THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1301/2021

In the matter between:

RENEAL ALLAN FRANCIS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Francis v The State* (1301/2021) [2023] ZASCA 30 (28 March 2023)

Coram: VAN DER MERWE, MABINDLA-BOQWANA, MEYER, WEINER and MOLEFE JJA

Heard: 3 March 2023

Delivered: 28 March 2023

Summary: Criminal procedure – appeal against refusal of petition by high court – appellant convicted of two counts of dealing in drugs – sentenced to effective imprisonment of 15 years – whether appeal against sentence would have reasonable prospects of success.

ORDER

On appeal from: Eastern Cape Division of the High Court, Makhanda (Jolwana J and Rusi AJ, sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Molefe JA (Van der Merwe, Mabindla-Boqwana, Meyer and Weiner JJA concurring):

[1] This is an appeal against the decision of the Eastern Cape Division of the High Court, Makhanda (the high court), refusing Mr Reneal Allan Francis (the appellant) leave to appeal the sentence ordered by the Magistrate's Court for the Regional Division of the Eastern Cape held at East London (the trial court), which imposed an effective sentence of 15 years' imprisonment on the appellant in respect of convictions for dealing in drugs.

[2] The appellant was a police officer working in the crime prevention unit of the South Africa Police Service (SAPS) stationed at Mdantsane. He was convicted by the trial court on two counts of dealing in drugs in contravention of s 5*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act). Pursuant to his conviction, the appellant was sentenced to 15 years' imprisonment on each count. The trial court found no substantial and compelling circumstances that justified a

deviation from the prescribed minimum sentence. It ordered that the sentences imposed on both counts run concurrently. The effective sentence, therefore, is imprisonment for 15 years.

[3] The appellant applied for leave to appeal against both his conviction and sentence, which the trial court refused. The high court also refused to grant leave to appeal on petition. The appellant appeals to this Court against his sentence with the leave of this Court. Thus, the question on appeal is whether the high court should have granted leave to the appellant to appeal to it. The answer to that question depends on whether there are reasonable prospects of success on appeal.

[4] As the appeal is only against the refusal of leave to appeal against sentence, those facts which are germane to the determination of reasonable prospects of success on appeal need only to be briefly recounted. The appellant was part of a group of police officers stationed at Mdantsane that conducted crime prevention duties specifically in respect of dealing in drugs. Information was obtained that these police officers would seize drugs during raids, but would not hand in the drugs as exhibits or would only hand over portions of the drugs. Instead, they would look for potential buyers to purchase the seized drugs from them, thereby enriching themselves.

[5] The organised crime unit in conjunction with crime intelligence of the SAPS in East London initiated operation ‘Cooler-Bag,’ an undercover operation in terms of s 252A of the Criminal Procedure Act 51 of 1977. An undercover agent was used to infiltrate and befriend the appellant and to arrange for the purchase of drugs. The agent was provided with audio and video equipment to record the transactions. The agent testified that on two separate occasions the appellant first sold 46 and then 50

tablets containing methaqualone (Mandrax) to him on 14 November and 30 November 2012, respectively. Money was exchanged between them and both transactions were captured by the audio and video equipment. The purchase price for the drugs was R1 700 and R1 600 respectively. Mandrax is an undesirable dependence-producing substance in terms of the Drugs Act, and thus the dealing therein is illegal.

[6] Section 51(2)*(a)* of the Criminal Law Amendment Act 105 of 1997 (the CLA) provides for prescribed minimum sentences for certain serious offences. It reads as follows:

'*(a)* Part II of Schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.'

[7] Section 51(2) read with Part II of Schedule 2 of the CLA relates to contravention of s 13*(f)* of the Drugs Act, where the value of the drugs is more than R50 000; or the value of the drugs is more than R10 000 and the offence is committed 'by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy'; or if the offender is a 'law enforcement officer'. The appellant correctly conceded that, as a member of the SAPS, he was a law enforcement officer.

[8] The argument presented on behalf of the appellant was that there are reasonable prospects of success on appeal that the trial court misdirected itself in its finding that there were no substantial and compelling circumstances justifying a

lesser sentence than that which it imposed. The appellant's contention further was that the trial court erred, in fact and in law, by failing to apply the legal principles enunciated in *S v Malgas*, the seminal judgment on 'substantial and compelling circumstances'.[1] More particularly, that the trial court erred, when it found no substantial and compelling circumstances to deviate from the prescribed minimum sentence of 15 years' imprisonment per count.

[9] The gist of *Malgas* is that the specified sentences should not be departed from lightly and that the prescribed sentences should ordinarily be imposed. If, however, the prescribed sentence would be unjust in all the circumstances, the court should not hesitate to depart from it.

[10] A pre-sentence report by a probation officer and a suitability report by the Department of Correctional Services were presented to the trial court. The reports pertaining to the appellant's personal circumstances provided the following information: he was 28 years old at the time of his arrest and served six years as a police officer in the SAPS; he is married with one minor child and was the sole breadwinner for his family prior to his arrest; he is a first offender and spent 19 months in custody awaiting trial; he obtained a diploma in information technology and was self-employed at the time of the sentence; and he made positive contributions to the community. There is clearly very little which is unusual in the appellant's personal circumstances.

[11] On the other hand, it is a serious aggravating factor for a law enforcement officer to be involved in criminal activities, because that is an abuse of the position

[1] *S v Malgas* 2001 (1) SACR 469 (SCA); [2001] 3 All SA 220 (A).

of trust society has placed on them.[2] Abuse of drugs is prevalent in the society that the appellant was supposed to serve and protect. The appellant, a police officer whose primary duty was to uphold the law and curb the commission of offences, abused his position of power and authority and fuelled the drug abuse problem he had been employed to eradicate. The appellant was more so employed in a department responsible to combat drug dealing. The appellant is not remorseful. The trial court correctly found that lack of remorse is not in itself an aggravating factor. It is, however, indicative that the appellant does not take responsibility for his actions and lacks insight into the gravity of the crimes he committed. This points to an absence of the prospect of rehabilitation on his part.[3]

[12] Based on all the circumstances in this matter, aggravating and mitigating, I can find no misdirection in the trial court's reasons for the sentences imposed. There are clearly no substantial and compelling circumstances present. The appellant's personal circumstances pale in comparison to the aggravating factors. The application for leave to appeal was therefore correctly refused.

[13] In the result, the following order is made:
The appeal is dismissed.

D S MOLEFE
JUDGE OF APPEAL

[2] *S v Maritz* 1996 (1) SACR 405 (A) at 417.
[3] *S v Dyantji* 2011 (1) SACR 540 (ECG) para 26.

Appearances

For the appellant:	R M Liddell
Instructed by:	Changfoot Van Breda Inc, East London
	Symington De Kok Attorneys, Bloemfontein
For the respondent:	S S Mtsila
Instructed by:	Director of Public Prosecutions, Makhanda
	Director of Public Prosecutions, Bloemfontein