



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case No:

580/10

In the matter between:

**JAMES PATRICK HIBBERT**

**Appellant**

and

**THE STATE**

**Respondent**

**Neutral citation:** *Hibbert v S* (580/10) [2011] ZASCA 18 (15 March 2011)

**Coram:** STREICHER, BOSIELO and THERON JJA

**Heard:** 15 March 2011

**Delivered:** 15 March 2011

**Summary:** Application for leave to appeal against a High Court order refusing a petition for leave to appeal.

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## ORDER

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**On appeal from:** Western Cape High Court (Cape Town) (Erasmus and Allie JJ sitting as court of first instance.):

- 1 The order of the Western Cape High Court (Erasmus and Allie JJ), dated 18 August 2009, is set aside.
  - 2 The appellant is granted leave to appeal against his convictions and sentence.
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## JUDGMENT

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THERON JA (STREICHER and BOSIELO JJA concurring)

[1] The appellant stood trial in the Regional Court, Mossel Bay, on charges of sexual assault and rape, read with the provisions of Act 105 of 1997. The incident giving rise to these charges being preferred against the appellant was alleged to have occurred during the period December 2004 to January 2005. The appellant was charged on 30 May 2008. Despite his plea of not guilty in respect of both charges, the appellant was, at the end of the trial found guilty and sentenced to an effective term of imprisonment of eight years.

[2] On 18 June 2009 and immediately after judgment on sentence was delivered, the appellant applied for leave to appeal against the convictions. This application was refused. The appellant subsequently petitioned the Western Cape Judge President for leave to appeal against the convictions and sentence in terms of s 309C of the Criminal

Procedure Act 51 of 1977. On 18 August 2009, the Western Cape High Court (Erasmus and Allie JJ) refused his petition.

[3] The appellant applied to the high court for leave to appeal against its decision refusing leave to appeal against his convictions and sentence. The high court apparently had second thoughts about its decision to refuse leave and granted the appellant leave to appeal to this court against the high court's refusal of his petition.

[4] At the hearing of this appeal, counsel for the state conceded that there was a reasonable possibility that another court could reach a different conclusion to that of the trial court. No more need be said.

[5] In the circumstances the following order is made:

5.1 The order of the Western Cape High Court (Erasmus and Allie JJ), dated 18 August 2009, is set aside.

5.2 The appellant is granted leave to appeal against his convictions and sentence.

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L Theron  
Judge of Appeal

APPEARANCES

APPELLANT: DL van der Merwe  
Instructed by Heyns & Partners Inc, Cape  
Town;  
Naudes, Bloemfontein

RESPONDENT: (Ms) EA Kortje  
Instructed by the Director of Public  
Prosecutions, Cape Town;  
The Director of Public Prosecutions,  
Bloemfontein