

Reportable: Yes / No Circulate to Judges: Yes / No
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Circulate to Magistrates: Yes / No

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

Appeal no: K/S 2/05
On roll : 23/02/ 2007
Date delivered: 09/03/ 2007

In the matter between :

SAM JACOBS

APPLICANT

and

THE STATE

RESPONDENT

Coram: **Makhafola, AJ**

LEAVE TO APPEAL JUDGMENT

MAKHAFOLA, A J:

1. The applicant herein was arraigned in the Regional Court of Kimberley charged with rape and alternatively with contravention of Section 14 (1) (a) read with Section 22 of Act 23 of 1957. The case was postponed several times until the trial commenced on 30 April 2004.

2. The applicant at the trial pleaded not guilty to the main and alternative charges and he did not tender any plea explanation. He was represented throughout the proceedings.
3. An intermediary was appointed in terms of section 170(A) of the Criminal Procedure Act 51 of 1977 through whom the 10 year old complainant gave evidence.
4. At the end of the trial the applicant was found guilty on the main charge of rape as charged.
5. The case was referred to this High Court in terms of Section 52(1)(b) of Act 105 of 1997 for sentencing. This Court (**Tlaletsi J**) formally convicted the applicant and proceeded to sentence him to ten (10) years imprisonment.
6. The applicant has launched his appeal to this court against both his conviction and sentence outside the prescribed period of 14 days for leave to appeal accompanied by an application for condonation. The application is made in terms of Section 316(1)(a) of the Act and is heard in terms of the provisions of Section 316(2)(a)(i) of Act 51 of 1977.
7. In the court file there is exchange of letters between the prison authorities, the Registrar of this Court, the Magistrate Kimberley and the Applicant personally relating to the appeal. There is a letter written by the applicant with no date on whereby he complains about his appeal not being attended to. The said letter is accompanied by a covering letter from the Department of Correctional Services, Aliwal North dated 07 February 2007. This letter is addressed to the Magistrate Kimberley and was served on the Registrar of this High Court

on 16 February 2007.

8. I am alive to different relevant factors to be considered when the application for condonation is launched. In the end, the question whether to condone or not any late filing of an application is within the discretion of the Court. **Vide: Veldman v Director of Public Prosecutions, WLD 2006 (2) SACR 319 (CC) at 326 [7]F.**

9. This condonation consideration is premised on the judicial discretion this Court has; the bulk of the exchange of letters between the applicant and the prison authorities, the Magistrate Kimberley and the office of the Registrar of this court; the quest to give closure to the application for leave to appeal on its merits; the interests of justice, fairness and justness to all parties. I found it expedient in the circumstances to grant condonation so that leave to appeal could be heard on the merits and be finalised. **Vide: S v Mohlathe 2000(2) SACR 530 (SCA).**

10. It is also trite that the overriding considerations to grant leave to appeal are prospects on appeal regardless of the seriousness of the crime and its consequences which may be taken into account in borderline cases. The applicant should show that there are reasonable prospects that the appeal may succeed. **Vide: R v Ngubane and others 1945 AD 185 at page 186.**
R v Muller 1957(4) SA 642(A) at 645 G.
S v Ackerman en 'n Ander 1973(1) SA 765 (A) at 676 G-H.

11. On the other hand leave to appeal should not be granted in the hope that another court may view the trial court's reasoning differently or find error with the trial Court. **Vide: S v**

Shabalala 1966(2) S A 297 (A) 299 C.

12. In recent years the Supreme Court of Appeal stated that leave to appeal should not be granted merely to give an Appeal Court the opportunity to rectify its earlier judgment where a Court is satisfied that its judgment is correct. **Vide: S v Kgafela 2003(2) SACR 176 (SCA) at 178 a-b**

13. In this matter now before Court, I have perused and studied the record of the proceedings in the Court of first instance, and the final judgment and the sentence meted out in this Court. I have found nothing wrong with the way the proceedings had been conducted by the learned Regional Magistrate. There appears nothing to suggest that the trial court has omitted any facts for consideration or that it has in any manner misconstrued facts or misdirected itself. **Vide: R v Dhlumayo and Another 1948 (2) SA 677 (AD) at pp 702,706.**
S v Pillay 1977 (4) SA 531 [AD] at p 535 B.

14. During sentencing all aspects that are required for considerations the court did take into account. The accused's drunkenness as having a diminishing effect on a person's reasoning capacity was also considered. **Vide: Judgment: Page 8: lines 16-20**

15. The question of the triad was also taken into account and by so doing the court referred to the case of: **S v O 2003 (2) SACR 147 (C) at 150 G-H.**
Vide: Judgment: Page 7: lines 2-10

16. The sentencing court did not close its eyes to the substantial and compelling circumstances and it expressed its mindfulness of the binding principles stated in the case of **S v Malgas 2001**

(1) SACR 469 (SCA).

17. The above having been stated I come to the conclusion that there are no prospects of success on appeal.

In the result, application for leave to appeal against both the conviction and sentence is refused.

MAKHAFOLA K

Acting Judge of the High Court

Northern Cape Division

On behalf of the Appellant : Adv. T Fourie
Instructed by : Legal Aid Board, Kimberley
On behalf of the Respondent: Adv. T Barnard
Instructed by : Office of the D P P, Kimberley.