

HIV STATUS AS A MITIGATING FACTOR IN SENTENCING: A CRITICAL REVIEW

S v Magida 2005 2 SACR 591 (SCA)

1 Introduction

Crime and punishment have always gone hand in hand. Over the centuries, courts have struggled with the difficult task of finding appropriate sentences. In doing so, they have had to deal with moral, social and other issues whilst striving to find a balance between society's right to have justice done, and the offender's right not to face an unnecessarily harsh sentence (*S v Calitz* 2003 1 SACR 116 SCA 1211-J). The rationale behind any particular sentence has historically been retributive (the court in pronouncing a sentence and imposing it, exacts the community's lust for "revenge" in a legally sanctioned manner); preventative (once removed from free society, the offender is prevented from continuing to behave in the socially reprehensible manner for which he or she was convicted); reformatory (once in custody of the correctional service authorities, the offender will be given the opportunity to reform, returning to society as a better citizen); and deterrent (the sentence imposed upon the offender discourages others from embarking on the criminal path (*S v Khumalo* 1984 3 SA 327 (A) 330D-E).

In a recent decision by the Supreme Court of Appeal, *S v Magida* (2005 2 SACR 591 (SCA)), the court held that the appellant was entitled to a lesser sentence because she was HIV-positive, had developed full-blown AIDS and could die soon (par 21). This case is significant as it is the first time the Supreme Court of Appeal has dealt with the circumstances in which HIV status ought to be a mitigating factor in sentencing. Whilst it is argued that the court's decision is correct, it is regrettable that the court glossed over the complexities relating to HIV status as a mitigating factor.

2 Background

Sub-Saharan Africa has just over 10% of the world's population, but is home to more than 60% of all people living with HIV – 25.8-million. In 2005, an estimated 3.2-million people in the region became newly infected, while 2.4-million adults and children died of AIDS (http://www.unaids.org/en/Regions_Countries/default.asp visited on the 2006-03-06).

In this context it is to be expected that HIV as a factor in mitigation of sentence would be an important issue as it is likely that a significant proportion of offenders are HIV positive and could conceivably argue that this ought to be taken into account during sentencing. Furthermore, a

significant number of sentenced prisoners could become aware of their HIV status and appeal against their custodial sentences on this basis.

Given the high HIV prevalence rate it is perhaps surprising that prior to *S v Magida* there had been only three cases dealing with HIV as a mitigating factor. In *S v Mahachi* (1993 2 SACR 36 (Z)) the court held that HIV should not be treated any differently to any other life-threatening illness (40F). Illness must be considered as a factor in conjunction with other relevant considerations when determining an appropriate sentence (41F). In this particular instance the court held that, given the accused's previous convictions, his state of health was not decisive and he was given a custodial sentence (42J).

In *S v Cloete* (1995 1 SACR 367 (W)) the court converted a sentence of imprisonment into correctional supervision. It held that incarceration in this instance was a far harsher sentence than was originally intended by the trial court, given that Mr Cloete had subsequently tested HIV positive (370D-E). Factors that influenced the court's decision included: Mr Cloete was in a different position to healthy prisoners; he was isolated from the general prison population (due to the Department of Correctional Services policy at the time) and this had severe psychological implications. Furthermore he was unable to get the expert psychological services he required whilst incarcerated (369I-370B-C).

Finally, in *S v C* (1996 SACR 503 (T)) the court held that the appellant's HIV status ought to result in some reduction in his sentence. Factors that were taken into account included the fact that he was being segregated from other prisoners (contrary to the Department of Correctional Services policy on HIV); his current "good health"; and the burdensome conditions within prison (512F-G).

3 *S v Magida*

The appellant was tried and convicted of 99 counts of fraud in the Bellville Magistrate's Court (par 1). She received an effective sentence of five years imprisonment of which she served part before discovering that she had contracted HIV and then full-blown AIDS (par 3). She appealed to the Cape High Court and eventually the Supreme Court of Appeal, arguing that her HIV/AIDS status entitled her to a lesser sentence (par 8). When she was released pending her appeal, she began anti-retroviral (ARV) treatment at Groote Schuur Hospital (par 9).

The court held that illness did not *per se* mean that an offender may escape imprisonment (par 17). Rather a court must consider the totality of the circumstances facing the convicted person to do justice to both the individual and society (par 17). With regard to HIV it held that a court may take an individual's HIV status into account in determining an appropriate sentence. In this particular situation a number of factors were relevant: HIV had already reduced the appellant's lifespan and without proper treatment she would die within a few months; she had contracted tuberculosis (TB) while awaiting trial because of her compromised immune status; the

treatment she was receiving at Grootte Schuur Hospital was not available in prison; she had contracted both thrush and shingles due to her AIDS status; the poor prison diet and the lack of vitamins also affected her health; and in prison she had become sicker as she was exposed to opportunistic infections (par 9). Taking these factors into account and balancing the appellant's shortened lifespan against the nature of her offence and the interests of society, the court held that her further imprisonment was unwarranted (par 21). In fact, the appellant had already spent more than 40 months in detention from the time of her arrest (19 July 2000) until she was released on bail (24 November 2003) (par 21).

4 Critical comment

It is a well accepted principle in our law that ill-health may be a mitigating factor in sentencing; but it will not automatically result in the offender escaping imprisonment (*S v Berliner* 1967 2 SA 193 (A) 199F-G). Likewise, as articulated above, the courts have accepted that HIV status may act as a mitigating factor (*S v Cloete supra* 370D-E). This should, however, not obscure the reality that where HIV is "directly related to the offence committed – for instance in the case of rape – it will always be regarded as an aggravating factor in view of the added anguish and heightened risk to life and well-being that the offender's HIV infection necessarily entails" (Cameron *Legal and Human Rights Responses to the HIV/AIDS Epidemic* par 4.4.3.1 October 2005 <http://law.sun.ac.za/judgecameron.pdf> 24).

The Supreme Court of Appeal decision in *S v Magida* should be seen as a significant case that has consolidated some of the emerging jurisprudence on this issue. Previous cases established the general principles relating to HIV as a mitigating factor and the *Magida* case applied many of these to the facts at hand. The court took into account the individual circumstances facing the appellant in determining an appropriate sentence and this is commendable. However, it is a pity that the court did not fully explore these factors or their concurrent complexities.

The complexity in applying the factors is that they relate mainly to the impact imprisonment will have on the health of an immuno-compromised person. However, in almost all instances it could be argued that imprisonment poses significant health risks for any HIV-positive prisoner. Research shows being incarcerated can cut the life expectancy of an HIV infected individual by up to 50% (Greene "HIV Positive in Prison: The Shadow of Death Row" October/November 1996 <http://prisonactivist.org/road/outside/cgreene-hiv+row.html> visited on 2006-03-07) and that throughout South Africa, approximately 90% of all deaths in prison are the result of HIV/AIDS (Goyer "Prison Health is Public Health: HIV/AIDS and the Case for Prison Reform" 2002 *South African Crime Quarterly* <http://www.iss.co.za/Pubs/CrimeQ/No.2/5Goyer.html>).

Goyer ("HIV/Aids in Prison, Problems, Policies and Potential" February 2003 79 *Monograph* <http://www.iss.co.za/pubs/Monographs/No79/Content>

.html visited on 2006-03-07 13-37) identifies five key elements of prison life that negatively impact on the health of inmates:

- *Contaminated needles* – tattooing is a key element of prison culture and it carries a possible risk of HIV infection or re-infection;
- *High risk sex* – rape and gang-related sex in prison are common features of prison life, which carry a high risk of HIV infection or re-infection;
- *Poor prison conditions* – imprisonment brings with it high levels of stress, malnutrition, violence and drugs, all of which weaken the immune system and make HIV-positive individuals more susceptible to opportunistic infections;
- *Overcrowding* – overcrowding facilitates the spreading of communicable diseases such as TB; it also brings with it greater possibilities of rape and violence; and
- *Nutrition* – prisoners have limited access to fresh fruit and vegetables which impacts on their ability to maintain their immune systems.

All of these are aspects of prison life in South Africa. Lawyers for Human Rights estimates that at least 65 % of prisoners are sexually active (Giffard “Out of Step? The Transformation Process in the South African Department of Correctional Services” 1999 Institute of Criminology, University of Cape Town). Furthermore sex in prison is generally associated with intimidation and violence (Goyer 2002 *South African Crime Quarterly* <http://www.iss.co.za/Pubs/CrimeQ/No.2/5Goyer.html>). Our prisons are also overcrowded. The Department of Correctional Services reported in July 2005 that the occupation rate in prisons was 136 % (<http://www.dcs.gov.za> visited on 2005-11-17). In some prisons the situation is far worse, with up to 60 men being housed in cells designed for 18 (Goyer 2002 *South African Crime Quarterly* <http://www.iss.co.za/Pubs/CrimeQ/No.2/5Goyer.html>). Nutrition is generally poor. For example, at the Westville Male Prison, inmates are given only two meals a day, with limited or no fresh fruit and vegetables (Goyer February 2003 79 *Monograph* <http://www.iss.co.za/pubs/Monographs/No79/Content.html> visited on 2006-03-07 35). The situation is worsened by the limited access to anti-retroviral treatment in prison. Although the Department of Correctional Services has committed itself to providing treatment, this does not appear to be happening in reality. Accordingly, prisoners have had to engage in litigation to compel the Department of Correctional Services to assist them in accessing anti-retroviral (ARV) treatment (*EN v Government of the Republic of South Africa*, Case number 4576/2006). In *EN v Government of the Republic of South Africa* the court held that the respondent’s implementation of relevant treatment laws and policies was unreasonable as, amongst others, its policies were inflexible, unjustified and resulted in unexplained delays (par 30). Accordingly, the court ordered the respondent to develop a comprehensive, workable plan to ensure that the eleven applicants and all other similarly situated prisoners at Westville Correctional Centre who meet the set treatment criteria are able to access ARVs (par 33-35).

In this context, as HIV lowers life expectancy and prison conditions exacerbate the situation, does this mean *all offenders* with HIV/AIDS ought to receive lesser or non-custodial sentences? Clearly, this is not an inference that can be drawn from the *Magida* case as the court based its decision on her individual circumstances. This is in line with the approach adopted by the Constitutional Court in *Hoffmann v SAA* (2001 1 SA 1 (CC)) where Ngcobo J held that it was unfair of SAA to exclude all HIV-positive individuals from employment because a group of such individuals with CD4 cell counts of less than 350 could not be vaccinated for yellow fever and accordingly could not perform an essential element of the job description, namely, worldwide service (*Hoffmann v SAA supra* 17D-E). However, it is difficult to individualise the factors in this instance as in most cases they all relate to the risks that imprisonment will pose for the health of any HIV-positive offender. In this instance, given the harsh prison conditions across the country, it is regrettable that the Supreme Court of Appeal failed to give more detailed guidance on when these health risks ought to influence sentencing.

Finally, the judgement is silent on the question of the extent to which judges should use sentencing to deal with the failure on the part of prison authorities to reduce the health risks facing HIV-positive prisoners. The English courts have held that there are two relevant principles:

“First, a medical condition that might at some unspecified future date either affect life expectancy or the prison authorities’ ability to treat the offender satisfactorily is not a reason for a court to interfere with the sentence that would otherwise be appropriate, but it might be a matter which can be brought to the attention of the Home Secretary. Prisoners who are HIV positive fall into this category. Secondly, a serious medical condition, even when it is difficult to treat in prison does not entitle the offender to a reduced sentence, although a court might impose a lesser sentence as an act of mercy” (*R v Bernard* [1997] 1 Cr App R (S) 135).

A similar principle was enunciated by the Australian courts in *R v Smith* (1987 44 SASR 587 CCASA) where it was held that it was the responsibility of the correctional services authorities to provide appropriate care and treatment for sick prisoners. Outside of the sentencing context our courts have held that there is an obligation on the Department of Correctional Services to ensure that prisoners obtain adequate health care “(s)ince the state is keeping these prisoners in conditions where they are more vulnerable to opportunistic infections than HIV patients outside, the adequate medical treatment with which the State must provide them must be treatment which is better able to improve their HIV immune systems than that which the State provides for HIV patients outside” (*B v Minister of Correctional Services* 1997 6 BCLR 789 (C) 804F-G). It is argued that this is at the heart of the complexity of HIV as a mitigating factor, as it appears that pressure will often be placed on judges to use HIV as a mitigating factor simply because of the failure on the part of the Department of Correctional Services to meet their most basic obligations relating to health care, nutrition and dignified living conditions.

5 Conclusion

In conclusion, the general trend in the cases appears to be that HIV status ought to be taken into account in sentencing. The factors used in this determination include:

- (i) The impact of the sentence on the offender and whether it will be unduly harsh. In particular the implications of incarceration for the offender's health, psychologically and physically (*S v Cloete supra* 370D-E);
- (ii) Whether the offender will be denied certain services if incarcerated (*S v Cloete supra* 369I);
- (iii) Whether they are facing discrimination in prison (*S v C supra* 512G);
- (iv) The nature of the offence (*S v Magida supra* par 21);
- (v) The shortened lifespan of the offender (*S v Magida supra* par 9); and
- (vi) The need to balance justice for the individual with justice for society (*S v Magida supra* par 21).

It is important that courts take into account the totality of circumstances facing the offender in order to ensure an appropriate sentence. Accordingly judges and magistrates must ensure that they examine the range of sentences available, including reduced sentences, correctional supervision and other non-custodial sentences. However they should be mindful of not trying to use sentencing as a remedy for the poor prison conditions. A legal obligation is on the Department of Correctional Services to ensure that prisoners are housed in conditions that are consistent with the right to dignity.

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