

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: CA&R 195/2003

Case Heard: 26/05/2009

Date delivered: 29/05/2009

In the matter between:

Dannyboy Marietjie

APPELLANT

and

The State

RESPONDENT

Coram: Kgomo JP et Henriques AJ

JUDGMENT

Henriques AJ:

1. This is an application for leave to appeal to the Supreme Court of Appeal against conviction and sentence. The appellant also seeks condonation for the late filing of the application for leave to appeal.

BACKGROUND FACTS

2. The appellant was charged in the Griekwastad Regional Court for the rape of his aunt, Ms M. At the time of the trial he pleaded not guilty but was convicted of rape and sentenced to 19 years imprisonment.

3. He subsequently appealed against both his conviction and sentence. The appeal was heard on 28 September 2004. Kgomo JP and Olivier J came to the conclusion that the conviction and sentence were in order and dismissed the appeal on 1 October 2004.

CONDONATION

4. The appellant's application for leave to appeal has been brought some four years after the appeal judgment was handed down. The appellant seeks condonation for his late filing. His explanation for such late filing is that he is not familiar with the legal processes and did not know that he could take further steps after the appeal was dismissed in 2004.
5. Having regard to the judgement of Jafta JA in the decision of **S v Mantsa** 2009 (1) SACR 414 (SCA) at paragraph 11 the Court, in considering an application for condonation, must take the following into account.

"These include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the Court and the avoidance of unnecessary delay in the administration of justice."

6. During the course of argument Advocate Cloete, who appeared for the appellant, was not able to advance any further submissions apart from those which appeared in his heads of argument as regards both the merits and the condonation. He also conceded that he could not make any cogent submissions

that there was a reasonable possibility that another Court could come to a different decision.

APPLICATION FOR LEAVE TO APPEAL

7. The application for leave to appeal is governed by the provisions of the Criminal Procedure Act, 51 of 1977 read with the provisions of section 21 of the Supreme Court Act, 59 of 1959. Section 309(1)(a) of the Criminal Procedure Act provides for a person who has been found guilty in a Magistrate's Court to appeal to the provincial or local division having jurisdiction. If such an appeal fails, he or she must apply for leave to appeal to the Supreme Court of Appeal.
8. At the trial of the matter the appellant's version was that he was asleep in the house at the time of the rape, he did not hear anything and slept in the livingroom which was a very short distance away from the complainant's bedroom. He slept uninterrupted from approximately 10:00 pm at night until the following morning when he was rudely awakened by the Police. He did not see the rape take place, and neither did he hear the complainant's mother scream. He cannot understand why he was arrested as he had nothing to do with the rape.
9. There can be no doubt about the fact that the complainant was raped. The medical report completed by the medical practitioner did not exclude the possibility of rape but also found that the abrasions and bruising which the complainant had suffered to her neck was consistent with her evidence of being strangled. She and the other state witnesses confirmed that they recognised the appellant at the time of the alleged rape. In fact the complainant not only recognised his face but also recognised

his voice. She further testified that the room was bright enough even though, it was night time, for her to see her rapist, the appellant.

10. The complainant's evidence was corroborated by two of the State witnesses who confirmed that they saw the appellant on top of her at the time of the rape. Despite the discrepancies in their description of the clothing which the appellant wore at the time of the rape, they were adamant that he was the person who raped the complainant.
11. In addition the State witnesses corroborated each other in one crucial aspect namely that at the time they came out of the room, the appellant was not lying in his usual place which he slept. There can thus be no doubt about the fact that the appellant was responsible for the rape of the complainant.
12. As far as the sentence is concerned, it is trite that a Court of appeal will only interfere with a sentence where a material irregularity or misdirection has occurred in the consideration of sentence or where the sentence is shockingly inappropriate (see **S v Shaik and Others** 2008 (1) SACR 1 (CC) para [72]).
13. In light of the above and having regard to the grounds upon which the appellant seeks leave to appeal to the Supreme Court of Appeal, I am of the view that the appellant has not made out a proper case for condonation and also does not have any reasonable prospects of success on appeal on the merits and I accordingly make the following order:

The application for leave to appeal is dismissed.

**J I HENRIQUES
ACTING JUDGE
NORTHERN CAPE DIVISION**

I agree:

**F DIALE KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION**

For the Plaintiff:	Adv P Fourie
On behalf of:	Legal Aid Centre, KIMBERLEY
For the Respondent:	Adv C Jansen
On behalf of:	Director of Public Prosecutions, KIMBERLEY