REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 9794/10

In the matter between:

ISMAIL SHEIK **APPLICANT**

versus

STATE **RESPONDENT**

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JUDGMENT

GORVEN J

1]The applicant was the appellant in an appeal under case number AR 319/07. On 3 December 2010 his appeal was struck from the roll. He had been admitted to bail pending the appeal and the bail conditions provided that, in the event of the appeal being struck from the roll, he must present himself to the authorities within 3 days in order to begin serving the custodial sentence imposed on him. This application seeks the reinstatement of his appeal and his admission to bail on the same conditions as before pending the outcome of the appeal. It was brought as a matter of urgency on 6 December 2010 and adjourned on that day to 9 December 2010 with his bail reinstated (presumably on the same conditions as before although the order did not specify this) until that date. On 9 December 2010 the application was

heard as an opposed application and, after argument, it was indicated that judgment would be handed down on 14 December 2010 and bail was granted until that date on the same conditions as had applied to his bail pending appeal.

2]In the court *a quo*, the applicant was charged with 20 counts. He was discharged at the end of the State case on all but counts 1 – 3 and 13 -16. These were as follows:

> Counts 1 – 3 were for kidnapping, indecent assault and defeating or obstructing the course of justice during 2002 in respect of Eva Pawlowski ("Eva").
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> Counts 13 – 15 were in identical terms to counts 1 – 3 but were alleged to have taken place on 10 April 2003 in relation to Tarryn Spencer ("Tarryn").
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> Count 16 was one of defeating or obstructing the course of justice during June 2003 in relation to Sara Klens ("Sara").

The defeating or obstructing the course of justice charges all related to incidents where the accused was alleged to have claimed that the complainants were engaged in illegal activities but failed to charge them. At the end of the trial he was convicted on these remaining counts and sentenced as follows:

> Count 1 – 3 years' imprisonment.
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> Count 2 – 10 years' imprisonment.
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> Count 3 – 2 years' imprisonment.
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> Count 13 – 3 years' imprisonment.

Count 14 – 5 years' imprisonment.

Counts 15 and 16 – 2 years' imprisonment each.

It was ordered that the sentences in respect of counts 1 & 2 would run concurrently as well as those in respect of counts 13 & 14. The effective term of imprisonment thus amounted to 21 years.

3]On 14 March 2007, the applicant was granted leave by the court a quo to appeal against the convictions and sentences imposed but bail pending the appeal was refused.

4]The chronology relating to the appeal is not contested. The following took place:

1. On 7 May 2007 his appeal against the refusal of bail was upheld by Hurt J, who granted bail.
2. One of the conditions of bail was that the appeal record be delivered within three months from that date.
3. The appeal record was lodged on 8 August 2007.
4. On 14 November 2008 the registrar wrote to the applicant's attorney by registered post

indicating that his heads of argument should be delivered no later than 13 March 2009.

5. On 2 March 2009 the applicant's attorney wrote to the Registrar requesting an extension of time for the filing of heads and referring to a prior telephonic conversation between Ms Hemraj SC and the Registrar's representative.

6. An extension was granted to 4 May 2009. An indication was given that no further extensions would be considered.

7. The applicant's heads of argument, prepared by Ms Hemraj SC, were delivered on 4 May 2009.

8. On 12 May 2009, the first date on which the appeal was to be heard, the matter could not proceed as a result of the applicant's request for time to finalise his legal representation.

The respondent was ready to proceed. The matter was adjourned to 10 November 2009.

9. On 10 November 2009 the applicant requested a further adjournment to finalise payment to his attorney. The respondent was ready to proceed. The matter was adjourned to 4 May 2010 and the postponement marked as a final one.

10. On 4 May 2010 the applicant once again requested an adjournment for purposes of finalising legal representation and fees. The respondent was ready to proceed. The matter was adjourned to 16 November 2010. It was once again indicated that this would be a final adjournment.

11. On 16 November 2010 the applicant's attorney appeared on his behalf and applied for a

further adjournment on the basis that the applicant had not been able to collect the requisite funds. An adjournment was granted to 3 December 2010. The adjournment was granted on condition that, if the applicant had not placed his attorney in funds by 29 November 2010, the attorney would withdraw and the applicant would ensure that the appeal would proceed on 3 December 2010, if necessary by way of his arguing the appeal himself. The applicant accepted this condition for the adjournment. The date chosen was a date within the current session on which the two judges were able to accommodate the appeal in addition to other work which had been allocated to them.

12. On 30 November 2010 the applicant's attorney withdrew as

a result of the applicant not having placed him in funds.

13. On 3 December 2010 the applicant appeared in person and requested an adjournment, saying, without putting any evidence before the court, that he had placed his attorneys in funds on 1 December 2010 but that, in the available time, his chosen counsel, Ms Hemraj SC, had not been able to prepare adequately to argue the appeal. The respondent opposed the application for an adjournment on grounds that numerous adjournments had already been granted, the matter required finality and the adjournment had been subject to the condition mentioned above. The applicant confirmed that he had understood that this was the position. The application for an adjournment was refused.

14. After the refusal of the application for an adjournment, the applicant was invited to argue the appeal. He stated that he could not do so. He did not have with him a copy of the record and indicated that he had not prepared himself to argue the appeal or made other arrangements. Since the applicant was not in a position to prosecute the appeal, it was struck from the roll.

5] As has been indicated in the answering affidavit in this application, the matter was set down for hearing on five occasions after leave to appeal was granted on 14 March 2007. On each of these occasions, the applicant was not ready to proceed. On each of these occasions the respondent was ready to proceed. On each of these occasions the applicant was said not to be ready to proceed on the basis that he had failed to place sufficient funds at the disposal of his attorney to ensure that the matter could be argued by Ms Hemraj SC.

6]This application is akin to an application for condonation.[1] This involves the exercise of a judicial discretion upon a consideration of all the relevant facts. There is no closed list of facts which are relevant. However, the court must

1 *S v van der Westhuizen* 2009 (2) SACR 350 (SCA)

generally consider the following:

> Factors such as the degree of non-compliance, the explanation for the delay, the prospects of success, the importance of the case, the nature of the relief, the interests in finality, the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible for non-compliance… [2]

It has been stated that: "None of these factors is decisive; the enquiry is one of weighing each against the others and determining what the interests of justice dictate."[3]

7]Although he apologised profusely for the many delays caused by his actions, and claimed that they had not been intentionally dilatory, in my view there are numerous difficulties with the explanation proffered by the applicant. In the first place, there are a number of material nondisclosures and inaccuracies in his application. He stated that his attorney received the notice to file heads of argument in 2009. This is not correct. I have referred above to the fact that the notice was sent to his attorney by way of a letter dated 14 November 2008. He did not disclose the date when the heads of argument were due or that an extension was required for their delivery for a period of some two months. He did not even disclose that the appeal was first set down on 12 May 2009 or that he requested an adjournment on this occasion. The respondent's affidavit raises it and indicates that the adjournment was for the purpose of finalising his legal representation. He did not disclose why, if Ms Hemraj SC was able to deliver heads of argument on 4 May 2009, she was

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2 *S v van der Westhuizen* para [4]. p 353
3 *Bernert v ABSA Bank Limited* [2010] ZACC 28 (CC) at para [14], an unreported judgment handed down on 9 December 2010 and the cases cited there.

not in a position to argue the appeal on 12 May 2009.

8]He stated that his business fell on hard times as a result of extensive media coverage of his trial. He realised that he would have difficulty in placing his attorney in funds to attend to the briefing of counsel. He indicated that his family had said they would assist him and he would also attempt to raise the necessary funds. He approached extended family members and the community to assist but his family does not come from an affluent background. There was no detail given at all of the specific steps taken by him, of the amount of money required to be raised, or of the amount which he succeeded in raising. No evidence was given of his income during that period or the reduction in income brought about by the factors mentioned by him. Perhaps more importantly, however, at no stage was it indicated at the time that the successive dates to which the appeal was adjourned would not afford sufficient time for the applicant to place his attorney in funds. He did not state why, if he did not regard the time as sufficient, he did not raise this with the Court or the respondent. He gave no evidence as to when he was told what funds would need to be deposited. He simply stated that his attorney advised him of the cost of briefing Senior Counsel to prepare and argue the appeal. It was accepted in argument by Mr Moodley, who appeared for the applicant, that on each of the occasions on which the appeal was adjourned, communication as regards his readiness to argue the appeal was initiated by the respondent and not by the applicant. At no stage did the applicant, prior to any of the appeal dates, initiate such contact in order to explain any difficulties being experienced by him.

9]No explanation was given as to why, despite the conditions upon which the adjournment of 16 November 2010 had been granted, he did not even have with him a record of the appeal at court on 3 December 2010 or why he had not prepared himself to argue the appeal or made other arrangements. No explanation was given as to why the employment of alternative, less expensive, counsel was not considered. He did not deal at all with why he did not explore the possibility of obtaining legal aid to assist him in prosecuting the appeal.

10]It appears to me that, throughout, the applicant adopted a *non possumus* attitude to the prosecution of the appeal. This court has not been placed in a position to assess whether or not, prior to 1 December 2010, the applicant took any action at all to obtain financial assistance in the prosecution of the appeal and, if so, whether any actions taken were reasonable in the circumstances. His assertion in the application was simply that he was unable to do so. No evidence was given why he was able to do so on 1 December 2010 after not having been able to do so since March 2007. The explanation is characterised by vagueness and by bald assertions unsubstantiated by any facts.

11]Four different sets of judges were in turn assigned to deal with the appeal whose record runs to some 1162 pages; 979 pages excluding exhibits. During the appearance on 16 November 2010, it was indicated that the two judges concerned had read the record and prepared for the appeal and it was

for that purpose that they would specially make themselves and a court available on a non-scheduled date within that session, in addition to the other workload allocated to them, to deal with the appeal.

12]It is so that the matter has serious consequences, especially for the applicant, if the appeal is not reinstated. The applicant faces 21 years' imprisonment. He has been convicted of serious offences and subjected to intrusive and negative media scrutiny. The case is an important one. It must also be borne in mind, however, that the interests of justice require finality in matters. Despite more than 18 months having elapsed since the first adjournment, and more than 3 ½ years since leave to appeal was granted, the applicant was still not in a position to prosecute the appeal on 3 December 2010. The complainants also require finality. The matter was serious for them. Each time the appeal is set down on the roll, two judges are allocated to deal with it. This means that no other appeals can be set down on that day before them, thus increasing the backlog of appeals in the division. In addition, the resources of the respondent are tied up by having to make counsel available, necessitating preparation time and the appearance at the appeal.

13]It was submitted by Mr Moodley, who appeared for the applicant, that the applicant will be prejudiced if the appeal is not reinstated because his right to legal representation would thereby be negated. He relied on a dictum in *S v Ntuli* [4] to the effect that, in our adversarial system, "legal representation for the accused becomes indispensable". This dictum is *obiter* and also too broadly

4 2003 (4) SA 259 (W) para [12]

stated. It is, in any event, not as if this was the issue for the applicant. The issue is that he desired the assistance of a particular Senior Counsel and took no steps to obtain alternative counsel when it was abundantly clear that he could not afford his desired choice. He has not anywhere stated that he could not afford other counsel or obtain legal aid.

14]In his initial affidavit in support of the application, the applicant made the simple assertion that he had "reasonable prospects of success on appeal". On the morning of the day on which the application was heard, a supplementary affidavit was put up by the applicant raising the arguments which would be advanced as to why he stated that he has prospects of success. These boiled down, in essence, to submissions in two areas. The first was that, in respect of counts 1, 2 and 3 and counts 13, 14 and 15, identification was the central issue and had not been adequately proved at the trial. The second was that, in respect of the counts on defeating or obstructing the course of justice, namely counts 3, 15 and 16, the state failed to prove any intention on his part to commit the offences.

15]In respect of counts 1,2, 3 and 14, the sole issue on appeal was whether the applicant was identified as the perpetrator of these crimes. It was submitted on his behalf that it was not proved beyond reasonable doubt that he was the person who committed the crimes. The fact that the crimes took place and how they took place is not in dispute. In respect of count 16 and counts 3 and 15, the appeal was based on two arguments, viz., that it had not been proved that the applicant had the necessary *mens rea* to commit the

crime and that, because he was a police reservist who was not on duty, his failure to charge the persons could not amount to defeating or obstructing the course of justice. I will deal with the prospects on the submissions made in turn.

16]On a Wednesday night in late September or early October 2002 the complainant in the first three counts, Eva and her boyfriend Adam van Heerden ("Adam"), were working at the Ocean Basket restaurant in Florida Road, Durban. After their shift finished Adam bought a marijuana cigarette after which the two of them went to the Burn nightclub on Umbilo Road. During their stay there they went outside the nightclub to smoke the marijuana cigarette. Whilst they were doing so they noticed a white citigolf motor vehicle approaching slowly and flashing a blue light. Believing it to be a police vehicle, Adam discarded the cigarette. A person in police uniform with a flashlight approached them, found and took possession of the discarded cigarette and told them they had broken the law. He instructed them to enter his vehicle which they did. Adam sat in the front and Eva in the back. The policeman drove around for 15 to 20 minutes during which time Adam had a view of his profile. They were only a short distance from the nearest two police stations, those in Berea and Umbilo respectively. Eventually he stopped at the Berea police station and instructed Adam to alight from the car. Adam asked him what he was going to do with Eva to which he responded that he was taking her home. He then drove off with Eva in the front seat. He eventually drove to outside the Magistrate's court in Durban and alighted from the car. There he started recording her details in official looking papers. He

then drove to the parking lot of CR Swart police station and told her that there was a different way which they could deal with the situation. She asked if he meant sexual intercourse and he said words to the effect of “if you like”. When she said that she was menstruating, he became angry and called her a liar. He then walked around and let her out of the vehicle, taking her to a nearby police Venture, unzipped his trousers, removed an erect penis, told her he didn’t want to feel teeth and had her perform fellatio on him which she termed oral sex. He then took her and left her at the Burn nightclub. Adam ran back to Burn nightclub as quickly as he could but did not see Eva there. He then went to her home and did not find her there. On his returning to the Burn nightclub again, he bumped into her and she appeared highly traumatised. The two were separated for between one and two hours. He asked whether she had been raped and she replied that she had not been raped. He was relieved but wanted to know what had happened so he asked her to tell him. She did so and he took her home to comfort her. The next day he again requested that she tell him what happened and, realising that he could not address her trauma adequately, suggested that she phone the women's abuse helpline which she did.

17]Both Adam and Eva identified the applicant as the policeman in question. Eva did so at an identification parade. Although the conduct of this parade was criticised in argument before us, the applicant’s attorney at the time was present at the identification parade and recorded no objections. When the parade was attacked at the trial, it was put in cross examination to Inspector Smal that the attorney would testify to various irregularities. This was never

done. No basis was laid in the court *a quo* which could found this submission. Eva also described the ears of the applicant as being unusual, as did Adam who also mentioned the applicant's nose. Adam stated that the applicant's face was imprinted on his mind. His identification was a dock identification but his description of the applicant was given without looking at him. He was not called to an identification parade despite having told the police that he was available to attend one. He recalled every single detail of that evening. He described the vehicle. He was, at the time, 20 years old and Eva was 17. Adam described the applicant as an Indian male dressed in police uniform who conducted himself as a policeman and who had "funny little ears". The two versions corroborated each other. Neither of them was subsequently charged for possession of marijuana.

18]It is clear that, if the identification of the applicant was satisfactory, he was appropriately found guilty on counts 1 to 3.

19]Counts 13 to 15 concerned Tarryn. She left the Burn nightclub in the early hours of the morning of 11 April 2003. She dropped two friends at home and was driving home when she noticed a vehicle with a blue light behind her and was stopped near the Hypermarket by the Sea. A person in police uniform came to her, asked for her identification document and drivers licence, told her that he had radioed in and that the car was registered in her mother's name and asked whether she had been drinking. She said that she had been drinking but was fine to drive. He said that he could smell alcohol and that it was a criminal offence to drive under the influence. He told her that he would

arrest her and would have to take her to CR Swart police station for tests. He instructed her to drive her vehicle to the petrol station a few metres up the road and park her car which she did. She asked whether she could phone her mother on her cell phone but he told her that he was placing her under arrest and that she was not allowed to use the cellphone. She then started crying and wanted to drive home and he said that he was under no obligation and refused to allow her to drive home with him following. He showed his identification, told her that she should not worry and that he would get her something to drink which would lower the alcohol level in her blood. He went to the service station shop and emerged with a cool drink in a can which had already been opened. She then fetched her belongings and got into his vehicle which was a white citigolf.

20]On the way to the police station he indicated that the police were undercover and conducting a drinking and driving exercise and that the police station would be very busy that night. He explained that, to save time, he would stop *en route* and fill in all the necessary documentation. He stopped at the Durban beachfront and fetched a black briefcase from the car boot, taking documentation out of it and asking certain questions. He then seemed to notice that she hadn't drunk the cooldrink and she then did so. She then said that she was desperate to go to the toilet and things began to get a bit hazy for her. He stopped at a hotel and she emerged from the car, went into the foyer and asked where the toilet was. When she emerged, he was waiting by the car door, opened it and she re-entered. The last thing she recalled was being in the passenger seat and having a hand down her underwear and

him pushing her head down into his lap. Thereafter she had no recollection of what happened at all. She could not recall any identifying features and, at the identity parade, pointed out an incorrect person although she said that she was not 100% sure it was the perpetrator. She was never charged for driving under the influence of alcohol. Later that day she contacted the police who came to her home where she laid a complaint and made a statement.

21] It is clear that, if the applicant was correctly identified as the person who was involved in this incident, his conviction on these three counts was appropriate.

22]The witness on whose evidence the magistrate relied in convicting the applicant on these counts was Selby Buthelezi. He identified the applicant at an informal identification parade arranged and conducted by the defence team for the applicant. Buthelezi had been told that the person might not be at the identification parade and, before pointing out the applicant, said the words "I do not know whether I am wrong or right". He then identified the applicant. He had been a petrol attendant at the service station approached by Tarryn that night where she parked her car. He was on duty and two cars followed each other, a white citigolf and a white Fiat. An Indian male alighted and entered the shop, buying a small can of cool drink. He then saw a white female alight from her vehicle, lock her vehicle and stand outside it. The male walked towards the cashier to pay for the can of cool drink and Buthelezi was sitting next to the cashier at the time, approximately a metre away. He noticed the person was wearing a black jacket, like those worn by security

guards and he had a big yellow torch hanging from his shoulder as well as a radio device with him. He left the shop and entered his vehicle and the white female also entered the vehicle, leaving her vehicle there. Later that morning, when he was sweeping the driveway, he saw the white female who was walking and staggering. He realised that she had a problem and walked towards her to help. He recognised her as the same person he had seen the night before. She was vomiting so he went to get some water for her. The white female indicated that the Indian man took her because she was driving badly and that she did not know what the person had put into the cool drink that he gave her and asked Buthelezi to phone her mother, giving her a telephone and the number. The mother eventually arrived. It was at this stage that he specifically brought to mind the Indian male he had observed buying a cool drink. Whilst he could not describe any facial features, he described him as being of medium-size insofar as his body and build goes and had a dark complexion. The lighting was bright and he was in a good position to observe him. There were no obstacles preventing his seeing this person clearly. What was visible to him was the side of the person from close proximity.

23]Count 16 relates to Sara. In the early hours of 11 June 2003 she left the Burn nightclub and was driving home. The applicant pulled her over in a white citigolf motor vehicle and alleged that she was driving badly and was under the influence of alcohol. The car had a blue light on the dashboard which was flashing and the applicant flashed his torch at her. She only wound her window down a crack and the applicant asked for her drivers licence. She

only had an affidavit since she had lost her licence and she showed this affidavit to him. He asked her to get out of her vehicle and she refused. She said that he could follow her to the nearest police station. She said that she heard there was a man like him pulling girls over and harassing them and she was not going to get out of the car for him. This took about half an hour and eventually he said that she could leave. The applicant was wearing dark blue clothes at the time. He did not charge her at all. On 25 June 2003 she had left the same nightclub and was driving towards Westville near the Tollgate Bridge. She was again followed by a white citigolf with a blue flashing light signalling to her to pull over. She signalled that she would not do so and requested him to follow her. He then pulled in front of her in the middle lane and slammed on brakes which made her stop. He forced her off the road near the Brickfield Road turnoff, came to the car and told her that she had been ducking and weaving all over the road. This is the same phrase he'd used two weeks previously. He asked to see her drivers licence. She indicated that he had approached her two weeks prior to this and asked if he recognized her to which he replied that he did and that she was drunk. She then refused to get out of the car and he then said he had never seen her before. She requested identification and he showed her a card through the window. She said she did not believe that he was a police officer. When she refused to get out from the car after the next half hour period, he said that she could go. She and her friend accompanying her then took down the licence number of the vehicle he was driving, which was ND 1938. Once again, he did not radio for help and was not prepared to follow her to a police station. The following morning she reported this to the police at the Westville police

station. She was never charged for driving under the influence of alcohol.

24]In cross examination she was incorrectly taxed on her failing to mention a flashing blue light on the second occasion.

25]I do not intend to deal with each submission made in the applicant's heads of argument or on behalf of the applicant in argument on the application. The magistrate gave a very full and reasoned judgment. In my view he was cautious where this was needed and was alive to the potential difficulties in the state case. In my view, also, he handled the matter with clarity and accuracy. The submission, for example, against the identity parade where Eva identified the applicant, has no basis. She said from the outset that she could identify him by his profile and was not sure that she could do so when facing the perpetrator head on and this is precisely what transpired. The fact that she identified him whilst he faced her strengthens the identification and her immediate statement when he turned and she saw him in profile puts the matter beyond any reasonable doubt, notwithstanding the caution needed in matters of identification. The magistrate was, if anything, unduly critical of aspects of the testimony of state witnesses. For example, he criticised Adam as having been arrogant. Of course arrogance does not imply lack of accuracy but, even if it did, the comment clearly does not arise from a demeanour finding. It derives from a few interventions by the magistrate, on invitation by the applicant's counsel at the trial, to rebuke Adam for answers which, as far as I am concerned, were entirely warranted. In addition, criticism was levelled against Adam and Eva for certain contradictions in their version

of how events unfolded. An example is whether Adam was told to report at the Berea Police Station or told to “fuck off” by walking through that police station to the other side and disappearing. Also, whether Eva told him on their reunion at Burn nightclub that she had been raped. The fact that the incident happened is not challenged and all that these criticisms do is show that these witnesses have not collaborated in order to prepare their testimony. It is accepted that witnesses will remember things differently and all people have something less than perfect recall. Indeed, the slight discrepancies show them to have been honest witnesses. This also appears from a reading of their testimony where they refused to overstate matters or, for example, to tailor their evidence to that of the applicant on peripheral matters. If they had done so they could claim to have remembered that there was vinyl on the car seats. In this regard, in any event, the evidence of the vinyl does not take the matter any further. Likewise, the applicant sought to make much of the comment of Buthelezi, in counts 13 to 15, that he was not sure he would be able to point out the perpetrator. The fact is that he did point him out. The identification took place some years later. His testimony that he was sure that it was him has a ring of truth as did the earlier statement that he could not be sure he would identify him and his failure to render a detailed description.

26]It is not necessary to deal in any more detail on these matters or to add to the reasons given by the magistrate for convicting the applicant on these counts. Suffice it to say that I am satisfied that he did not commit any material misdirections which would be likely to warrant interference on appeal.

27]As regards count 16, the explanation of the applicant as to why he did not radio for assistance and why he refused to follow Sara to the nearest police station, at her invitation, amounts to a tissue of lies and was correctly rejected by the magistrate.

28]As indicated above, the applicant's heads of argument made two submissions on the counts of defeating or obstructing the course of justice. In the first place, it was submitted that the applicant was not on duty and that there was accordingly no legal duty on him to effect an arrest. The submission here was that the South African Police Service Act, No 68 of 1995, provides that police reservists are only deemed to be in the employ of the service while on duty and that, since he was not on duty, he was not authorised to arrest or charge the complainants and Adam. Secondly, that the State failed to prove that the applicant had the necessary *mens rea* to commit this crime. This was raised for the first time on appeal.

29]"Defeating or obstructing the course of justice consists in unlawfully doing an act which is intended to defeat or obstruct and which does defeat or obstruct the due administration of justice."[5] The applicant correctly conceded in his heads of argument that this crime can be committed by an omission provided that there was, at the time, a duty on the applicant to act.[6] It is also clear that obstructing the course of justice connotes something less than defeating the course of justice.[7]

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5 JRL Milton: *South African Criminal Law and Procedure, Vol II Common Law Crimes* (3 ed) p102
6 *S v Williams and Others* 1998 (2) SACR 191 (SCA) 194*h-j*
7 *S v Burger* 1975 (2) SA 601 (C) 612 in which the above definition was approved.

30]The submission in the heads of argument is to the effect that the applicant was not, at the time of the offence, on duty and that, therefore, he could not charge the persons concerned. This was not elaborated on in argument. The applicant conceded under cross examination that there was a national instruction of which he was aware that where a reservist sees a crime in progress he or she is deemed to be on duty. The evidence shows that he took the view that crimes were in progress duty by confronting the complainants concerned and indicating that they had committed offences, even going so far, in Tarryn's case, of claiming to have placed her under arrest. As regards Adam and Eva, he claimed that they were in possession of an unlawful substance and took it into his possession. As regards Sara, he stated at the trial that she was an erratic driver, drunk, verbally abusive, stubborn and could not be restrained or immobilised. He could give no reason as to why he did not contact the police station by radio to request assistance when she refused to accompany him.

31]The submission that no intention was proved was not developed either in the heads of argument or in argument before us. It may be that the motive of the applicant, as regards Eva and Tarryn in particular, was to commit the offences in counts 1, 2, 13 and 14. Such a motive is not inconsistent or to be confused with an intention of the applicant to obstruct the course of justice by not charging the complainants. In argument Mr Moodley relied on *S v Mdakani* [8] where Trollip J spoke of "intent to obstruct, frustrate, or otherwise interfere with" the course of justice. This relates to *dolus directus*. Intention can, however, take the form of *dolus eventualis* whereby the applicant

8 1964 (3) SA 311 (T) at 315

foresees the possibility that his conduct will obstruct the course of justice.[9] It was stated in *S v Williams & Others* [10] that "[t]here is no doubt that a police officer has a duty to report a crime". On his version he saw crimes in progress and took action but stopped short of charging the complainants and Adam for these offences or reporting them. Having identified criminal activity, being in a position to act on it and deliberately omitting to do so, he must have foreseen that this failure would mean that they would not be charged for those offences. It follows ineluctably that the applicant must have intended to obstruct the course of justice in failing to charge them or at least report the crimes in question.

32]In the result, I am of the view that the applicant has no prospects in an appeal against his convictions.

33]As regards sentence, the magistrate made those arising from a single continuous event run concurrently. The sentence on count 2 is a stiff one. The question is, however, whether any misdirections gave rise to it or, absent such, that the sentences imposed are so disproportionate that they induce a sense of shock. No argument was advanced in this regard at the application and the heads of argument make the bald submission that the cumulative effect is shocking. No misdirection were pointed out. The magistrate correctly saw as aggravating factors the abuse of his office of police reservist by the applicant which enabled him to commit each of the offences of which he was convicted. He used his reservist identification to persuade or attempt

9 Milton *op cit* p125f
10 At 194*b-c*

to persuade the complainants to accompany him. A further aggravating factor is the planning and persistence involved in carrying through his unlawful conduct over an extended period of time during the evenings in question. He further did so in the light of concerns expressed by Adam and Eva as to the appropriateness of his conduct, which should have given him pause. I am of the view that there are no prospects that the appeal will succeed in relation to the sentences.

34]Taking all the above factors into account, therefore, and having weighed them against each other, I have determined that the interests of justice dictate that condonation should not be granted to the applicant. I am not prepared to exercise my discretion in his favour in all the circumstances. The application must therefore fail.

In the result, the application is dismissed.

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GORVEN J

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SEEGOBIN J

DATE OF HEARING:	9 December 2010
DATE OF JUDGMENT:	14 December 2010
FOR THE APPLICANT:	Mr Moodley (Attorney) of DMI Attorneys, c/o Mornet Attorneys
FOR THE RESPONDENT:	Ms V Lotan