THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no. 962/2022

In the matter between:

ANDREW BARNEY AUGUST Appellant

and

THE STATE Respondent

Neutral Citation: *Andrew Barney August v The State* (962/2022) [2023] ZASCA 170 (04 December 2023)

Coram: MOLEMELA P, CARELSE and MATOJANE JJA and MUSI and BINNS-WARD AJJA

Heard: **0**2 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme

Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 4 December 2023.

Summary: Application for condonation of the late filing of notice of appeal – requirements for condonation restated – appellant not satisfying requirements – application refused and appeal struck from the roll.

Criminal Procedure – Entrapment –import of s 252A of the Criminal Procedure Act 51 of 1977 ('CPA') considered.

Evidence – Exclusionary rule in terms of s 252A of CPA and s 35(5) of the Constitution considered – no basis on the facts of the current case to exclude evidence obtained by entrapment by undercover agent.

Application by appellant, in appeal against refusal of High Court to grant petition for leave to appeal in terms of s 309C of CPA against conviction in the magistrates' court, to adduce further evidence for the purpose of the contemplated appeal to the High Court on the merits –appellant purporting to rely on s 19 of Superior Courts Act 10 of 2013 – s 19 not applicable in respect of appeals regulated by the CPA and any other criminal procedural law – application in any event not satisfying the established test for the introduction of further evidence on appeal.

ORDER

On appeal from: The Northern Cape High Court (Lacock and Majiedt JJ sitting as court of appeal):

1. The application for condonation is refused.
2. The appeal is struck from the roll.

JUDGMENT

BINNS-WARD AJA (MOLEMELA P and CARELSE and MATOJANE JJA and MUSI AJA concurring):

[1] More than 17 years ago, on 20 September 2006, Andrew Barney August (the appellant) was convicted in the Magistrates' Court, Kimberley, on a charge of dealing in drugs (100 Mandrax tablets) in contravention of s 5(*b*) of the Drugs and Drugs Trafficking Act 140 of 1992. On 4 October 2006, he was sentenced to a term of four years' imprisonment. The conviction was founded entirely on incriminating evidence obtained by the police through entrapment. The appellant sold the drugs in question to an undercover agent. At this far remove in time from the dates mentioned, and notwithstanding that he has long since completed serving his term of imprisonment, the appellant is seeking leave to appeal against his conviction. His intended appeal in the principal case is premised on the

contention that the evidence against him obtained by the trap[1] should have been excluded.

[2] The appellant's application to the trial court for leave to appeal against his conviction and sentence was refused on 30 March 2007, as was his subsequent petition to the Northern Cape High Court, Kimberley (the High Court) in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA), on 10 June 2008. An application to the High Court for leave to appeal to this Court against the refusal of his petition was refused by Lacock and Majiedt JJ in a reasoned judgment delivered on 10 September 2009. This Court subsequently, on 10 March 2011, in terms of s 20(4)*(b)* of the (then subsisting) Supreme Court Act 59 of 1959, granted the appellant leave to appeal against the High Court's refusal of his petition.

[3] The appellant failed, however, to timeously prosecute the appeal. He attributes the failure to the delinquency of the Legal Aid attorney appointed to represent him in 2011. He avers that he laid a complaint against that attorney in 2013, at which stage Legal Aid withdrew its assistance, taking the view that an appeal would have no practical effect as the appellant had already completed his sentence. Legal Aid representation was reinstated several years later, in 2022, after he had lobbied the Department of Justice.

[4] The preliminary, and potentially dispositive, matter currently before this Court more than 12 years after leave to appeal was granted is an application by the appellant for (i) condonation for the late filing of the notice of appeal and (ii) leave to lead further evidence on appeal. If condonation is refused, the appeal falls to be struck from the roll and the application to admit further evidence falls

---

[1] In *S v Malinga and Others* [1963] 1 All SA 128 (A); 1963 (1) SA 692 (A) at 693F-G, Holmes JA adopted the following definition of 'a trap' given in Gardiner and Lansdown, *South African Criminal Law and Procedure*, (1957) 6th ed. vol. 1 pp 659 - 660, 'a trap is a person who, with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words he creates the occasion for someone else to commit the offence.'

away. If condonation is granted and the appeal against the refusal of the appellant's petition succeeds, the principal case stands to be remitted to the High Court to hear the appeal against the magistrate's judgment convicting the appellant irrespective of the fate of the application before us to lead further evidence.

[5] The appellant has not explained in his supporting affidavit why an appeal at this stage would serve any practical purpose. His counsel submitted that the case was of 'huge importance' to him because of its effect on his criminal record, but there was no support for that contention in the appellant's evidence in the condonation application. It is obvious that a successful appeal would correct the appellant's criminal record. It is evident from the trial record, however, that he already had previous convictions of a similar nature and was facing like charges in another court at the time of his trial in respect of the matter currently in issue. The reputational benefit to be derived from a successful appeal in the High Court would therefore be limited.

[6] There is an indication in the record on appeal that the appellant's conviction resulted in a forfeiture order in terms of the Prevention of Organised Crime Act 121 of 1998. The value of his property declared subject to forfeiture was fixed at R2800.00. The appellant did not, however, rely in support of the condonation application on any hope or expectation for the return of his forfeited property or for compensation for its loss if his intended appeal proved successful. So any idea that this might be the basis for his persistence with the matter is speculative.

[7] Any implication in the appellant's continuing prosecution of the matter that he is seeking to exercise his constitutionally entrenched fair trial rights, which include the right of appeal to or review by a higher court, has to be assessed in the context of the provisions and practices in place to discourage frivolous and

meritless appeals and also, significantly, the requirement that such right has to be exercised timeously.

[8] One is consequently left with the impression that the appellant's only purpose in seeking to prosecute the appeal at this remote juncture from the date special leave was granted to him to do so is to hope thereby to be able to set the history books to right by reversing the magistrate's judgment in an eventual appeal to the High Court. Does that make his appeal against the High Court's refusal of leave to appeal sufficiently material to be entertained so late in the day? The materiality of the matters in issue is a salient consideration in determining whether the interests of justice would be served by granting condonation to the appellant for the inordinate delay. Objectively, for the reasons just discussed, in its current state of senescence the matter does not appear to be of significant importance to the appellant or the administration of criminal justice.

[9] A consistent refrain in the relevant jurisprudence, including several judgments of this Court and the Constitutional Court, is that condonation entails the grant of an indulgence and is not to be had just for the asking.[2] The relevant principles – described in that matter with an emphasis on the limits to which a litigant can rely on ignorance of legal procedures and the incompetence of its legal representatives, even when its case on the merits might enjoy reasonable prospects of success – were quite recently comprehensively rehearsed in this Court's judgment in *SA Express Ltd v Bagport (Pty) Ltd*,[3] and it would therefore be a supererogation to repeat them.

---

[2] See e.g. *Kham And Others v Electoral Commission And Another* [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) para 28, *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (10) BCLR 1052 (CC); 2009 (5) SA 345 (CC) para 20, *eThekwini Municipality v Ingonyama Trust* [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) paras 25-27; *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) paras 25-26; and *Uitenhage Transitional Local Council v South African Revenue Service* [2003] ZASCA 76; [2003] 4 All SA 37 (SCA) para 6.
[3] *SA Express Ltd v Bagport (Pty) Ltd* [2020] ZASCA 13; 2020 (5) SA 404 (SCA).

[10] The general approach to determining whether the interests of justice would be served by condoning non-compliance with procedural and practice requirements is well established. Thus, for example, in *Van Wyk v Unitas Hospital and Another*[4] it was stated that factors relevant to the enquiry include, but are not limited to, the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success. Each case must be treated on its peculiar facts, and the weight to be given to the pertinent factors will vary case by case, but when the delay has been inordinate the public interest in the finality of judicial decisions (including in criminal matters[5]) becomes an accentuated consideration.

[11] As mentioned, the basis upon which the appellant contends that he enjoys good prospects of success in appealing against his conviction is that the evidence concerning his entrapment by the police on which the conviction squarely rested should have been excluded. It was otherwise not seriously disputed that the appellant procured the prohibited substances involved at the instance of a police trap and then sold them to him.

[12] Entrapment is regulated in terms of s 252A of the CPA. The import of s 252A of the CPA was considered in depth by this Court in *S v Kotzè (Kotzè)*.[6] Our law does not recognise a defence of entrapment but, through the mechanisms of s 252A, it seeks to address the well-documented concerns about the unfairness that can arise from the misuse of trapping by law enforcement officers. The

[4] *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 20.
[5] Cf. *S v Nofumela* 1992 (1) SA 740 (A) at 746F and *S v Sterrenberg* 1980 (2) SA 888 (A) at 893F-G.
[6] *S v Kotzè* [2009] ZASCA 93; 2010 (1) SACR 100 (SCA); [2010] 1 All SA 220 (SCA).

provision does this by way of what Wallis AJA termed 'an exclusionary rule of evidence'.[7]

[13] The position that obtains in terms of s 252A is succinctly summarised in *Kotzè* as follows:

> '[23] The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by which the evidence was obtained and the impact that its admission would have on the fairness of the trial and the administration of justice in order to determine whether it should be admitted.
>
> [24] It must be stressed that the fact that the undercover operation or trap goes beyond providing the accused person with an opportunity to commit the crime does not render that conduct improper or imply that some taint attaches to the evidence obtained thereby. All that it does is create the necessity for the trial court to proceed to the enquiry mentioned in the previous paragraph.'[8]

---

[7] *Kotze* para 21.

[8] *Kotzè* paras 23-24. 'The enquiry mentioned in the previous paragraph' is that provided for in s 252A(3) of the CPA, which provides:
'(3)*(a)* If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.
(b) When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:
(i) The nature and seriousness of the offence, including-
(aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;
(bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;
(cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or
(dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;
(ii) the extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to-
(aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;
(bb) the facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed; or
(cc) the prejudice to the accused resulting from any improper or unfair conduct;

[14] It follows that even if the evidence did establish that the conduct of the undercover agent concerned went further than just providing an opportunity to the appellant to commit the offence (a question to be discussed presently), the admissibility of the evidence would not necessarily be excluded. The court would, in such a situation, have to determine whether upholding the fairness of the trial and the administration of justice required it to be excluded. And in that regard, it would weigh up the public interest against the personal interest of the accused, having regard to the factors identified in s 252A(3)*(b)* to the extent that any of them was relevant in the case.

[15] The entrapment of the appellant was part of a broader undercover operation (Operation Junior) authorised by the Northern Cape Director of Public Prosecutions (the DPP) in terms of s 252A(4) of the CPA.[9] The operation was initially directed against drug dealers in Postmasburg and Kuruman and subsequently extended, as a result of evidence uncovered, to include Kimberley, where the dealing transaction in which the appellant took part happened. The appellant was not listed as one of the targets of the originally authorised operation. A written application to add him as an identified target of the authorised operation was submitted by the police on 11 December 2003. The dealing in respect of which the appellant was convicted occurred on 14 December 2003.

[16] The unchallenged oral evidence was to the effect that authorisation had been obtained by then, possibly telephonically. The vagueness of the evidence on the point was understandable because, when resisting the admission of the

---

(iii) the nature and seriousness of any infringement of any fundamental right contained in the Constitution;
(iv) whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and
(v) any other factor which in the opinion of the court ought to be taken into account.'

[9] Section 252A(4) provides:
'(4) An attorney-general may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise.'
It was not in dispute that the Director of Public Prosecutions for the Northern Cape had issued relevant guidelines.

entrapment evidence, the appellant's then legal representative had not placed the question of authorisation in issue. The police witnesses therefore had no reason to prepare to be examined on the details of the authorisation, and the relevant events had occurred nearly three years before they testified. The DPP's guidelines prescribed that written authorisation had to be obtained, but it is not clear whether that requirement also applied in respect of applications to add persons to the list of suspects in already authorised undercover operations.

[17] An accused person wishing to resist the admission of evidence on the grounds that the trap was unfair because it went beyond merely offering an opportunity to the target to commit the offence concerned is required, in terms of the proviso to s 252A(6) of the CPA, to identify the grounds on which he or she contends the evidence should be excluded.[10] A number of grounds upon which it can be contended that the conduct of the trap went too far is listed in s 252A(2).[11] The absence of authorisation or the failure to comply with the terms thereof are amongst them – in s 252A(2)*(a)*.

---

[10] Section 252A(6) provides:
'If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence.'

[11] Section 252A(2) provides:
'In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:
(a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions or guidelines issued by the attorney-general were adhered to;
(b) the nature of the offence under investigation, including-
(i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;
(ii) the prevalence of the offence in the area concerned; and
(iii) the seriousness of such offence;
(c) the availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area concerned;
(d) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;
(e) the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;
(f) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;

[18] Not all of the factors listed in s 252A(2) have to be considered in a case; only those that appear to be pertinent on the peculiar facts of the matter.[12] In *Kotzè*, they were described as 'an open list of factors' and it was observed that they 'must be viewed holistically and weighed cumulatively as different factors may point towards different answers. Not all of the factors will be relevant in every case'. Most importantly, as Wallis AJA stressed, '[s]ight must not be lost of the fact that there is only a single question to be answered, namely, whether the conduct of the trap went beyond providing an opportunity to commit an offence'.[13]

[19] It is clear that the object of the forementioned requirement in s 252A(6) is to define the basis of the challenge so as to alert the prosecution to the questions it will have to address in order to meet it.[14] The required indication of the grounds upon which objection is taken to the admission usually precipitates a trial within a trial on the admissibility of the evidence,[15] as indeed it did in the current matter.

[20] The declared basis upon which the admission of the evidence was resisted at the appellant's trial was that the agent's conduct had gone beyond merely affording the opportunity to the appellant to commit the offence, but had actually

---

(g) the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;

(h) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances in order to increase the probability of the commission of the offence;

(i) whether the official or his or her agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;

(j) the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;

(k) any threats, implied or expressed, by the official or his or her agent against the accused;

(l) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;

(m) whether the official or his or her agent acted in good or bad faith; or

(n) any other factor which in the opinion of the court has a bearing on the question.'

[12] *S v Hammond* [2007] ZASCA 164; [2008] 2 All SA 226 (SCA); 2008 (1) SACR 476 (SCA) para 26.

[13] *Kotzè* para27.

[14] *Kotzè* para 19.

[15] See s 252A(7) of the CPA; *Kotzè* para 19; and *S v Lachman* [2010] ZASCA 14; 2010 (2) SACR 52 (SCA); [2010] 3 All SA 483 (SCA) para 26.

involved the payment of a monetary inducement to do so. The appellant's attorney, who adumbrated the appellant's objection to the admission of the entrapment evidence in his opening statement to the trial court, therefore (unsurprisingly) did not rely on paragraph (a) of s 252A(2) (lack of approval). He relied on other grounds, namely those listed in paragraphs (c), (d), (e), (f), (h) and (m).

[21] The undercover agent denied that he had provided the appellant with a financial incentive or reward to commit the offence. His evidence was to the effect that the only money that changed hands was the consideration that he gave to the appellant in payment for the drugs supplied. There was no need for the court to determine that dispute of fact, however, as it became evident on the appellant's version of the transaction that it was *he* who solicited a payment from the agent in order to initiate the illicit transaction. The appellant testified as follows in respect of the initiation of the deal:

> 'Toe het ek en mnr Hartzenberg [the agent] ingegaan in my huis. Toe het mnr Hartzenberg my gevra of ek hom nie 'n guns kan doen en vir hom 'n sterk pil in die hande kan kry nie. Toe het ek vir hom gesê dit is okay, ek ken vriende. Ek sal paar kontakte maak, sien jy maar ek het nie geld om die kontak te maak nie. Toe het mnr Hartzenberg my R500 gegee en gesê ek moet in die tussentyd in vir hom pille kry en dan moet ek hom kontak sodra die pille daar by my is.'[16]

[22] Once it became apparent that the appellant's own evidence negated the basis for objection stated in his attorney's statement in terms of the proviso to s 252A(6), the entrapment evidence thereupon became 'automatically

[16] 'Then Mr Hartzenberg (the agent) and I went into my house. Then Mr Hartzenberg asked if I could do him a favour and obtain some hard drugs for him. Then I said to him that that would be fine, I know some friends. I shall make some contacts, but look I do not have the money to make the contact. Mr Hartzenberg then gave me R500 and told me that I must in the meantime get some pills for him and must contact him as soon as I had the pills in my possession'. (My translation.)

admissible', as it was put in *Kotzè supra*; subject, of course, if the question were applicable on the facts, to s 35(5) of the Constitution. [17]

[23] It is no cause for surprise in the circumstances that there was no mention in the appellant's application to the trial court for leave to appeal, nor in his petition to the High Court in terms of s 309C that the entrapment evidence should have been excluded by reason of his having been financially induced to commit the offence. Instead, in his petition to the High Court, the appellant raised the complaint that the trap had not been authorised and blamed his attorney for not complying with his instructions to make an issue of it at the trial. He also complained that the electronic monitoring of the drug deal by the police had happened in contravention of s 2 of the (since repealed[18]) Interception and Monitoring Prohibition Act 127 of 1992 (the IMPA).

[24] It will be apparent from the passage in *Kotzè* quoted above[19] that the appellant's contention concerning lack of authority even if factually well-founded – which it was not because it went against the unchallenged evidence that the entrapment was authorised – would not preclude the admissibility of the evidence obtained by means of it. It would only be necessary to consider the admissibility of the evidence if the facts showed that the method of entrapment went beyond just offering the appellant the opportunity to commit the offence. Absence of authorisation would then be only one factor in a matrix of other considerations to which the trial court could have regard to determine whether at the end of the day the agent's conduct went beyond providing an opportunity to commit an offence. And only if the court concluded that it did, would the court then have to consider whether to exclude the evidence pursuant to the weighing-up exercise

[17] Section 35(5) provides:
'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'
[18] Repealed by the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, which was assented to on 30 December 2002 and came into operation on 30 September 2005.
[19] In para 14 above.

contemplated by s 252A(3). As discussed,[20] in this matter the basis upon which the appellant contended that the method of entrapment had been such as to engage the enquiry mandated by s 252A(3) was negated by his own evidence.

[25] At the risk of repetition, it falls to be stressed that the sole enquiry before s 252A(3) comes into play is whether the trap went further than just affording the opportunity to commit the offence. The fact that the trap may not have been authorised is not, of itself, determinative in the enquiry.[21] It is merely one of the factors that, depending on the pertinent factual matrix, might contribute to the determination. An absence of authorisation does not, of itself, render evidence obtained through entrapment inadmissible. The fact that a trap was unauthorised is irrelevant unless it serves, in the peculiar context of the case, to indicate that the conduct of the trap went beyond just providing an opportunity to commit an offence.[22] Therefore, even assuming in favour of the appellant, against the weight of the evidence, that authorisation was lacking, that, by itself, would be of no assistance to him. If the trap did not go beyond offering an opportunity, the lack of authority would be significant only if the context indicated resultant unfairness or flagrant and inexcusable non-compliance with the law. And any exclusion of the entrapment on that basis would happen in terms of s 35(5) of the Constitution, rather than s 252A of the CPA.

[26] There is nothing in the evidence in the current matter to show that the trap went beyond affording the opportunity to the appellant to commit the offence, and, therefore, save for the possible implication of s 35(5) of the Constitution, whether the trap had been authorised or not was irrelevant to the admissibility of the evidence obtained by it.

---

[20] In para 22 above.
[21] *Bilankulu and Another v S* [2020] ZASCA 114 (SCA) para 18.
[22] *Kotzè*, para 26.

[27] Dealing, in the context of undercover and entrapment work, with the issue of the exclusion of incriminating evidence in terms of s 35(5) of the Constitution, Tshiqi JA observed in *S v Singh and Others*[23] that –

> 'The use of undercover agents by the police, both for the prevention and the detection of crime, is long established, and is acceptable in our constitutional democracy. Section 35(5) of the Constitution does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. The enquiry as to whether the admission of evidence would be detrimental to the administration of justice centres around public interest. Since the enquiry is purely a legal question, the question of the incidence and quantum of proof required to discharge the onus of proof does not arise. It essentially involves a value judgment. In *Key v Attorney-General, Cape Provincial Division, and Another* the Constitutional Court stated:
>
> > 'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale.'[24]
>
> In *S v Mthembu* [25] this court stated:
>
> > '… Public policy, in this context, is concerned not only to ensure that the guilty are held accountable; it is also concerned with the propriety of the conduct of investigating and prosecutorial agencies in securing evidence against criminal suspects. It involves considering the nature of the violation and the impact that evidence obtained as a result thereof will have, not only on a particular case, but

---

[23] *S v Singh and Others* [2016] ZASCA 37; 2016 (2) SACR 443 (SCA) para 16.

[24] *Key v Attorney-General, Cape Provincial Division, and Another* [1996] ZACC 25; 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC) para 13. The paragraph actually bears quoting in full. It reads: 'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'

[25] *S v Mthembu* [2008] ZASCA 51; [2008] 3 All SA 159 (SCA); [2008] 4 All SA 517 (SCA); 2008 (2) SACR 407 (SCA).

> also on the integrity of the administration of justice in the long term. Public policy therefore sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution. If on the other hand the conduct of the police is reasonable and justifiable, the evidence is less likely to be excluded – even if obtained through an infringement of the Constitution.'[26]

[28] There was nothing in the evidence to suggest that the conduct of the trap in the present case was such as to make it unfair to the appellant for the trial court to have regard to it. And it is clear that there was no flagrant violation of the law because we know from the appellant's application to adduce further evidence that prior written application was made for authority to conduct the trap. There is nothing to suggest the existence of any reason for the application not to have been granted in the ordinary course. The trap was conducted in the context of an authorised undercover operation.

[29] In *Singh*, Tshiqi JA pertinently remarked on the role that public opinion should play towards the avoidance of too nice an approach by the courts in weighing the adverse effect of the infringement of accused persons' rights in entrapment matters in which the accused sought the exclusion of incriminating evidence with resort to s 35(5) of the Constitution**.** The learned judge held, with reference to this Court's acceptance in *S v Tandwa*[27] that 'the public flinches when courts exclude evidence indicating guilt', held that '[p]ublic opinion is one of the relevant considerations on whether rights violations are detrimental to the administration of justice'.[28]

[30] Assuming, against the weight of the evidence to the contrary, that the trap had not yet been authorised, and acknowledging that approval for the electronic monitoring of the transaction had not yet been granted, I do not consider that there is a realistic prospect that the High Court in an appeal in the principal case would

---

[26] Ibid para 26.
[27] *S v Tandwa* [2007] ZASCA 34; 2008 (1) SACR 613 (SCA) para 121.
[28] *Singh* para 22.

regard the extent of any resultant infringement of the appellant's right to privacy as weighing sufficiently against the public interest in the identification and arrest of drug dealers. Drug dealing is difficult to detect and investigate without the use of entrapment. It is notorious that the use of and trading in illicit narcotics is a scourge in South African society, especially its most vulnerable and disadvantaged sections. This case is a far cry from cases such as *Tandwa* in which it was held, hardly surprisingly, that incriminating evidence obtained consequent upon a brutal assault of the accused should have been excluded by the trial court in terms of s 35(5) of the Constitution. In the current matter, by contrast, I do not think it would be unduly dismissive of the appellant's personal interests to characterise his reliance on the lack of authorisation in the peculiar circumstances of the case as opportunistically technical.

[31] For all the foregoing reasons I have concluded that the prospect of the trial court's decision to admit the evidence obtained through the use of entrapment being reversed on appeal is nugatory. I consider that it is unlikely that a court seized of an appeal from the judgment of the trial court would find that the trap had gone further than just affording the appellant the opportunity to commit the offence. Further, and in any event, the court considering the matter would very probably nevertheless, after a consideration of the factors identified in s 252A(3), conclude that the evidence was properly admitted. These conclusions on the appellant's prospects of success weigh heavily against the granting of his application for condonation. It is impossible to conceive how the interests of justice could be served by permitting the appellant, so many years after the relevant events occurred and at a stage where he has long ago completed his sentence, to take up judicial time and resources in a criminal justice system notoriously plagued by backlog problems with a very stale appeal that has little to no prospects of success.

[32] In the circumstances it is hardly necessary to consider the other factors that are usually weighed in determining whether to grant condonation. Having regard, however, to the exceptionally long period that has intervened since the appellant's trial and the completion of his consequent term of imprisonment, it is nevertheless meet to remark on the inadequacy of the appellant's explanation of the extraordinary delay. The delay is of such an inordinate nature, that absent a very good explanation or the pressing importance of the case, it would be sufficient to refuse condonation even if the prospective appeal did enjoy realistic prospects of success.

[33] An applicant for condonation is required to give a full and reasonable explanation for the delay that has occurred, and that explanation must cover the entire period of the delay, or at least account satisfactorily for the applicant's inability to do so.[29] The appellant's explanation for delays between 2011 and 2013 and the further period between 2013 and 2019 was woefully inadequate.

[34] As mentioned, he blamed his Legal Aid attorney for the inaction in the first of those periods. However, he provides no particularity whatsoever about his interactions, if any, with the attorney directed at ensuring that a notice of appeal was filed. It is evident from the record that the appellant was no shrinking violet when it came to dealing with his legal representatives. He intervened repeatedly from the dock during the conduct of his trial, much to the magistrate's annoyance. He was also aware, from the fact that he had required condonation for his submission of his s 309C petition, of the importance of taking procedural steps within the prescribed time limits. The appellant managed to submit his petition and make the attendant condonation application without legal representation. He does not present as someone who would not be capable, without assistance, of ensuring that a notice of appeal was filed timeously or within a reasonable time

[29] *Van Wyk v Unitas Hospital*, para 22; *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* [2009] ZACC 12; 2009 (10) BCLR 1040 (CC); 2012 (2) SA 637 (CC) para 15.

after the period for doing so had elapsed. He has not explained why he did not do so.

[35] The six-year delay between 2013 and 2019 was covered in a single sentence of his supporting affidavit: 'As a layman I tried to make progress in my appeal'. The lack of particularity could not be starker. The appellant did add that '[a]t some stage part of the case record was missing and I struggled in getting a complete record before court'. He did not give any indication of when it was in the 11-year chronology from the granting of leave that problems with assembling the record were encountered, or when and how he resolved them.

[36] In the result, having regard to the poor prospects of success, the inordinate delay and the grossly inadequate explanation of it, it would be inappropriate to grant the appellant's application for condonation. The application consequently falls to be refused and the appeal struck from the roll.

[37] In the circumstances, it is strictly speaking not necessary to say anything about the application to lead further evidence, but I shall deal with it briefly because it was argued by the appellant's counsel and accepted by counsel for the state that even if we declined to entertain the application we should nevertheless have regard to the additional evidence that the appellant sought to introduce for the purpose of assessing his prospects of success in the contemplated appeal on the merits to the High Court. The application for leave to adduce further evidence was directed firstly, at belatedly contradicting the state's previously unchallenged evidence that the entrapment had been authorised and secondly, to introduce evidence that the secret electronic recording of the drug transaction had not yet been authorised in terms of the IMPA when the transaction took place. All of the evidence concerned was documentary and it can be accepted for present purposes that the three documents concerned were what they purported to be.

[38] The content of the two documents upon which the appellant sought to rely to establish that the trap had not been authorised proved that application had been made for authorisation and were inconclusive on whether it had been granted before the trap was sprung. For the reasons set out earlier in this judgment, the issue of authority was a red herring in this case in that even if an absence of authority had been established, that would not have improved the appellant's prospects of successfully overturning his conviction by way of achieving the exclusion of the evidence against him obtained by his entrapment.

[39] The third document that the appellant sought to introduce as further evidence purported to show that approval for the recording of the drug transaction had been granted by the designated judge only on 27 January 2004. In my judgment, the absence of authorisation for the recording of the transaction, were it established before the High Court sitting in an appeal, would be unlikely in the circumstances to lead to the exclusion of the entrapment evidence. The consequent infringement of his right to privacy was not an egregious one. It was not of the nature against which s 2 of the IMPA was directed at protecting.[30] On the contrary, the communication concerned was one that, since the inception of the IMPA's replacement, the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, a law enforcement officer has expressly been permitted to intercept in a case like this.[31]

---

[30] Section 2 of the IMPA provided (insofar as relevant):
'**Prohibition on interception and monitoring**
(1) No person shall-
(a) ..
(b) intentionally monitor any conversation or communication by means of a monitoring device so as to gather confidential information concerning any person, body or organization.
(2) Notwithstanding the provisions of subsection (1) or anything to the contrary in any other law contained, a judge may direct that-
(a) …
(b) …
(c) conversations by or with, or communications to or from, a person, body or organization, whether a telecommunications line is being used in conducting those conversations or transmitting those communications or not, be monitored in any manner by means of a monitoring device.'

[31] Section 4(2) of the IMPA provides:
'(2) Any law enforcement officer may intercept any communication if he or she is-
(a) a party to the communication; and

The recording evidence was in any event merely corroborative of the trap's oral testimony. Its exclusion would not negate that testimony, which was sufficient unto itself as a foundation for the appellant's conviction. The magistrate found the evidence of the trap to be of 'peak quality'. It is trite that an appeal court does not meddle readily in the credibility findings of a trial court.

[40] We raised with the appellant's counsel whether the application to this Court for the introduction of further evidence was in any event appropriate or permissible, and whether the decision to admit further evidence should not in any event be made to the appeal court (i.e. the High Court) if his appeal in this Court were to succeed. Section 309B(5) of the CPA permits an accused in the position of the appellant to apply to adduce further evidence at the time he or she makes application to the trial court for leave to appeal, and the High Court may, on petition in terms of s 309C, reconsider any refusal of such application. Section 316(5) is essentially an equivalent of s 309B(5) in respect of applications for leave to appeal from trial judgments of the High Court. Counsel were unable, however, to direct our attention to any provision in the CPA that provided for an application to adduce further evidence at the stage and in the form that the current one was.

[41] The appellant's counsel sought support in s 19 of the Superior Courts Act 10 of 2013. That section, which resorts in Chapter 5 of the Act, provides for this Court or a Division exercising appeal jurisdiction, in addition to any power as may specifically be provided for in any other law, to receive further evidence or remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the

---

(b) satisfied that there are reasonable grounds to believe that the interception of a communication of another party to the communication is necessary on a ground referred to in section 16(5)(a),

unless such communication is intercepted by such law enforcement officer for purposes of committing an offence.' (The grounds referred to in s 16(5)(a) include the belief that 'a serious offence has been or is being or will probably be committed'. A contravention of s 5(b) of the Drugs and Drugs Trafficking Act is a 'serious offence' as defined in s 1 of Act 70 of 2002.

taking of further evidence or otherwise as deemed necessary. However, by virtue of the definition of 'appeal' in s 1 of the Act, viz. '"appeal" in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977), or in terms of any other criminal procedural law', s 19 is clearly not applicable.

[42] The predecessor to s 19 of the Superior Courts Act was s 22 of the Supreme Court Act 59 of 1959. The range of s 22 in respect of permitting further evidence on appeal was not constricted in the manner effected by the definition of 'appeal' in the Superior Courts Act. The evident intention of the definition of 'appeal' in the Superior Courts Act was that appeal procedures in respect of criminal cases should be regulated exclusively by the CPA or any other criminal procedural law. An instance in which the High Court has heard further evidence on appeal in a criminal matter subsequent to the commencement of the Superior Courts Act is recorded in *S v De Villiers*,[32] although no attention was given in that judgment to the basis on which it had been able to do so. The application by the accused in that case was not opposed.[33]

[43] It is unnecessary for us to decide whether it would have been competent for the High Court to allow further evidence on appeal to it in the current matter had we granted leave to appeal. Suffice it to say, however, that even had the provisions of s 19 of the Superior Courts Act faithfully replicated those of its predecessor, s 22 of the Supreme Court Act, I would have been reluctant to make an order directing the High Court to allow the further evidence that the appellant sought to introduce. In my view, the decision whether to permit further evidence on appeal, save as otherwise provided in s 309B, 309C and 316(5) of the CPA, is one that should be made by the court seized of the appeal rather than by this Court in an appeal as to whether leave to appeal should have been granted in terms of

[32] *S v De Villiers* [2023] ZASCA 83; 2023 (2) SACR 221 (SCA) para 5.
[33] *De Villiers* para 7.

309C. This Court is, after all, not seized of the merits of the intended appeal. Had it entertained the matter, it would have been concerned only with the prospects of success, not with having to make a substantive determination on the outcome of the principal case.

[44] For the reasons summarised earlier, the application to adduce further evidence in this case in any event did not satisfy the general requirements for such relief.[34]

[45] In the result, the following order is made:

1. The application for condonation is refused.

2. The appeal is struck from the roll.

A G BINNS-WARD
ACTING JUDGE OF APPEAL

[34] See eg *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) paras 39-43; and *S v De Jager* [1965] 2 All SA 490 (A); 1965 (2) SA 612 (A) at 613B-F.

Appearances:

Appellant’s counsel:	K F Pieterse
Appellant’s attorneys:	Legal Aid South Africa Kimberley and Bloemfontein
Respondent’s counsel:	J J D Rosenberg
	Directorate of Public Prosecutions, Northern Cape. Kimberley