

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

SS119/2005

5 **DATE:**

2011-03-11

In the matter between:

LORENZO NEWING

APPLICANT

and

10 **THE STATE**

RESPONDENT

J U D G M E N T

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(Application for leave to appeal)

D POTGIETER, AJ:

20 This is an application for leave to appeal against the conviction of two counts of attempted murder and one count of murder of the applicant, Mr Lorenzo Newing, who was Accused 3 in the criminal trial. The three accused were convicted in the Regional Court in Paarl, and were referred for sentence to this Court.

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SS119/2005

This Court had regard to the record of the Regional Court proceedings, and, after consideration, had confirmed, as far as it was necessary, the convictions of the accused, including the convictions of Mr Newing, who, as I have indicated, is the
5 applicant for leave to appeal.

The applicant was sentenced to similar terms of imprisonment as his co-accused with regard to the common convictions between himself and the other two accused. It should be
10 mentioned in this regard that the accused had faced a number of counts at the trial, and that the present applicant, Mr Newing, was only convicted in respect of three of those, that is the two attempted murder counts and the one count of murder. He was sentenced, in respect of the two counts of attempted
15 murder, to 10 years imprisonment each, and, in respect of the murder, to a sentence of 20 years imprisonment. It was ordered that the sentences in respect of the other counts should run concurrently with the sentence in respect of the murder count. The sentence in this matter was imposed on the
20 29th of June 2005, which is virtually six years ago.

There is an application for condonation which accompanies the application for leave to appeal, and in that application and the accompanying affidavit of the applicant, the circumstances
25 relied upon in respect of the condonation application are set

out. Those are not in dispute, and they basically amount to the fact that, because of the adverse circumstances of the applicant's incarceration and the resultant difficulties in order to get an application for leave to appeal prepared and submitted, there were various delays that resulted from this situation. The applicant sets out his attempts in order to proceed with his appeal, and it is apparent that he had, pretty soon after the date of the sentencing, taken the first steps in order to pursue an appeal in the matter.

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The principal cause for the delay in the matter concerned attempts to obtain a copy of the record of the proceedings, and it appears that this process, surprisingly, took approximately four years in order to be finalised. It is also apparent from the application that, once the matter was ready to be proceeded with, that was done without any further or undue delays.

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The approach to condonation applications is trite. The applicant is required to establish good cause for the non-compliance, and the Court has the inherent right to grant condonation where the principles of justice and fair play demand that, and, of course, where the reasons for the delay have been explained to the satisfaction of the Court. In dealing with an application for condonation, what is, in effect, required of the Court is to exercise a judicial discretion, with

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reference to all of the circumstances of the case.

Having considered the relevant facts and circumstances concerning the condonation application, I am satisfied that the
5 applicant has provided a satisfactory explanation for the failure to prosecute the appeal timeously, and, in the circumstances, I am of the view that good cause has been established by the applicant, and that condonation should be granted.

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Insofar as the application for leave to appeal is concerned, yet again, the approach to applications of this nature is trite. The principal issue is whether there are reasonable prospects of success on appeal, or reasonable prospects that another Court
15 may come to a different conclusion. See in this regard Rex v Baloi 1949(1) SA 523 (A).

The case for leave to appeal has been set out in the actual application, and Mr Burgers, who appears for the applicant,
20 has referred to those grounds, indicating that that is what is being relied upon in support of the application for leave to appeal.

The application indicates that the grounds of the application
25 for leave is that the Court erred in accepting the evidence of

an eyewitness, Moses Stoffels, and that there is reason to doubt whether the identification of the accused, which was in issue, was clear and satisfactory in all material respects. Similar grounds are relied upon in respect of the evidence of a further eyewitness, Claudio Herandien. It was contended that, the circumstances of the identification were less than ideal, and that, in the result, the identification was also not satisfactory and clear in all material respects.

10 There is a further ground, namely that the Court had erred in finding that there was a common purpose among the accused, and, convicting the applicant on that basis. That is insofar as the grounds in respect of the conviction are concerned.

15 In respect of the sentence, leave to appeal is sought on the ground that the Court had erred in imposing a similar sentence upon all the accused, despite the fact that the extent of the participation of the applicant differed from that of the other accused.

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The application is being opposed on behalf of the State, on the basis that, in convicting the accused, the Trial Court was fully aware that the incidents in question were gang-related, and had taken that into account in assessing the evidence and the case of the State. Insofar as the identification of the applicant

is concerned, it was pointed out that the eyewitness, Moses Stoffels, knew the applicant, who was with Accused 1, who was, in fact, in possession of the firearm and who had fired the shots. The applicant was in close proximity to the eyewitness,
5 the incident happened in broad daylight, and the applicant was part of the group that had, in fact, shot and injured Mr Stoffels. This in fact resulted in the one attempted murder conviction.

Insofar as the testimony of the further eyewitness, Herandien,
10 was concerned, the State submitted that, similarly, the incident happened in broad daylight, albeit at a different location, and that the prospects or the chances of an incorrect identification were virtually nonexistent.

15 Insofar as the sentence is concerned, it was submitted on behalf of the State that, for purposes of sentence, it was taken into account that the personal circumstances of the applicant differed from that of Accused 1, who was the person who had actually fired the shots. Accused 1 was relatively young at the
20 time of the incident; he was, in fact, 14 years of age, whereas the applicant was 18 years of age, and the applicant, moreover, had one previous conviction.

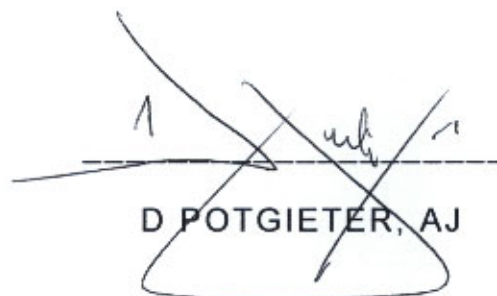
It was submitted on behalf of the State that the Court had
25 properly taken into account that the accused had acted as a

group, and that it would have been inappropriate, in those circumstances, to differentiate in the sentences which were eventually imposed on the accused.

- 5 Having considered the matter, as well as the submissions that were made on behalf of the applicant and the State, I am not persuaded that there are reasonable prospects of the appeal succeeding, or, as is often put, that there are reasonable prospects of another Court coming to a different conclusion in
10 respect of either the conviction or the sentence imposed on the applicant.

In those circumstances, there is, in my view, no merit in the application for leave to appeal, and I accordingly make the
15 following order, THAT CONDONATION IS GRANTED FOR THE LATE FILING OF THE APPLICATION FOR LEAVE TO APPEAL, AND THAT THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED.

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D POTGIETER, AJ