IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

10 May 2000

The Magistrate

Kempton Park

CASE NUMBER : A.868/99

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED
DATE 1/6/2000 SIGNATURE

(10)

In the matter between :-

ANGEL, ESEQUIEL ARAIS Appellant

and

(20)

THE STATE Respondent

J U D G M E N T

WILLIS, J.: The appellant was charged of contravening section 5(b) of Act 140 of 1992, in that on 2 September 1998, at Johannesburg International Airport, he had wrongfully and unlawfully dealt in dependence producing substances, in particular the substance in this case being cocaine, a derivative of the cocoa leaf, by bringing it into (30)

the/...

the Republic of South Africa. The appellant was convicted and sentenced to 15 years' imprisonment. The appellant appeals against both conviction and sentence.

The appellant had been represented during the course of his trial in the Regional Court. He pleaded not guilty, but admitted the following:

1. That he had travelled from Columbia to Johannesburg International Airport.
2. That he had been arrested at Johannesburg International Airport, searched on 2 September, and that he was thereafter X-rayed. He was taken to a latrine, made to pass goods that were in his stomach. (10)
3. That the goods he passed from his stomach were taken by the police and sealed correctly and sent for analysis. Furthermore, that he knew it was unlawful to possess cocaine or to bring it into the country.

These admissions were confirmed directly with the appellant by the learned magistrate.

In his explanation of his plea of not guilty the (20) appellant denied that he had knowledge that the goods in his stomach were cocaine, he thought that it was diamonds or gold. He explained that he had been threatened by certain terrorist groups, in Columbia, and told that if he did not transport the goods to South Africa either he or his mother would be killed.

On the issue of whether or not it is proven that the appellant did in fact transport cocaine, this fact appears clearly from exhibit A, which was the analysis report of a certain Martha Catharina du Plessis. Her evidence regarding (30)

the/..

the question of what the substance was, was not challenged under cross-examination and must therefore be accepted. The evidence was that 371,3 grams of cocaine had been in the stomach of the appellant.

With regard to the appellant's defence, that he did not know that he was transporting cocaine but thought that he was transporting either gold or diamonds, the learned magistrate correctly rejected this defence, and in a thorough judgment gives the reasons for this conclusion. (10)

In short, the contradictions in the plea explanation, it is said that the person who was involved was Fabian, whereas in his evidence he says it was one Mohammed.

Significantly, in his evidence, the appellant in fact says:

"They told me that I had to travel with ***drugs*** otherwise they would kill my mother."

Later he denies having said so, although the record clearly shows that he did in fact do so.

There are other inherent probabilities in this version, (20) but I do not think it is necessary to canvass those points.

Counsel for the appellant also raised the point, that the learned magistrate had descended into the arena.

Perhaps there may be some validity in a degree of criticism concerning the extent to which the learned magistrate put questions. I do not think that it can be said that his questioning would in any way have made a difference to the outcome. The evidence against the appellant was overwhelming.

Furthermore, the questions were not of such a nature (30)

that it can be said that the whole trial was a travesty, and that for policy reasons the conviction should be set aside. I think it is fair for this court to take judicial notice of the fact that the magistrates presiding in this special court have to cope with a considerable amount of pressure, and some degree of understanding should be exercised.

Counsel for the appellant also made a point of the fact that it did not appear that the appellant had consented to X-rays being taken, and that therefore the evidence obtained as a result may be inadmissible.

In the first place, it should be borne in mind that the appellant was represented, that it was common cause that the appellant had been X-rayed, and prima facie it would seem to me that, when a person has been X-rayed, it is done with his or her consent. The consensual taking of X-rays clearly would not be inadmissible on any basis.

evidence of one Mr Mabasa, that consent had been obtained.

Similarly it must be recorded that the appellant was represented, and that this issue was never raised in cross-examination of State witnesses. Furthermore, the learned magistrate was not afforded an opportunity to comment on this particular point, and which did not appear in the grounds of appeal appearing in the notice of appeal.

With regard to sentence counsel for the appellant made the usual submissions, that the sentence was excessive in the circumstances and disturbingly inappropriate and induced a sense of shock. He also raised criticisms that the learned magistrate should not have sentenced the appellant under the

newly increased jurisdiction, and alluded to references in the judgment on sentence relating to apparent inconsistencies between the increased jurisdiction of District Courts and the increased jurisdiction of Regional Courts.

In my view the learned magistrate did very carefully consider the ordinary triad that is relevant in sentencing, namely the crime, the criminal, the interests of society. The learned magistrate took into account the need to show a degree of mercy. One would hope that the discrepancies, if they still exist with regard to the increased jurisdiction of the District Court and the Regional Court, will be resolved.

With regard to the point, that it was wrong for the learned magistrate to have acted at this stage in terms of his increased jurisdiction and the question of the disturbingly inappropriate severity of the sentence, I think the question of sentence can be crisply dealt with by referring to the case of S v Homareda 1999 (2) SACR 319 (W). This was a judgment of Cloete J, with which Robinson AJ concurred. At 328H the learned judge says as follows:

> "What is of paramount importance is that in none of the cases to which I have referred was an effective sentence of 15 years' imprisonment considered appropriate by the Court of Appeal, even where the appellant had refused to co-operate, and despite the fact that vastly greater quantities of cocaine had been imported than the amount imported by the appellant in the present case. Even bearing in mind the view of the

legislature, that harsh sentences are necessary to act as a deterrent to those who would commit this type of crime, no reasonable Court would, in my view, have imposed a sentence of 15 years' imprisonment in the present matter. This Court is therefore justified in interfering with the sentence."

This judgment was a judgment of the full bench, and it would be appropriate, in my view, that this court should act in a manner consistent with the views expressed by Cloete J. (10)

In the circumstances I would dismiss the appeal against conviction, but uphold the appeal in respect of sentence, and reduce the sentence of imprisonment from a period of 15 years to 10 years.

SCHABORT, J.: I agree. The appeal against the conviction is dismissed. The appeal against sentence succeeds. The sentence is altered to one of 10 years' imprisonment.

(20)

ON BEHALF OF APPELLANT:	ADV M F MILLER
INSTRUCTED BY:	SADLER ATTORNEYS
ON BEHALF OF THE STATE:	ADV VAN TONDER
DATE OF HEARING:	10 MAY 2000
DATE OF JUDGMENT:	10 MAY 2000

(30)