabrication. Their cumulative evidence shows that the complainant's grandfather, Mr Robert Ntelamo, (first State witness) to whom the complainant made the first report of the rape, was

[16]S v HN 2010 (2) NR 429 at 443E-F, para 56.

[17] Accused 1 in his cross-examination of various witnesses, and accused 2 also in his cross-examination of various witnesses and in his evidence under oath.

opposed to the complainant having a romantic relationship. The evidence also shows that accused 1 had a romantic relationship with the complainant. (To the extent that the complainant was involved in such a relationship she would have provoked the ire of the grandfather). The defence evidence also showed that the complainant's grandfather did not like accused 1. Further, the defence witnesses suggested that the complainant had at some stage during the confrontation of the accused in hers' and others' presence admitted to having had consensual sex with accused 1 on the date the alleged rape occurred but denied any sexual contact with accused 2. The defence evidence shows that the grandfather had not only accused the complainant of having had sex with both accused consensually but threatened to beat her up. The defence witnesses stated that the rape allegations were made after the alleged threat by the grandfather to beat up the complainant. Finally, the defence evidence shows that the grandfather assaulted accused 2, threatened accused 1 with violence and took the law into his own hands by detaining and interrogating the two accused – in the case of accused 2 even tying him up on the leg to some object in order to conduct some form of vigilante interrogation.

[39] This potentially favourable evidence to the accused was not properly ventilated at the trial as having a bearing on the credibility of the State witnesses. It was the duty of the magistrate to assist the two accused in that regard.

[40] No attempt whatsoever was made to raise the issue of the absent rape kit and to alert the accused to its significance. I do not agree that the absence of the rape kit is an insignificant matter. At the very least it should have been explained what had become of it. The accused were entitled to any favourable conclusion that could have been drawn from its findings. The admitted non-introduction into evidence of the rape kit is no small matter. Any reasonably competent practitioner representing an accused in a criminal trial will pose questions about its existence and will seek an adverse inference against the State's case if it not produced in court. It is therefore not a sound proposition by

counsel of the State to say that it was immaterial that the trier of fact, who had the duty to assist the accused, did not inquire about its whereabouts. Mr Heathcote's submission in that respect is therefore justified.

[41] It is common cause that at the time of the alleged rape, the complainant was menstruating. As regards the act of rape, Mr Ntelamo (the complainant's grandfather) testified that the complainant reported to him that the two accused 'were just exchanging themselves to have sexual intercourse with me or on my body.' Therefore, according to the complainant, both accused had penetrative sex with her. No evidence was led at the trial of the clothes worn by the complainant when the alleged rape took place, the blankets on which the alleged rape took place, the clothes worn by the two accused when they were taken in custody, or that any attempt was made to examine their bodies for any traces of blood emanating from the complainant. It beggars disbelief that no such evidence was introduced, in the face of the denial of the two accused that they raped the complainant. Not only that, no attempt appears to have been made by the investigating officers to see if the accused persons had any traces of blood, either on their clothes or bodies.

[42] The absence of such evidence, or an explanation why it could not be present, is a relevant consideration whether or not the complainant's allegation of penetrative sex by the two accused was proved beyond reasonable doubt. It is not far-fetched to expect traces of blood in the circumstances described. Since the accused denied having sexual intercourse with the complainant, the State bore the onus to prove that a sexual act had taken place in respect of the complainant. It was the duty of the magistrate to ventilate these issues. They went to the heart of the issue whether the complainant was telling the truth. What is even more disturbing is that the trial magistrate disallowed a question put to the complainant by accused 1 that it was impossible for him to have had sex with her while she was menstruating. The court also disallowed, improperly in my view, a

question he posed if any of his blood was taken to link him to the offence. In fact, when accused 2 cross-examined her, the complainant stated she was perplexed that the two accused had sexual intercourse with her without asking if she was menstruating. Common sense suggests that a person who has sex with a woman who is menstruating would have contact with her blood and that the blankets or bed on which the act took place will have traces of blood.

[43] Given that the complainant is a single witness on the rape allegations, her credibility was a critical factor in the trial of the two accused. Her evidence as a single witness had to be satisfactory and reliable or otherwise be corroborated. Evidence tending to show that her accusations of rape were not truthful needed to be highlighted and given special attention by the presiding officer. In that connection, the State's failure to explain the absence of certain evidence was critical in determining not only the credibility of the complainant but also whether the accused's denial of rape was reasonably possibly true. Questions which highlighted the weaknesses in the State's case ought properly to have been ventilated by the presiding officer considering that the accused were unrepresented. He should have done that by fairly and patiently raising those issues in a manner that would have alerted the accused to the importance of missing evidential material, inconsistencies in the State's case and matters bearing on the credibility of State witnesses.

[44] The State had a duty to disprove the allegations of rape beyond reasonable doubt, including any exculpatory assertions made by the accused. Besides, in so far as the two accused were unrepresented, the magistrate was duty-bound to assist both accused in placing their versions to the relevant witnesses so that they could either deny the allegations or offer explanations which might have thrown doubt on the allegation of rape. The duty extended to assisting the accused in appropriately raising evidential material which impacted on the credibility of State witnesses. The learned

magistrate did not do that and that seriously undermined the fairness of the trial. As Mr Heathcote correctly submits, the failure to have fully explained the purpose of cross-examination must be seen against the backdrop that in its summing up, the court said, inter alia, that accused 1 'under cross-examination by the public prosecutor…conceded that he did not put his version to the complainant when she testified'.[18]

[45] Mr Heathcote's further attack relates to the admission of the s 212 statement (J 88) without, counsel suggests, affording an opportunity to the accused to challenge the findings therein, its purpose and the effect of a failure to challenge any conclusion therein adverse to them. In addition, Mr Heathcote argued that it was an irregularity to have allowed a doctor who had not prepared the J 88 to come and explain the findings recorded thereon by a Cuban doctor who had since left Namibia and did not testify at the trial. The Cuban doctor had recorded on the J 88 that the 'lessions' found on complainant's vagina were 'coincident with the time and circumstances'. The Namibian doctor who came to explain the J 88 interpreted 'coincident' as 'correlation'. Mr Heathcote maintains this was impermissible. Counsel's stance is that the irregularities he points to in respect of the J 88 are exacerbated by the fact that the court, in its summing up recorded that nothing of significance emerged from the accused' s cross-examination in respect of the J 88.

The J 88

[46] Counsel for the State, Mrs Esterhuizen has argued that even without the J 88 the accused's guilt was proved beyond reasonable doubt - presumably based on the complainant's allegation that she was raped, her alleged report to the grandfather after the alleged offence and the actions (fleeing from the scene) of the accused after the alleged rape. I will therefore assume, without deciding, that the statement was

[18] See also para 31 above. This accentuates the need for proper assistance to an unrepresented accused so that failure to cross-examine is not later on held against him or her.

improperly obtained and is liable to be excluded. In the event that the issue becomes a live one at another forum, I want to make it clear that it was most improper, in light of the accused having squarely placed in issue the medical evidence, for a doctor other than the one who prepared the J 88, under the guise of explaining a report, to give an explanation about the word which suggested that a disputed fact, sexual penetration, had been the finding of the absent doctor. This should however not be construed as laying down a rule that it is impermissible for one doctor who is not the author of the J 88 to explain entries made thereon by another doctor. That is a practice which is perfectly acceptable and is adopted in our criminal courts.

[47] Probably the most damaging evidence against the accused in so far as corroboration goes, is that of the complainant that the accused ran away, and that of Mr Ntelamo that he heard the complainant scream and that when he got to her, the two accused were not there and that he chased after them and found them at the home of accused 2, when accused 1 ‘broke’ out from the house and ran away. There are however important countervailing considerations against this evidence. The first is that there is no evidence that Mr Ntelamo saw the two accused run away, although initially he gave that impression. Secondly, accused 2’s version was that Mr Ntelamo saw them at the room of the complainant early in the morning when complainant was getting prepared for school. This evidence is at odds with the version of Mr Ntelamo that he heard the complainant scream around 22h00 on the 19 September 2006. Thirdly , and perhaps most significantly, the defence evidence suggests that Mr Ntelamo acted aggressively, even threatening violence, when he came to the house of accused 2 where he found the two accused. The reason given by the two accused for running away is therefore reasonably possibly true and certainly not false beyond reasonable doubt.

[48] *S v Shikunga and Another*[19] establishes the principle that where there was a non-constitutional irregularity committed during the trial, the test is whether it was so fundamental that it could be said that in effect there had been no trial at all. If the answer is in the affirmative the conviction must be set aside. Where the irregularity was of less severe nature, then depending on the impact of the irregularity on the verdict, the conviction should either stand or a verdict of acquittal on the merits should be substituted therefor, the essential question being whether the verdict was tainted by the irregularity.

[49] Mr Heathcote has quite properly raised as an issue the unfairness in the conduct of the trial, in particular the failure by the trial magistrate to assist the accused with cross-examination. Based on the views I expressed earlier, I am satisfied that this complaint is merited and is decisive of the outcome of this appeal.

[50] I come to the conclusion that there are too many unexplained questions which throw doubt on the version of the complainant and Mr Ntelamo. In the first place, Mr Ntelamo was implicated in very unambiguous terms by accused 2 and all defence witness that he visited, and seems was prepared to, visit violence on accused 2. Mr Ntelamo himself admitted tying-up accused 2 during some pseudo interrogation. Mr Ntelamo seems to be a man who was not only disposed to take the law into his own hands but he never gainsaid the accused's suggestion that he operated a strict code which prevented the complainant from having a boyfriend. His evidence ought therefore to have been approached with great caution. Given his predisposition for violence, and his attitude towards the complainant's love life, the suggestion by accused 2 that Mr Ntelamo disliked accused 1 has a ring of truth to it. The version that Mr Ntelamo accused the complainant of having sex with both accused and threatening to beat her up also seems reasonably possibly true and was, at all events, not disproved beyond

[19] 1997 NR 156 at 170F-G-171A-D.

reasonable doubt. The court, if it properly directed itself, could not reasonably have come to the conclusion that the complainant's allegations of rape were proved beyond reasonable doubt.

[51] For all of the above reasons, the court a quo should have found that the State had failed to prove the case against the two accused beyond reasonable doubt. They should have been acquitted.

[52] Accordingly,

a) The application for condonation for the late filing of the appeal is granted;

b) The appeal succeeds; and

d) The convictions and sentences of both accused are set aside and both accused are set free.

P T Damaseb

Judge-President

N Shivute

Judge

APPEARANCES

APPELLANT:	R Heathcote, SC
	Pro Amico
RESPONDENT:	K Esterhuizen
	Of the Office of Prosecutor-General, Windhoek