

**IN THE HIGH COURT OF SOUTH AFRICA****(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

SS47/2008

5 **DATE:**

24 MAY 2010

In the matter between:

**SAMKELO MTSHISELWA**

Appellant

and

10 **THE STATE**Respondent

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**J U D G M E N T****(Application for Leave to Appeal)**

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**HLOPHE, JP:**

This is an application for leave to appeal against sentence imposed by Matojane, AJ, as he then was. The sentence  
20 imposed by the Court has been attacked by counsel, Mr Sebueng, appearing on behalf of the appellant, on a number of grounds, but essentially on the grounds that the court *a quo* overemphasised the aggravating factors and did not pay much attention to the accused's personal circumstances, i.e. the fact  
25 that he was a first offender and the fact that he had already  
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been incarcerated for some period of four years.

There were a number of aggravating factors which counsel for the State, Mr Sebelebele ably identified to this Court. The fact  
5 that the accused raped his own biological daughter, which is disgusting to say the least, who was 11 years old at the time and the fact that that biological daughter testified that she had been raped similarly in the past by her own father and the medical evidence was consistence, in the sense that there  
10 were healed scars to the complainant's private parts. The fact that she sustained serious injuries and obviously the accused did not show any remorse. In order for the appellant to succeed, it must be demonstrated that the court *a quo* abused his discretion when it came to sentence.

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Counsel for the appellant contended that the sentence was excessive and too harsh and obviously there was an application as well for condonation for the late filing of an accused, which can be disposed of simply on the basis that if  
20 this Court is of the view that there is no other court acting reasonably, then the application for condonation should not be allowed. I am persuaded that the application for condonation for failure to prosecute the appeal timeously, should not be allowed simply because in my judgment there are no  
25 reasonable prospects of another court coming to a different

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conclusion.

Accordingly the condonation application is hereby refused. It follows, therefore, that the application for leave to appeal is  
5 dismissed.

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HLOPHE, JP

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