IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A548/2007

DATE: 18 APRIL 2008

In the matter between:

PAULUS PETRUS COETZER Appellant

and

THE STATE Respondent

J U D G M E N T

VAN REENEN, J:

[1] For the sake of convenience I shall refer to the appellant as the accused. The accused was charged on 5 December 2006 of having contravened section 5(b), alternatively 4(b) and related sections of the Drug Trafficking Act 140 of 1992 (to which I shall refer as "the Act").

[2] The gravamen of the charges were that the accused on 30 January 2006 at the International Airport, Cape Town, wrongfully and unlawfully dealt in or possessed 5.961 kilograms of cocaine, cocaine being a dangerous and/or habit-forming substance. The accused, who was

unrepresented during the trial, was, on 15 March 2007, found guilty on the main count and he was sentenced to 15 years' imprisonment on 3 April 2007. The accused has lodged an appeal to this Court with the leave of the Court *a quo* who limited the relief to sentence only.

[3] Advocate Losch for the accused assailed the sentence imposed by the Court on two broad bases. The first is that it induces a sense of shock. The second is that the magistrate misdirected himself in a number of respects. The first of the alleged misdirections is that he failed to give sufficient consideration to the accused's age; that he is HIV-positive; that he is the father of minor children; was unemployed and was actuated by his financial needs; that he was a first offender; that he disregarded the accused's plea for mercy and, in conclusion, that he did not have sufficient regard to the fact that the accused had been awaiting trial for over a year.

[4] The second of the alleged misdirections is that the magistrate over-emphasised the seriousness of the offence at the expense of the accused's personal circumstances. The third of the alleged misdirections is that the magistrate failed to give due consideration to the accused's condition of health, as well as the

consequences thereof when he imposed such a lengthy period of imprisonment.

[5] It is trite that a court in exercising an appeal function does not have an overriding power to interfere with the sentence imposed by a lower court at will, but will only do so if the sentence imposed is shockingly or disturbingly inappropriate, or if the lower Court committed a material misdirection. Those bases have been formulated in a number of decisions which need not be quoted, but can be paraphrased broadly as follows.

[6] The first ground requires the Court to determine, with reference to the record of the proceedings, whether there is a striking disparity between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat as a Court of first instance. As regards the second basis, it is trite that it constitutes a misdirection if the trial Court misconstrued certain facts; failed to have taken certain material factors which should have been taken into account; or has over-accentuated the seriousness of the crime and/or under-estimated the accused's personal circumstances.

[7] I have carefully considered the magistrate's detailed judgment on sentence and have come to the conclusion that he dealt with, and carefully weighed each and every one of the aspects enumerated in the accused's counsel's heads of argument, and considered them in an even-handed and balanced manner. Accordingly, the misdirections attributed to the magistrate, in my view, are devoid of any merit.

[8] It is common cause that the accused, by having brought 9.961 kilograms of cocaine into the Republic of South Africa from South America, performed an act of importation which, in terms of section 1 of the Act amounts to dealing therein which, in terms of section 13(f) is an offence and in terms of section 17, punishable with a sentence of 25 years' imprisonment or both such imprisonment and a fine and such fine as a court might deem fit to impose.

[9] It is apparent from the said penalty provision that the Legislature viewed crimes such as the one of which the accused has been convicted, in a very serious light. Bearing in mind the prevalence of the offence, as mentioned by the magistrate, and the cataclysmic consequences of addiction to hard drugs of that nature

on individuals and society; that the accused had been warned against participating in bringing drugs into South Africa from overseas previously, and did so again purely because of financial considerations; and failed to show any remorse there, in my view, there is not such a disparity between the sentence imposed by the magistrate and the one I would have imposed had I sat as a Court of first instance that it would have evoked a reaction of shock or a reaction of startling inappropriateness. In my view, the crime of which the accused has been convicted requires the imposition of a severe sentence and that is exactly what the magistrate did.

[10] Bearing in mind all those factors that should normally be taken into account in sentencing, the magistrate's conduct in having imposed the sentence he did, cannot be criticised. I accordingly incline to the view that the only other ground on which the sentence was assailed is also devoid of any merit.

[11] Accordingly, the appeal against the sentence imposed by the learned magistrate in the court *a quo* is dismissed.

[12] In conclusion, although it is an aspect that did not feature in this appeal, there is an aspect that troubled both members of this Court. It is that the magistrate who tried the accused is the same magistrate who presided in the application for bail on 8 February 2006, i.e. approximately 10 months prior to the trial. What troubled us was that as the accused was charged with a Schedule 5 offence, he, in terms of section 60(11)(b), was obliged to divulge any previous convictions and in fact alluded to previous convictions for possession of marijuana and housebreaking.

[13] Although the record of such proceedings formed part of the record of the trial, it did not feature in the proceedings before the magistrate but, contrary to the provisions of section 60(11)(b), the full record of both proceedings, including the reference to the previous convictions, forms part of the record on appeal. There does not appear to have been anything improper in the magistrate hearing the bail application and the provisions of section 197 of Act 51 of 1977 (the Criminal Procedure Act) – which restricts questions relating to previous convictions to clearly circumscribed circumstances – do not appear to have been offended against during the trial.

[14] The only potential problem is the appropriateness thereof that the magistrate who heard the bail application also presided at the trial. That knowledge of an accused's previous convictions, other than in the limited circumstances enumerated in section 197 of the Criminal Procedure Act, is undesirable seems to be supported by the provisions of section 60(11)B(c) of the Criminal Procedure Act and is also apparent from comments to that effect made by judges in decided cases (see for instance S v Thusi & Others 2004 BCLR 433 (N) and S v Nhlati 2000(8) BCLR 121 (N).)

[15] There could be little doubt that the gleaning of knowledge of an accused's relevant previous convictions during the course of a trial prior to conviction constitutes an irregularity. I come to that conclusion in a reported case S v Njikaza 2002(2) SACR 481 (C) in which the accused's previous convictions had been elicited prior to a sentencing. That conclusion was logically and cogently criticized in the 2003 in Tydskrif vir Hedendaagse Romeins-Hollandse Reg at page 505 and further. It would appear that the then Appellate Division in S v Ntembu & Others 1988(1) SA 145 at 151, in a pre-constitutional context, found that the cross-examination of an accused on his previous convictions after it had

been raised by himself, did not constitute an irregularity of such a severity that it amounted to a failure of justice *per se*.

[16] The only potential problem, as I have said, is that the magistrate who heard the trial also sat in the application for bail but that is not decisive of the matter. Interference would be justified only if it appears that a failure of justice has in fact resulted from any irregularity or defect as provided for by section 309(3) of the Criminal Procedure Act, or if it could be said that it resulted in the accused not having had a fair trial within the meaning thereof in the Bill of Rights in that it is of such a nature that it offends against "notions of basic fairness and justice" (see S v Zuma & Others 1995(1) SACR 568 (CC).)

[17] As it appears to us that irrespective of the irregularity, the accused's guilt had been amply proved by the evidence adduced by the State and, because of the long time lapse between the bail application and the trial, as well as the fact that the magistrate specifically stated in his judgment that he treated the accused as a first offender and there is nothing to signify to the contrary, we, without having had the benefit of full argument

thereanent, came to the conclusion that the said magistrate presided at the trial, as well as the bail application, did not in the instant case constitute an irregularity of such a magnitude that it vitiated the trial proceedings.

[18] Accordingly, in our view, there is no need for us to interfere with the conviction in the exercise of our review powers.

VAN REENEN, J

DLODLO, J: I agree.

DLODLO, J