Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE: A62/2023

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

[redacted] 31/5/2024

In the matter between:

BONE FIGUEROA MARIA JOSE Appellant

and

THE STATE Respondent

JUDGMENT

VAN DER WESTHUIZEN AJ:

INTRODUCTION:

[1] The Appellant was charged in the Magistrate's Court, Kempton Park with the following:

1.1 Contravening section 5(b) read with other sections of the Drugs and Drug Trafficking Act, Act 140 of 1992.

[2] The allegations against her are that on 19 May 2018 at OR Tambo International Airport, she imported 4228, 20 grams of cocaine into the Republic of South Africa.

[3] She appeared in court for the first time on 21 May 2018 and the trial only started 9 October 2019. What I can gather from the record, the main reason for the delay was that her legal representative was never available and to a lesser extent there was a problem to obtain the services of a Spanish interpreter. This delay is, for obvious reasons, totally unacceptable.

THE TRIAL:.

[4] The Appellant pleaded guilty on 9 October 2019. A statement in terms of section 112 (2) of the Criminal Procedure Act was read into the record and handed in as an exhibit. The Appellant was duly convicted of the offence as charged.

[5] The defence and the State addressed the court before the sentence was imposed.

SENTENCE:

[6] The Magistrate took the following into consideration before imposing the sentence:

1. That the Appellant is a first offender.

2. That the Appellant is 24 years of age and the mother of three minor children.

3. That she has spent 17 months in custody before the date of sentence which he attributed to the fact that the defence indicated the she was going to plea not guilty.

4. The reason why she decided to be used as a drug mule.

5. The fact that she is from a foreign country and that she has no support structure in this country and might find herself isolated whilst being incarcerated.

6. The court also referred to a number of reported cases that dealt with sentences imposed in similar cases.

7. He also took into consideration that for purpose of sentence, other aspirant drug traffickers should be discouraged from embarking on this unfortunate and devastating practice.

[7] After everything was taken into account the Appellant was sentenced to 18 years imprisonment.

[8] On 1 February 2023 the Appellant brought an application for leave to appeal the sentence that was imposed on the following ground:

8.1 The Appellant is of the view that a sentence of 18 years is too harsh.

[9] The State opposed the application.

[10] On the same date the court granted leave to appeal the sentence.

DISCUSSION:

[11] It was pointed out to this court that:

11.1 The learned Magistrate did not attach enough weight to the fact that the Appellant has spent 15 months awaiting trial; and

11.2 That the sentence that was imposed is shockingly inappropriate.

TIME AWAITING TRIAL:

[12] The Magistrate did take into consideration the time the Appellant spent in custody before the matter was finalized – see par 6.3.

[13] In S v Mqabhi 2015 (1) SACR 508 (GJ) it was held that the period an accused spent in custody awaiting trial, is a factor in determining the presence of substantial and compelling circumstances and a factor not to be isolated but to be weighed with other circumstances.

[14] This approach was confirmed in S v Nqcobo 2018 (1) SACR 479 (SCA) where Pillay AJA said the following on P 483: "In short, a pre-conviction period of imprisonment is not, on its own, a substantial and compelling circumstance; it is merely a factor in determining whether the sentence imposed is disproportionate or unjust."

[15] With respect, I agree with the approach followed by Pillay AJA in S v Nqcobo supra.

[16] We are therefore of the view that the learned Magistrate did take the time that the Appellant was awaiting trial into consideration but taking that into account with the other

[16] We are therefore of the view that the learned Magistrate did take the time that the Appellant was awaiting trial into consideration but taking that into account with the other factors, especially the aggravating factors of the case, he was satisfied that the sentence which was imposed was a suitable sentence.

SENTENCE IS SHOCKINGLY INAPPROPRIATE:

[17] The Appellant was convicted of a very serious offence. What is extremely aggravating is the quantity of cocaine that was brought into the country viz more than 4 kilograms. The Magistrate was guided by case-law when he decided on an appropriate sentence to impose.

[18] We are of the view that the learned Magistrate took all factors into account when he decided on the appropriate sentence to be imposed in this matter. We are of the view that the sentence that was imposed is not shockingly inappropriate. For this Court to interfere with the sentence that was imposed, it must find a misdirection by the court below. It can find none.

ORDER:

I am of the view that the appeal be dismissed against the sentence imposed.

[redacted]

FJ VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

W A KARAM
ACTING JUDGE OF THE HIGH COURT

Date :

Of hearing: 18 March 2024

Of judgment: 07 June 2024

Appearances:

For the appellants: N Nguqu

Instructed by Legal Aid South Africa

For the State: Adv. V T Mushwana

Office of the Director of Public Prosecution, Johannesburg