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A new sentencing principle in the context of HIV/AIDS?

Magida v S (SCA Case No. 515/04) by Julia Sloth-Nielsen

This landmark judgment was handed down by the Supreme Court of Appeal on the 26th August 2005. The matter was taken on appeal first to the Cape High Court and then to the Supreme Court of Appeal against the sentence imposed by a magistrate's court. The cumulative sentence originally imposed for 99 counts of cheque fraud was 16 years and 3 months imprisonment, of which two thirds was suspended. The unsuspended portion of the sentence was therefore 5 years, 5 months and 2 days. Although a probation officer's pre-sentence report was presented during the trial, the magistrate gave no reasons for the sentence imposed by him, nor were reasons requested by the Cape High Court which heard the first appeal against sentence. This appeal was therefore decided without the benefit of the magistrate's reasons, which is irregular, and one of the reasons why the high court ruling was overturned, as specified further below.

The appellant had served part of her sentence, but was released on bail pending her first appeal, which bail was extended pending the outcome of her appeal to the Supreme Court of Appeal. She had discovered, after being sentenced, that she had acquired HIV/Aids, and faced the prospect of a drastically reduced life expectancy. She argued, *inter alia*, that her Aids status entitled her to a lesser sentence.

This was, she contended, because the effects of a sentence of imprisonment would be disproportionately harsher for her than it would be for a healthy person. She described in her papers how without proper treatment for Aids, she would die within a matter of months. Whilst awaiting trial in prison, she had contracted tuberculosis very quickly as well as shingles and thrush, as a result of her Aids status. Her exposure to opportunistic infections in prison drastically increased the risk to her health. In her own words, 'her immune system crashed' and she became much sicker.

Whilst on bail pending the finalisation of her appeal, she had participated in a government sponsored anti-retroviral programme, which was effective. Doctors treating her at the government hospital confirmed that her return to prison would have a serious impact on her health and that lack of proper treatment would lead to premature death. This treatment, she alleged, was not available in prison, a fact which was confirmed by way of a letter from the Head of the Prison where she had been incarcerated, who said that nevirapine was not available in any prison in South Africa.

In the Cape High Court, the contention that the appellant's HIV/Aids status should serve to mitigate sentence was dismissed out of hand. In the words of the judge, 'no case has been made out or no suggestion has been made that she has been deprived of treatment for her HIV status by relevant authorities. I am not aware of any good authority for the view that if someone is HIV positive, he or she may get away with murder'

The Supreme Court of Appeal (per Navsa JA) noted that the Cape High Court had erred in two ways: first, the original notice of appeal was in fact a letter from the appellant herself, and little supplementary evidential material was provided. The Supreme Court of Appeal found that since a new issue, viz the Aids status of the appellant, had been raised on appeal, supplementary evidence or an adequate notice of appeal should have been called for. Second, the Cape High Court should have found it necessary to call on the magistrate to supply reasons for sentence. For these reasons, and given the need for expeditious resolution of the matter due to the appellant's dire state of health, these misdirections left the Supreme Court of Appeal at large to determine an appropriate sentence.

Whilst agreeing that the fact of illness does not *per se* entitle a convicted person to escape imprisonment, the Supreme Court of Appeal emphasized that the totality of circumstances do have to be taken into account in order to do justice to the convicted person and to society,

Navsa JA reaffirmed the importance of the principle of individualization of sentence, and pointed out that a particular sentence may indeed be rendered more burdensome due to an offender's state of health.[1] This finding echoes at least two previous judgments to this effect, both also dealing with offenders who acquired HIV/Aids after sentence. In *S v Cloete* 1995 (1) SACR 367 (W) Levy AJ (with Zulman J concurring) held that the fact of a prisoner's HIV condition was relevant to an application by the Commissioner of Correctional Services to convert a sentence of imprisonment into correctional supervision. This court also held that the more burdensome circumstances of imprisonment resulting from infection with HIV are relevant to the reconsideration of the imposed sentence. In *S v C* 1996 (2) SACR 503 (T) Cameron J (as he then was) relied with approval on *R v McDonald* (1988) 38 A Crim R 470 (CCA NSW) and quoted the remarks of New South Wales Court of Criminal Appeal:

'The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process..'The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process."

This case involved an appeal against sentence, which was duly reduced from eight years to five years as a consequence of the HIV status of the prisoner, even though he was still evidently still in good health.

In the *Magida* case, the Supreme Court of Appeal noted that the appellant had already spent 40 months in detention (both pre-trial, and whilst serving a portion of her sentence prior to being released on bail pending appeal), and observing that she could die soon, the Court was of the view that her sentence should be substituted with a sentence equivalent to the time already spent in prison. The effect of this order was that the appellant was not to undergo any further period of imprisonment.

This case is significant for three reasons. First, despite the earlier decision of the Cape High Court in *Van Biljon*[2] granting prisoners access to antiretroviral treatment in prisons, the de facto situation remains that this treatment is not available to prisoners, a fact accepted by the Supreme Court of Appeal. Second, as regards HIV positive prisoners, the judgment details graphically the results of exposure to prison conditions, including referring to the inadequate diet and lack of necessary vitamins that exacerbates opportunistic infections and the onset of full-blown Aids.

Most significant, though, is the fact that the reality of prison conditions in South Africa must be factored into the sentencing process. After all, it is not solely the HIV/Aids status of the appellant that impelled the Supreme Court of Appeal to its decision - it is this fact viewed in tandem with the actual conditions in prisons, such as prison overcrowding, exposure to infection, poor diet, and lack or proper medical treatment. This decision should therefore be a beacon to all sentencing officers contemplating imposing a sentence of imprisonment.

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Access to antiretroviral treatment

by Lukas Muntingh

On 6 September 2005 the Department of Correctional Services briefed the Portfolio Committee on its "HIV/AIDS Policy for Offenders".[3] This was the sixth briefing by the DCS to the Committee on HIV/AIDS since 2001 and signified a different approach on the matter. In 2004 the committee did not formally deal with the issue and in 2003 the Committee was informed that the policy was under development. The September 2005 briefing placed something more solid on the table but also stated that the HIV/AIDS policy is currently under review "to ensure that fundamental changes in government's approach to treatment, care and support are included".

In the light of *Magida v S* (see above) it is necessary to enquire as to the state of antiretroviral treatment in South African prisons. The DCS reported to the Portfolio Committee that the National Department of Health's guidelines for anti-retroviral therapy have been distributed to the relevant officials. It was also reported that there is continuous monitoring of the implementation of the anti-retroviral therapy roll-out to ensure that the DCS is included in the implementation process in the provinces. It is also planned (or in progress) that health care workers in the department will receive training in comprehensive management of HIV/AIDS related diseases as well as the management of anti-retroviral treatment.

What seems to be clear is that progress is slow. It is not known at this stage how many prisoners are on anti-retroviral treatment at this stage. Figures made available by the Department of Health for all persons nationally on anti-retroviral therapy illustrate that the roll-out programme is a time consuming task.[4] At the end of September 2004 a total of 68 978 people were assessed for anti-retroviral treatment. Of this group, only 11 253 people were

placed on anti-retroviral treatment. It is not known if prisoners are included in this group.

The DCS is admitting that it is facing a number of tough challenges. The increasing prevalence of the pandemic in prisons, growing complications in the management of TB, and ensuring adherence to treatment after release are some of the major issues. The Department also explained to the Portfolio Committee that the provisioning of anti-retroviral treatment to prisoners who qualify for treatment is a major challenge. Security arrangements and the fact that roll-out centres in the provinces are externally situated were cited as the main reasons. Practically, access to anti-retroviral treatment under the current delivery model means that a prisoner being detained at, for example, Pollsmoor Prison who qualifies for anti-retroviral treatment, needs to be taken to Groote Schuur Hospital (the roll-out centre) at least once a week to receive his/her medication and to undergo a medical examination. At the beginning phases of therapy, it will probably be required that the patient is seen more frequently than once a week.

It is also the case with anti-retroviral treatment that if the treatment is interrupted (or terminated), the patient is placed at extreme risk and life expectancy will be further compromised. It is therefore critical that when the DCS provides access to antiretroviral treatment, it must be able to do so "without missing a beat" - access to treatment cannot be made subject to staff availability or any other logistical reason. It is obvious that at a large prison, such a Pollsmoor or Durban/Westville, the transporting of prisoners to and from roll-out centres will be draining on human resources. The scenario for prisons in the far-flung rural areas of, for example, the Northern Cape or Free State becomes even more complicated with less staff, fewer vehicles and longer distances to towns where roll-out centres are located. At this stage it seems to be rather logistics and not political will that is the problem and this may indeed be cause for optimism rather than desperation.

CSPRI Website has moved

We would like to inform you that the CSPRI website has been transferred to the website of the Community Law Centre. The new URL is http://www.communitylawcentre.org.za/cspri .

All the research reports, links and back copies of the newsletter are available on the website. Please feel free to send any comments or suggestions to muntingh@worldonline.co.za

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Prisons at a glance

Category	Feb-05	Jul-05	Variance
Functioning prisons	233	237	1.7
Total prisoners	186823	155662	-16.7
Sentenced prisoners	135743	114230	-15.8
Unsentenced prisoners	51080	45345	-11.2
Male prisoners	182652	156433	-14.4
Female prisoners	4173	4171	3142
Children in prison	3035	2245	-26.0
Sentenced children	1423	1001	-29.7
Unsentenced children	1612	1245	-22.8
Total capacity of prisons	113825	114495	0.6
Overcrowding	164	135.9	-17.1
Most overcrowded			
Feb '05: Durban Med C	387.63%		
Jul '05: Johannesburg Med B		377.00%	
Least overcrowded			
Apr '05: Emthonjeni	27.85%		
Jul '05: Pomeroy		13.30%	
Awaiting trial longer than 3 months	23132	22015	-4.8
Infants in prison with mothers	228	123	-46.1

[1] The general principle is that enunciated by Ogilvie Thompson JA in *S v Berliner* 1967 (2) 193 (A), namely that while there is no general rule that ill-health or foreshortened life expectation automatically relieves a criminal from being imprisoned, a convicted person's health or life expectation may, depending on the circumstances, afford good reason for not sentencing him to imprisonment.

[2] *Van Biljon and others v Minister of Correctional Services* 1997 (4) S 441 (C). Pierre de Vos notes, though, that this case was unique in that the prisoner was provided with anti-retroviral drugs on two occasions by prison doctors after he had launched an application in court

regarding this matter, and further points out that the case had little if any effect on prisoner's access to HIV treatment (Pierre de Vos 'Prisoners rights litigation since 1994: a critical evaluation' 2005 (1) *Law Democracy and Development* (forthcoming).

[3] The unofficial minutes of the Portfolio Committee meeting of 6/9/2005 and the submissions made by the Department of Correctional Services are available on the website of the Parliamentary Monitoring Group at http://www.pmg.org.za/viewminute.php?id=6232

[4] Department of Health (2004) Monitoring Review: progress Report on the Implementation of the Comprehensive HIV and AIDS Care, Management and Treatment Programme, Issue 1 September 2004, p. 13.

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