REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 19/2016

In the Main Appeal between:

VINCENT KAPUMBURU LIKORO **APPELLANT**

and

THE STATE **RESPONDENT**

In the Cross Appeal between:

THE STATE **APPELLANT**

and

VINCENT KAPUMBURU LIKORO **RESPONDENT**

Neutral citation: *Likoro v S* (CA 19/2016) [2017] NAHCMD 355 (08 December 2017)

Coram: LIEBENBERG J and D USIKU J

Heard: **17 November 2017**

Delivered: **08 December 2017**

Flynote: Criminal Procedure – Court of appeal is confined to the four corners of the record – Any alleged irregularities committed by either the legal representative of the appellant, or the presiding magistrate, must be decided on what is apparent from the record.

Appellant's legal representative omitted to put appellant's version to State witnesses during cross-examination – Whether it constituted an irregularity – General rule is that where an accused entrusts his defence to his legal representative, he is bound by the actions of his representative – At no stage during proceedings did appellant protest against manner his counsel conducted his defence – Nothing on the record suggested that appellant's counsel was not executing his instructions – Failure by appellant's legal representative in his conducting of the defence not constituting an irregularity.

S 167 of the Criminal Procedure Act 51 of 1977 entitles the court to recall and re-examine any person – Where the evidence of such person appears to the court essential, the court is obliged to call or re-call that person – Before case can be re-opened on the ground of error of judgment on the part of a legal representative, a very strong case must be made out – Failure by defence to put its version to State witnesses in cross-examination – Not constituting new evidence when appellant testifies – There was in law no basis for the court to order the recalling of State witnesses to be questioned.

Summary: Appellant attacked the conviction on two different fronts, firstly it was directed against the manner in which proceedings were conducted (procedurally); and secondly, on the merits he attacked the court's evaluation and findings on the facts. The appellant, however, was uncertain as to whether he should bring the Regional Court proceedings before this court by way of review and simultaneously lodge an appeal. Review applications are heard separately by judges from the civil stream whereas criminal appeals fall under judges of the criminal stream. It was up to counsel to decide the way forward.

With regards to the procedural aspect the appellant stated that he was not afforded effective legal representation during the trial due to the lack of experience of his erstwhile legal representative and the second procedural attack was on the failure of the presiding magistrate in the court *a quo* to recall State witnesses in order for the appellant to put his version to State's witnesses.

Held, that, any of the alleged irregularities committed by either the legal representative of the appellant, or the presiding magistrate, must be decided on what is apparent from the record.

Held, further that, the general rule had always been that where an accused entrusts his defence to his legal representative, he is bound by the actions of his representative.

Held, further that, before a case can be re-opened on the ground of error of judgment on the part of a legal representative, a very strong case must be made out and in the premises there was in law no basis for the court to order the recalling of State witnesses to be questioned.

ORDER

1. Respondent's application for adjournment of the proceedings is refused.
2. The appellant's application for condonation for the late noting of the appeal and amendment thereto, is refused and struck off the roll.
3. Appellant's bail is cancelled with immediate effect and he is to be taken into custody and brought before the Regional Court sitting at Katima Mulilo for committal.

JUDGMENT

LIEBENBERG J (USIKU J concurring):

Application for postponement

[1] Appellant in the main appealed against his conviction in the Regional Court sitting in Katima Mulilo, on a count of rape, read with the provisions of the Combating of Rape Act 8 of 2000 (the Act).[1] In what I prefer referring to in the judgment as a 'cross appeal' the State, in terms of s 310(1) of the Criminal Procedure Act, 1977[2] successfully obtained leave to appeal against the appellant's acquittal on a similar charge contained in count 2. Despite leave having been granted to the State, it never lodged the appeal and seemed only to have realised this during the exchange of written heads. As a result thereof, the State caused a Notice of Appeal to be filed with this court on 13 November 2017, four days prior to the appeal hearing.

[2] Mr *Lisulo*, for the respondent, in his founding affidavit in support of an application for condonation of the respondent's failure to comply with the rules of court as regards the late filing of heads of argument, admits the State's omission to have the Notice of Appeal filed on time. It is further asserted that the cross appeal will be pursued essentially on the same grounds relied on during the application for leave to appeal, and that the appellant would therefore not suffer any foreseeable prejudice. This conclusion is probably based on the assumption that the appellant did not oppose the State's application for leave to appeal. It must however be observed that appellant during that application had clearly stated that this was done not as confirmation of the State's prospects of success on appeal, but merely to expedite proceedings and to have the appeal heard as soon as possible.

[1] Count 1.
[2] Act 51 of 1977.

[3] In view thereof and in particular for the State's failure to file their notice with the Clerk of the Court Katima Mulilo in terms of Rule 67 of the Magistrates' Court Rules, we asked counsel at the commencement of proceedings to address us on why the State's cross appeal should not be struck off.

[4] Mr *Botes*, representing the appellant, in response submitted that he holds instructions to oppose any further postponement. Notwithstanding, leave was sought by the State from the Bar to have the matter adjourned in order to comply with the rules, supported by a substantiated application for condonation. The reasons advanced for the State's late filing of heads of argument proffers no explanation for its failure to file the notice of appeal as prescribed by the rules.

[5] Although the State was granted leave to appeal by this court, it did not constitute the lodging of the appeal itself. It was nothing more than being allowed to appeal the matter. The appeal would only have come into existence when a proper notice was filed with the clerk of the court at Katima Mulilo where after the matter were to be dealt with as provided for in the rules. It is imperative that the presiding magistrate be afforded the opportunity to make a statement and reply to those appeal grounds levelled against his judgment, which reasons would obviously be of assistance to the court sitting on appeal. In the present instance there is nothing on record showing that the trial magistrate was even aware that leave was granted to the State to appeal against the court's finding on count 2.

[6] What the State essentially requests is to put the main appeal on hold in order to allow the lodging of a cross appeal. This is done against the background where the State was aware of the appellant's desire to have his appeal finalised as a matter of urgency. Though the issue of prejudice to the appellant was not addressed by his counsel, it appears to us a foregone conclusion that appellant will indeed be prejudiced by any further postponement, not only for the want of having the matter finalised, but also for

counsel until now not having submitted any written argument as regards the proposed appeal. Without notice being given, how could it argue the matter without knowing the grounds it is based on? In addition, appellant will still have to bear the legal costs of one court day going wasted.

[7] Everything taken into consideration, and equally mindful of the principle that an appeal is not to be heard in piecemeal, we have come to the conclusion that there is no proper basis for the granting of leave to have proceedings adjourned. The application is accordingly refused.

Condonation

[8] Appellant filed his Notice of Appeal outside the prescribed time limit provided for in the rules[3] and subsequent thereto, also filed an amended notice styled *SUPPLEMENTARY / ADDITIONAL NOTICE OF APPEAL.* Whereas both notices having been filed out of time, condonation for appellant's non-compliance with the rules is sought.

[9] Whereas the respondent opposed the appeal against conviction but not the condonation application, we must, for purposes of the present application, assume that the respondent considers the appellant's reasons for filing both notices out of time, reasonable and acceptable. What thus remains to be decided is the prospects of success on appeal.

Appellant's two-pronged approach

[10] Appellant attacked the conviction on two divergent fronts. Firstly, it is directed against the manner in which proceedings were conducted (procedurally); and secondly, the court's evaluation and findings on the facts. The first challenge turns on the manner in which the trial was conducted by the appellant's erstwhile legal representative and the court, as a result thereof, not receiving evidence to its fullest extent, an omission that resulted in a conviction on one count of rape.

[3] Rule 67 of the Magistrates' Court Rules.

[11] In view of the elaborative formulation of the grounds of appeal articulated in both notices and same largely overlapping or repeated, I do not intend dealing with these grounds *seriatim* as that would unnecessarily overstretch the judgment. I am further mindful, as regards those grounds relating to procedure, that the appeal is not based on any alleged misdirection on the part of the trial court on either fact or law as required by the rules, but turns on the alleged irregularities vitiating the proceedings.

[12] From a reading of the papers it would appear that in view of the nature and extent of the complaints, appellant was at first uncertain as to whether he should bring the Regional Court proceedings before this court by way of review and simultaneously lodge an appeal. During a meeting in chambers with counsel it was pointed out that the current dispensation is that review applications are heard separately by judges from the civil stream whereas criminal appeals fall under judges of the criminal stream. It was then left to counsel to decide the way forward. This court in *S v Mwambazi*[4] said the following at 365E-G:

'Proceedings of any magistrate's court can be brought before the High Court of Namibia by way of appeal or by way of review, depending on the nature of the complaint. Where an accused complains about his conviction or sentence, he should approach the High Court by way of appeal, but where his complaint is about an irregularity involved in arriving at the conviction, the best procedure is to bring his complaint by way of review. Should he wish to bring an appeal as well as review proceedings, he can do so simultaneously and both can be set down before the same Court on the same day. In *Ellis v Morgan*; *Ellis v Dessai* 1909 TS 576 at 581 Mason J said:

"But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."

(See also *Coetser v Henning and Ente NO* 1926 TPD 401; *Hirschorn v Reich and Another* (1929) 50 NLR 314.)

[4] 1990 NR 353 (HC).

The complaint need not, however, arise from mere high-handedness by the magistrate; a bona fide mistake which denies the accused a fair trial is also an irregularity. *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551. It must be stressed that in an appeal an appellant is confined to the four corners of the record, but in review proceedings the aggrieved party traverses matters not appearing on the record. *Schwartz v Goldschmid* 1914 TPD 122.'

[13] It is against this background that the appellant proceeded with the appeal against conviction on a charge of rape as set out in count 1. With commencement of proceedings appellant's counsel informed us that the appellant abandons his appeal against sentence.

[14] What is before us is an appeal in which the appellant *inter alia* complains about the manner in which his legal representative conducted his defence during the trial, as a result of which he was not afforded a fair trial. From the above quoted passage it is clear that in deciding the appeal on grounds not directly relating to the conviction and sentence i.e. on the merits, but on procedure, a court of appeal is 'confined to the four corners of the record' and any of the alleged irregularities committed by either the legal representative of the appellant, or the presiding magistrate, must be decided on what is apparent from the record.

[15] It is settled law that it is only 'where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside'.[5] In essence, the question the court of appeal has to decide in respect of both constitutional and non-constitutional irregularities, is whether or not the verdict has been tainted by such irregularity?

The procedural challenge

[16] It was argued that in no way could it be said that the appellant received a fair trial as enshrined in Article 12(1)*(a)* of the Constitution, in that he was not afforded effective legal representation during the trial due to the

[5] *S v Shikunga and Another* 1997 NR 156 (SC) at 170I-J.

'incapacity, lack of experience or lack of preparation' on the part of his erstwhile legal representative. The contention is substantiated by nine instances during the trial where appellant's counsel is said to have failed in his duty to provide effective legal representation. These failures, it is submitted, were of such proportion that it constituted an impermissible and unlawful infringement of the appellant's right to a fair trial. Appellant further contends that in the end this impacted on the presiding magistrate when arriving at the conclusion to convict.

[17] Appellant's contention of his legal representation not having been effective is mainly based on his counsel's failure to put material aspects of appellant's version to State witnesses during cross-examination. Reference was also made to 'blunders' by his former representative. These *inter alia* relate to the following:

- Counsel's failure to plead the defence of consent from the onset.
- The manner in which the medical report was introduced as evidence.
- The inability to cross-examine from a witness statement and the requirement to lay a basis first.
- His request to consult with appellant before introduction of the complainant's evidence.
- Counsel's failure in cross-examination to deal with, exploit or address possible motives complainant might have had for laying charges of rape and improbabilities related thereto.
- Failure to address during cross-examination of complainant, material differences between the scene of crime report and her evidence.
- Failure to put the essence of the appellant's version to complainant and other State witnesses where it differs.
- Counsel's failure, when realising that appellant's evidence is attacked on the basis of being a recent fabrication, to rectify same during re-examination or otherwise.

[18] In appellant's view these failures by his legal representative were of such significance and material proportions that it did not only constitute an

impermissible and unlawful infringement of his right to a fair trial, but in effect destroyed his right to same.

[19] But the appeal simultaneously lies against the presiding magistrate's inaction or passivity for not intervening as he, already during the early stages of the trial must have realised that appellant's legal representative was incapable or lacked experience; hence, he had a legal duty to intervene and/or assist the appellant to take the necessary steps to ensure that appellant received a fair trial. To this end, it is said, the court could have recalled some of the State witnesses 'so as to enable the appellant's legal practitioner and/or the court to put appellant's version, as it unfolded during his testimony, to the witnesses to test the veracity thereof …'. (Emphasis provided) Failure to do so, it was submitted, culminated in the court rejecting the appellant's version on the basis of it being recently fabricated.

The Magistrate's reasons

[20] In a statement submitted by the presiding magistrate in response to the complaints lodged against the manner in which proceedings were conducted, he started off by reasoning that in terms of Article 12(1)*(e)* of the Namibian Constitution the appellant was 'entitled to be defended by a legal practitioner of his choice'. He further pointed out that the appellant was clearly satisfied with the advocacy of his counsel when appellant stated under cross-examination that the burden of proof was on the State to prove that he was guilty, and that *it was up to counsel to decide how to approach the matter*.[6] There was no further response from the magistrate pertaining to the alleged inadequacy of appellant's legal representative.

[21] Regarding the alleged passivity on the part of the court, the magistrate said that in his opinion, to have done more than he already did, would have amounted to descending into the proverbial arena in an adversarial criminal trial, constituting a violation of the appellant's right to be represented by a legal practitioner of his own choice. That the court indeed assisted counsel on

[6] Record p 380 lines25 – 28.

procedural matters at different stages of the proceedings, is borne out by the record.

[22] As regards a further irregularity allegedly committed by the court *a quo* when disallowing a request by appellant's counsel to have the matter stood down for a period of one and a half hours in order to take instructions from the appellant prior to the leading of the complainant's evidence, the magistrate relied on the *dictum* enunciated in *Seth Sheehama v The State*[7] and reasoned that there was nothing exceptional about the circumstances of the case justifying the request. Notwithstanding, it was allowed but not to the full extent thereof.

Applicable law

[23] Article 12(1)*(e)* of the Namibian Constitution states as follows:

> 'All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.'

[24] From the record of the proceedings before the court *a quo* it is evident that the appellant instructed a legal practitioner of his choice. It is not disputed that the legal practitioner appellant opted for to represent him in the trial, was admitted and had all the qualifications to be enrolled as legal practitioner; as such, he was a practicing legal practitioner at the relevant time. To this end all legal requisites had been met and in principle there was nothing inappropriate for appellant to be represented by the particular legal practitioner of his choice.

[25] It was submitted on appellant's behalf that there has been a substantial change between the pre-constitutional approach where it was accepted that, failure on the part of the accused to raise disagreement with the manner in which his case in defence is conducted but takes no steps during the trial to

[7] Case No. CA 201/2008 (unreported) delivered on 03 April 2009.

terminate his counsel's mandate and does so only after the verdict, then he is not permitted to challenge the verdict on appeal.

[26] As authority for this contention the court was referred to *S v Tandwa & Others*[8] where the following appears at 621H – 622B:

'The right to chosen or assigned legal representation is a right of substance, not form:

The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence.[9]

Incompetent lawyering can wreck a trial, thus violating the accused's fair trial right. The right to legal representation therefore means a right to competent representation - representation of a quality and nature that ensures that the trial is indeed fair. When an accused therefore complains about the quality of legal representation, the focus is no longer, as before the Constitution, only on the nature of the mandate the accused conferred on his legal representative, or only on whether an irregularity occurred that vitiated the proceedings - the inquiry is into the quality of the representation afforded.'

[27] In the same vein the court in *S v Chabedi*[10] at 484 para 19 restated the well-established principle that 'an irregularity in the conduct of a criminal trial may be of such an order as to amount *per se* to a failure of justice, which vitiates the trial'.
(See: *S v Bennett*)[11]

[28] Van Oosten J in *Chabedi* (at para 21) summed it up in the following terms:

'[21] It is well established under our present constitutional setting that an accused's right to a fair trial embraces, inter alia, the right to legal representation and, as a corollary thereto, to be informed thereof (see *S v Mbambo* 1999 (2) SACR 421

[8] 2008(1) SACR 613 (SCA).
[9] *S v Halgryn* 2002 (2) SACR 211 (SCA) ([2002] 4 All SA 157) para 14, per Harms JA for the court; *S v Mofokeng* 2004 (1) SACR 349 (W) para 18 (Louw AJ, Gudelsky AJ concurring).
[10] 2004 (1) SACR 477 (W).
[11] 1994 (1) SACR 392 (C) at 399c.

(W)). Inextricably linked hereto, in my view, is the right of an accused person to be properly defended. Whether an infringement of this right has occurred will depend on the facts and circumstances of each particular case. That does not mean, of course, that the common-law principles to which I have referred do not apply. Insofar as they are not in conflict with the Constitution they remain good law.' (Emphasis provided)

We respectfully endorse these sentiments.

[29] The general rule had always been that where an accused entrusts his defence to his legal representative, he is bound by the actions of his representative. However, the court in *R v Muruven*[12] found the rule not entirely inflexible but with the qualification that:

'… it is clear that a very strong case must be made before a decided case can be re-opened on the ground of an error of judgment on the part of the legal representative. But for that, there would be a lack of finality about court judgments which would be entirely against public interest.'

[30] In *S v Bennett* (*supra*) the appellant on appeal and in support of an application for review, relied on certain alleged shortcomings of counsel in defending the appellant. It was argued that those shortcomings constituted a fundamental and gross miscarriage of justice and thus a fatal irregularity in the proceedings. The Court found the complaints against the conduct of his counsel unmeritorious and held that even if they were, relying on the judgment in *S v Matonsi*[13] it was not open to the appellant, as a matter of law, to claim, on the grounds set out by him, a fatal irregularity in the trial which vitiated the proceedings (p.397). In *Matonsi* the appellant contended that he was 'prevented' by his counsel to testify in his defence on which the Appellate Division held that '… since the appellant had taken no steps to withdraw his counsel's mandate and had expressed no disagreement with the conduct of his case until after the verdict had been given, the trial was regular and the correctness of the verdict could not be challenged on appeal'.

[12] 1953 (2) SA 779 (N).
[13] 1958 (2) SA 450 (A).

[31] In the present instance the appellant substantially relies on the *dicta* enunciated in *Chabedi* (para 22) in support of a contention that a material irregularity occurred in that he was not properly and adequately represented at the trial. It would however appear to me from what follows, that the facts of that case are significantly distinguishable from the facts before us.

[32] Whilst under cross-examination the appellant in *Chabedi* was challenged with certain aspects of his evidence which had not been put to State witnesses by his lawyer. The appellant then in open court expressed his dissatisfaction as to how his lawyer was conducting his defence in that he had barely consulted him before the trial and neither was he giving effect to his instructions pertaining to his defence. These complaints he had noted in the same document he handed to his lawyer for perusal before giving evidence. From his reply it was apparent that appellant had, at that stage of the proceedings, still not furnished the attorney with full instructions – this came only during a further adjournment. The court, clearly appreciative of the situation, invited the recalling of State witnesses which resulted in the recalling of only one State witness (complainant's mother) whose testimony was not really helpful but during which further questions arose that could be answered by other witnesses. The complainant and medical doctor, whose evidence, in the appeal court's view, was vitally important and material to determine the accused's guilt or innocence, were however not recalled.

[33] On appeal it was held that the lawyer, in performance of his mandate to defend the accused, had a duty to call these witnesses in order to do justice to his client's defence, and clearly failed to appreciate the import of their evidence and the effect it might have had on the evidence of the complainant and other witnesses. This was considered a material misdirection by the court *a quo.* Other omissions on the lawyer's part concerned cross-examination of State witnesses where incriminating evidence was left unchallenged and where the appellant's defence was merely put to witnesses for their comment. It was accepted that the appellant was not properly defended and the court

then posed the question as to whether it amounted to a fatal irregularity which vitiated the proceedings.

[34] After a discussion of relevant case law, the court concluded that a material irregularity had been committed in that the appellant was not properly and adequately represented at the trial. The proceedings were set aside and remitted to be heard *de novo*.

[35] Quite contrary to *Chabedi*, there is nothing on record showing that the appellant before us had not fully consulted with counsel. The one incident where an adjournment of proceedings was sought for consultation on a specific matter can hardly serve as basis for any argument that there was no full and proper consultation prior to and during the proceedings. That instructions on the appellant's defence had been given, was confirmed by the appellant in cross-examination when stating that what he had testified in court, is how he instructed his counsel. It has not been established at what stage were instructions given in full i.e. from the outset, or as the trial progressed. That having been the case, he was challenged on certain aspects that evidently had not been put to the State witnesses by his counsel, to which he responded by referring to the *onus* of proof being on the State, and how counsel chose to approach the case was for him to decide.

[36] The significance of his response is twofold: a) Appellant through his answer appeared to have been acquainted with the law and legal principles (at least as far as cross-examination is concerned); and b) he was clearly satisfied with the manner in which his defence was being conducted. This implies that effect was given to his instructions.

[37] Had the appellant given instructions to his counsel identical to what he testified, it then raises the question why his conflicting version was never put to State witnesses in cross-examination. When asked whether he had given the same instructions to his lawyer from the beginning, he confirmed but remarked that by then he had a different lawyer. It seems to me there are two possible explanations for this: Firstly, that the version (at that stage) was

never part of his instructions and therefore counsel could not have challenged the State witnesses' evidence on that version. Or secondly, had it indeed been his instructions from the outset as he claims, counsel's failure to put his conflicting version to the witnesses should have drawn the appellant's attention who, in the circumstances, had the duty to point out this serious omission to his counsel – or to the court if necessary. This we know, was never done. On the contrary, he defended the approach adopted by his counsel – an approach that could only have been in compliance with his instructions.

[38] Unlike in *Chabedi* and the majority of criminals tried in our courts on a daily basis, the present appellant is a highly qualified person holding a Bachelor of Science degree obtained from the University of Cape Town. In mitigation he stated a very impressive *Curriculum Vitae* in full, which led up to his appointment by the then President of Namibia, as Special Advisor to the Minister of the Ministry of Lands and Resettlement, a position he held until his arrest. Taking into account the appellant's background and qualifications on record, it seems highly unlikely that the attentiveness or incompetency on the part of his counsel, to the extent claimed by the appellant, would have escaped his attention. Hence, any argument in which the appellant is portrayed as a lay person who was left at the complete mercy of his legal representative, disturbs one's sense of logic and reasonableness. In any case, that is not borne out by the record of the proceedings. The first time he protested his dissatisfaction with his counsel was only after conviction. At no stage during the trial did appellant raise his concern about the way in which proceedings were conducted and neither did he take any steps to withdraw his counsel's mandate. On this point his fate should be no different from that of *Matonsi* (*supra*) where the court in similar circumstances held the trial to have been regular and the verdict not challengeable on appeal.

Failure or omissions by defence counsel

[39] The linchpin of the attack on the regularity of the proceedings was the alleged failure of counsel to put the appellant's version to State witnesses

during cross-examination. Although the appellant's defence was not put to the complainant in all its detail, the record reflects at p.272 – 273 that she denied the appellant's claim that they went to the toilet together and that there was no kissing, caressing or foreplay. This would clearly suggest appellant's defence of consent by the complainant.

[40] Appellant accepted no responsibility for such failure, for which the blame was squarely laid before his counsel, being accused of incompetence, inferred from alleged mistakes made by the lawyer during the trial and which compounded in an irregularity, vitiating his conviction.

[41] We however do not share the same sentiments on this point, and are strongly of the view that in the present circumstances, and particularly with appellant's background, there is no basis for coming to the conclusion that his counsel is solely responsible for bringing such omission about (failing to put the appellant's version to the State witnesses). There is nothing on record that remotely suggests that appellant's counsel was not executing his instructions.

[42] The alleged omissions must also not be viewed in isolation, as it suits his earlier explanation at the stage of pleading. Counsel then informed the court that there was no plea explanation and that the onus was on the State to prove its case beyond reasonable doubt. This was clearly aimed at first testing the strength of the State case before the appellant's defence would become known. This practice is not uncommon in our courts as the accused would often from the onset of the proceedings invoke his or her right to remain silent, a right enshrined in the Constitution. Though the accused at the stage of pleading cannot be compelled to give a plea explanation, there is a duty on the accused to challenge the evidence of State witnesses where in conflict with that of the defence, failing which the court will be entitled to accept the unchallenged evidence as the truth. See *President of the Republic of South Africa v South African Rugby Football Union (SARFU),*[14] a case often cited with approval in this Jurisdiction, where it was said:

[14] 2000(1) SA 1 (CC).

'(T)hat the institution of cross-examination not only constituted a right, it also imposed certain obligations. As a general rule it was essential, when it was intended to suggest that a witness was not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation was intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending her or his character. If a point in dispute was left unchallenged in cross-examination, the party calling the witness was entitled to assume that the unchallenged witness's testimony was accepted as correct. … This was so because the witness had to be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance was to be placed. The rule was, of course, not an inflexible one.' (Emphasis provided) (Headnote)

[43] Appellant in the present instance (through his counsel) clearly disregarded the *onus* on him to put his version across to the State witnesses, failing which, was at his own peril. In its assessment of the evidence, this was indeed a fact the trial court could take into account – as it did – when deciding the veracity of the defence case. What the exact arrangements were between appellant and his counsel as to how his defence would be conducted is not known to us. But what can be deduced from the record is that the manner in which his counsel handled his defence, carried his approval, and likely to have been in accordance with appellant's instructions.

[44] A host of alleged omissions or failures on the part of the appellant's counsel are articulated in the notice, some of which had already been addressed. I do not intend dealing with each in the same detail as set out as it will suffice to mention but a few.

[45] Consent by his counsel to have the medical report compiled in respect of the complainant received into evidence by agreement without dealing with the report itself, could hardly be seen as ineffectiveness on the part of counsel. *Prima facie* the report, there was no incriminating evidence against the appellant which had to be dealt with – the same conclusion reached by

the court during its evaluation of the evidence. Accordingly, the contention is without merit.

[46] In my view, for purposes of highlighting counsel's alleged incapacity, nothing turns on the un-procedural manner in which he attempted to lay a basis for the introduction into evidence of a witness's written statement, or when seeking the court's indulgence for an adjournment before the leading of the complainant's evidence. These incidents are regularly experienced in our courts, even at the highest level and certainly does not *per se* render a legal practitioner incompetent. Neither could a brief adjournment for purposes of consultation be indicative of incompetence. On the contrary, leave is usually granted where justified in the circumstances. In the present circumstances I am unable to read anything sinister into the timing of the request. Whatever the issue was, this had been resolved during a short break in which further instructions were taken from the appellant. I pause to observe that a request of that nature seems to defy the appellant's latter claim that full instructions were given to counsel at the outset.

[47] Though the need to question the complainant on discrepancies between her *viva voce* evidence and points indicated in the scene of crime report probably arose during cross-examination of the complainant, the mere failure not to do so, cannot without an explanation by counsel for such failure, be construed as incompetency on the part of the practitioner. This might have been considered of less importance in view of the appellant's defence and therefore no need arose to challenge it. The alleged incompetency was therefore not the only reasonable inference to be drawn from the facts and we decline to do so.

[48] Whereas some of the remaining instances raised will be dealt with later, those discussed above in order to decide whether the cumulative effect thereof constitutes an irregularity, will suffice.

[49] Though criticism may justifiably be levelled against counsel's tactics or ability to cross-examine witnesses, this court will be overreaching when

attempting to lay down any definition of what process constitutes good or proper cross-examination, and what does not. Neither are there fixed rules to be followed and the skill of cross-examination normally develops over years of practice.

[50] After due consideration of the facts and guided by relevant case law, we have come to the conclusion that the cumulative effect of the alleged failures or omissions by the appellant's legal representative in his conducting of the defence, fall short of constituting an irregularity that would necessitate vitiating the conviction on appeal. Though the legal practitioner's conduct is indeed open to criticism, it does not on the strength of the proceedings before us cross the threshold of constituting an irregularity.

The magistrate's role

[51] As with the appellant's former counsel, similar accusations of irregular conduct at the trial were levelled against the presiding magistrate. It is said that the magistrate should from an early stage in the trial already have become aware of counsel's failures and incapacity to properly defend his client and therefore should have intervened. Again on authority of the *Chabedi* judgment it was reasoned that, as a result of new facts that arose from the appellant's evidence, the magistrate had a legal and constitutional duty to intervene by taking the necessary and reasonable steps to intervene and assist the appellant, thereby ensuring that he is guaranteed a fair trial.[15] See also s 167 of the Criminal Procedure Act 51 of 1977 which entitles the court to recall and re-examine any person, including the accused, already examined at the proceedings. Furthermore, where the evidence of such person appears to the court essential to the just decision of the case, the court is obliged to call or re-call that person.

[52] The *dicta* from *Chabedi* relied on in the present case to show that the magistrate (as in *Chabedi*) failed the appellant by not intervening, is again based on significantly different facts. Though the court rejected an argument

[15] *R v Hepworth* 1928 AD 265 at 277.

that the magistrate in that case became too involved at the stage when evidence was led and whereby the prosecution was greatly assisted, it did pose the question why the magistrate, when he became aware of the issues that arose on the new evidence and which was considered crucial for the determination of the appellant's guilt or innocence, did not recall those witnesses (complainant and the doctor). The appeal court found this omission to have contributed to its ultimate finding that the proceedings in the trial court were fundamentally irregular and resulted in a gross miscarriage of justice. It must also be borne in mind that the appellant already raised his complaints regarding the conduct of his defence in open court and during the course of the proceedings, at a stage when it was still possible to remedy the situation.

[53] Contrary thereto, the court *a quo* in the instant matter was not faced with a similar decision where it was clear to the defence and the court that as a result of *new evidence*, witnesses had to be recalled as their evidence was crucial for the determination of the appellant's guilt or otherwise. The reasons presently advanced as to why the complainant and several other witnesses had to be recalled, was to tests the veracity of the appellant's version against theirs, as this was not done when they were on the stand. Clearly, the purpose of having witnesses recalled in these two cases, differs substantially. In fact, what has been proposed by the appellant would, in my view, bring about exactly what the court in *R v Muruven* (*supra*) had warned against, namely, that before a decided case can be re-opened on the ground of error of judgment on the part of a legal representative, a very strong case must be made out because, if this were to be allowed regardless, it would bring about a lack of finality of court judgments which in itself would be against public interest.

[54] There was in law no basis for the court to order the recalling of State witnesses to be questioned on what the appellant now on appeal perceived to be 'new facts' that only emerged after those witnesses gave evidence. It could not be treated as new facts as it certainly was not. It was already known to the appellant and his counsel (on his version) during the stages of cross-examination of State witnesses and could (should) have been dealt with at the

time. The mere failure on the part of the appellant at that stage to do so, certainly does not render it 'new facts' which justified the recalling of witnesses.

[55] For reasons stated above, we are unable to find any misdirection committed by the court *a quo* on those grounds raised in appellant's notices of appeal and are accordingly without merit.

Appeal on the merits

[56] Appellant in his Notice of Appeal against conviction tabulated 14 grounds of which the first five address the alleged incompetence of his erstwhile legal representative, and the passivity of the presiding magistrate to intervene. These issues have duly been discussed and nothing further needs to be said in this regard.

[57] As for the remaining grounds, I do not deem it necessary to quote same in any detail, safe for stating that, essentially, all are directed at the court's evaluation of the evidence of State witnesses. Appellant further asserts that the court gave insufficient weight to a host of improbabilities (ground 12); possibilities and prospects (ground13); and comprehensively argued on the court *a quo's* 'written arguments in judgment' (ground 14).

[58] Before I turn to address the grounds raised on appeal, it seems necessary to comment on the manner in which the notice is drawn.

[59] The Notice of Appeal comprises 15 pages which, besides the grounds of appeal alluded to, is mainly consumed by comprehensive arguments that would be presented during the hearing of the appeal, and not a mere amplification of the grounds noted. Though the present notice may attempt to satisfy the requirement of grounds of appeal to be clear and specific,[16] the inclusion of any argument, speculation, conjecture and inferential reasoning aimed at constituting grounds of appeal, should as far as possible be avoided

[16] Magistrate's Court Rule 67(1).

and rather be dealt with in argument, as it makes the actual grounds interminable, whereby the crisp formulation of grounds of appeal is largely frustrated. For purposes of the present appeal regard would therefore only be had to the respective grounds which are clear and specific and not necessarily any reasoning in support thereof.[17]

The Facts

[60] During the year 2013 the appellant was the Special Advisor in the Ministry of Lands and Resettlement whilst the complainant was the Under-Secretary in the same ministry at the time. Between the 6th and 7th of July 2013 they officially accompanied the Minister to the Zambezi Region as part of a programme in which Traditional Authorities were visited. After the activities of the 06th (Saturday) they went to Camp Kwando where they were lodging and in the afternoon went on a river cruise. On their return it was decided to pay the complainant's father a visit at his village home and were taken there by the official driver, Mr Alfred Lutombi. They were accompanied by Councillor Sipapela. With their return to the lodge later that night they first spent time in the reception/lounge area having drinks before proceeding to their rooms.

[61] The group went to the complainant's room as prior arrangements had been made that their dinners would be left there. Messrs Lutombi and Sipapela from there on proceeded to their respective rooms while appellant remained behind with the complainant, apparently first wanting to finish his dinner. There was an incident between the two when appellant offered her some food but that she declined. She did not initially interpret this as a romantic gesture from his side, neither when he next tried to kiss her. Because of their good relationship as colleagues she did not take it serious and interpreted it as a joke when shoving him off. She described it as 'a joking scuffle'. Under cross-examination she said she at that stage did not perceive the appellant's behaviour as violent, but rather as flirting or playful. It is common cause that she then suggested they move inside the tent, for reason

[17] Paras 12, 13 and 14.

that if he wanted to propose and discuss it, they should move inside. Upon stepping inside the grabbing of the complainant and attempted kissing and fondling escalated, during which the complainant told him that it was not the way adults go about. When she realised that there was an increase in force, she resisted him and during an ensuing struggle ended up falling onto the floor, from where he picked her up and lay her on the bed whilst telling her how much he loved her.

[62] She described her mind-set at that stage as 'very slow to catch on what was going on because I think first of all it should have been the position of the Accused and also the trust I had in him when I knew he knew my father'.[18] Realising what was happening she went into shock as she had never experienced something similar in the past. He pinned her onto the bed and as she lay in the foetal position he lied down behind her and after pulling aside her panty, had sexual intercourse with her. Throughout she tried to reason with him and bring him to his senses, but without success. She suspected him to have ejaculated outside of her where after he went to the toilet. She then moved onto the other bed with the appellant following. She experienced her whole body going numb and was unable to figure out what to do. She had lost trust in him and was uncertain as to what he was capable of doing to her next. He refused to leave her room, saying that he wanted to make love to her throughout the night. In fear of worsening the situation through any further engagement she decided to lie still and see what happens in the morning.

[63] The person with whom she at the time was in an intimate relationship called her on the phone at around 03h00 but she did not make any report to him about her having been raped as she did not want to raise the alarm, from which appellant would know how she felt. Appellant thereafter had sexual intercourse with her for a second time. She had put up no resistance and said her body by then had gone cold; she no longer cared about what was being done to her. They went back to sleep until early morning when appellant left at her request.

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[18] Record p242.

[64] When asked to explain why she did not raise the alarm or tried to get out of the room, she said that she was aware of both her and appellant being officials of high rank and it would have been shameful to have been found in those circumstances. She experienced the whole incident as out of the ordinary, not knowing how to react. This concern is evinced by the complainant's subsequent indecisiveness as regards her reporting the appellant.

[65] Later over breakfast she told the minister that she had been raped by the appellant the previous night, but did not go into any detail. Her evidence on this point was corroborated by Minister Naruseb who, upon the report, indicated that it was a criminal offence and that he did not want to become involved; also that the complainant could take the day off to report it to the police and go for medical attention.

[66] In town she directly went to her mother to whom she reported the rape, without going into any detail. Not knowing where to report the incident she was directed to Warrant Officer Mudamburi from the Namibian Police, attached to the unit investigating gender based violence cases, with whom she then met and made a full report. Besides having the process of reporting of a rape case explained to her by the officer, she was told that once a case has been opened it cannot be withdrawn and the law will take its course. Mindful of the media attention it would attract, she did not make an official report and was given time to decide on the way forward.

[67] Except for saying that complainant told her that appellant took her by the hand and pulled her inside the room and sexual intercourse on the second occasion having been forceful, her evidence corroborates the complainant's version in material respects. Though stating that on the second occasion the sexual act was forceful, this was, to some extent, qualified when saying in cross-examination that, despite pleading with the appellant to leave her and him not adhering thereto, she allowed him 'to do whatever he wants' as she was already resigned to her fate. Officer Mudamburi confirmed that the complainant was severely distressed and mindful of their positions as it would

be seen as a high profile case. The case was formally registered only the following day (Monday) when complainant returned to the officer.

[68] Also common cause is a meeting between complainant and the appellant in the presence of Councillor Sipapela later that same day during which, according to the complainant, she had told the appellant that he had raped her the previous night and that she intended reporting him to the police. During a follow-up meeting with the minister she narrated what had happened and as the appellant did not deny the allegations, the minister expressed his disappointment in the appellant. According to the complainant appellant in both meetings did not deny the allegations of rape against him. The minister restated that given his position (as minister) he could not get involved and it remained for the complainant to decide whether or not to report the incident. I pause to observe that the evidence of the minister only concerned the time complainant reported to him in the morning as he did not testify about a follow-up meeting with the complainant and appellant in the evening. It was only thereafter that complainant finally made up her mind and laid an official complaint the next day.

[69] In a report made to Councillor Sipapela in the morning, the complainant told him that she had been raped by the appellant, though the version then somewhat different from that of complainant in respect of them having wrestled until 03h00 that morning before she gave in and was raped. No mention was made of the number of times the appellant forced himself on the complainant. This is a material difference, if Sipapela's narrative were to be correct. He cautioned her about her reputation if exposed to the media and proposed a meeting between them to try and find a solution, to which she agreed. During the meeting the appellant appealed to the complainant to find a way to forgive him, if she was of the view that what he did, was wrong ('bad'). The complainant pointed out that they were sharing the same office and whether it was possible that he could be transferred to another ministry. This led to him setting up a meeting with the minister in the evening.

[70] Complainant and Sipapela's evidence about the appellant having been accused of rape and thereafter sought the complainant's forgiveness during the two meetings, had not been disputed during cross-examination. It was only challenged towards the end of the trial during appellant's evidence when he denied having admitting to anything, or that he had sought the complainant's forgiveness.

[71] Appellant was the only witness testifying in his defence and his version, in all material respects, is contradictory to that of the complainant and Sipapela. He gave a detailed and elaborative explanation of two incidents in the complainant's room during which there was consensual sexual intercourse between him and the complainant. He confirmed the reason for entering the complainant's room was for them having been loud and not to be seen by others. He described the complainant's behaviour at the time as seductive and, subsequent to his proposal, she was a willing partner at kissing and cuddling, all of which led to both incidents of consensual sexual intercourse. During his testimony when asked whether there was sexual intercourse on the first occasion (count 1), appellant surprisingly said 'Yes, to a large degree'. It must be observed that, on his own version, there could have been no room for entertaining any other possibility, or that it was not consensual. Hence there was no need for the qualified answer he provided and now appears to have been less certain of his earlier convictions.

[72] When informed in the morning by text message received from the complainant that she intended reporting him for having raped her, he claims to have set up the meetings with the councillor and minister, evidence that had neither been raised with the witnesses nor confirmed when giving evidence. In his main evidence appellant said that during the first meeting with Sipapela the complainant postulated two options which would lead her not to lay formal charges i.e. a traditional settlement, or the appellant moving to another ministry. Under cross-examination he made a complete turnabout as to who raised the possibility of a traditional settlement, not knowing who mentioned it first. The issue of a traditional settlement arose for the first time in the appellant's testimony. At the meeting with the minister the complainant,

according to the appellant, agreed not to lay charges but to his surprise, he was arrested the following day. This crucial aspect of his version was however never put to the complainant.

[73] In cross-examination the appellant was required to explain why his detailed account of events that played out that night was never put to the complainant and other State witnesses. What is clearly borne out by the record of the proceedings is appellant's superior and arrogant attitude when responding to the prosecutor's questions. Those issues not raised with the respective witnesses were identified and when asked to explain why it had not been raised earlier by his counsel, it prompted the response that it was within his counsel's discretion how to approach the matter i.e. cross-examination of witnesses. At the expense of belabouring the constitutional challenge discussed earlier herein, suffice it to say that the appellant could not satisfactorily explain why State witnesses were not confronted with his version, affording them the opportunity of giving explanations open to them and of defending their characters.[19] This was a factor the trial court was entitled to take into account.

The court *a quo's* assessment of the evidence

[74] In view of the appellant's evidence differing materially from that of the complainant and witness Sipapela, the court deemed it apposite in summarising appellant's evidence, to concentrate on the highlighted areas of difference while due regard being had to the appellant's evidence. The court then proceeded identifying no less than 12 instances of material differences in the respective versions that were not challenged or addressed in cross-examination. In the court's opinion nothing of significance turned on the forensic report and scene of crime photo plan, and made no further reference thereto. This conclusion in all probability was reached in view of the said documents having been received into evidence by agreement and not challenged in any form or manner.

[19] *President of the RSA v SARFU* 2000(1) SA 1 (CC) approved in *S v Luis* 2005 NR 527 (HC).

[75] In its evaluation of the complainant's evidence the court was mindful of her being a single witness as far as it concerns the allegations that she had been raped by the appellant, and that a court may convict on single evidence when satisfied that in every material respect it was satisfactory, and that the truth has been told. Also, that the court should follow a cautious approach in its assessment of single evidence and cited the relevant authorities in this regard.[20]

[76] Turning to appellant's failure to put his defence to the State witnesses the court relied on what was said in *S v Mushishi*[21] where the following appears at p7 para 12:

'This Court has in the past, in several cases, endorsed the sentiments expressed by Smalberger JA in *S v Boesak* 2000 (1) SACR 633 (SCA) at 647c-d where it was said: "…, *it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client."* And, in *Small v Smith* 1954 (3) SA 434 (SWA) this Court held the view that: "*It was grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."* There can be no doubt that the reason why conflicting evidence was left unchallenged is either because the accused did not fully take his counsel into his confidence and came clean with her during consultations or, that he adapted his evidence whilst on the stand – the latter being the more probable.'

[77] Mindful of being faced with two mutually destructive versions the court set out the applicable law before concluding that the complainant's evidence was clear and consistent and where overlapping, it was supported by other witnesses. While recognising what was referred to as minor imperfections in the complainant's evidence relating to peripheral issues, but more specifically reports made to the witnesses Sipapela and Munangisa, the trial court, on the totality of the evidence found these to be immaterial. Regard was equally had to the strengths of the complainant's evidence pertaining to her demeanour and repeated expression of her concern about the media attention her reporting would attract. Moreover, Sipalela's confirmation of the complainant's

[20] Section 208 of Act 51 of 1977; *S v Noble* 2002 NR 67 (HC); *S v HN* 2010(2) NR 429 (HC).
[21] Unreported Case No CC 07/2010 delivered on 21 June 2010.

evidence about appellant having sought her forgiveness if she considered the previous night's incident to be serious. Also that appellant during the respective meetings with the minister and Sipapela did not raise the defence of having acted with consent. The court *a quo* correctly reasoned that the right to remain silent in criminal matters afforded by law to the appellant, did not encompass silence in the face of damning evidence implicating him. The court, in consideration of the totality of evidence adduced, found the appellant's version on those aspects which were not common course, to be false beyond reasonable doubt and rejected it.

[78] Appellant's sharp criticism of the trial court's assessment of the complainant's evidence is essentially directed at the discrepancies identified and dealt with by the court, but which were found to have lost material relevance when considered against the totality of the evidence. The court had direct evidence implicating the appellant, being a witness who had not been discredited under cross-examination and whose evidence in material respects had been corroborated; neither did appellant speak out when condemning evidence was adduced against him in circumstances where he was compelled to do so.

[79] Where on appeal the trial court's factual findings and associated credibility findings have been challenged, an appeal court will not readily disturb the findings of a trial court on credibility and on questions of fact. The rationale behind this rule is that the trial court has the advantage of seeing and hearing the witnesses and being steeped in the atmosphere of the trial, an advantage the appeal court simply does not have. Only where the trial court's conclusion is clearly wrong would the appellate court be duty bound to interfere.

Conclusion

[80] For the aforesaid reasons, we are unable to find that the trial court misdirected itself in its evaluation of the evidence, justifying any interference

by this court on appeal. The appeal against conviction being without prospects of success is accordingly refused.

[81] In the result, it is ordered:

1. Respondent's application for adjournment of the proceedings is refused.
2. Appellant's application for condonation for the late noting of the appeal and amendment thereto, is refused and struck off the roll.
3. Appellant's bail is cancelled with immediate effect and he is to be taken into custody and brought before the Regional Court sitting at Katima Mulilo for committal.

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JC LIEBENBERG

JUDGE

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D USIKU

JUDGE

APPEARANCES

APPELLANT	Adv L Botes, Instructed by Stern & Barnard, Windhoek.
RESPONDENT	D Lisulo Of the Office of the Prosecutor-General, Windhoek.