THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 515/04

In the matter between:

MEMORY MUSHANDO MAGIDA Appellant

and

THE STATE Respondent

Coram: *Navsa, Ponnan JJA et Maya AJA*

Date of hearing: **18 August 2005**

Date of delivery: **26 August 2005**

Summary: Appellant's AIDS status a factor to be considered in deciding an appropriate sentence – magistrate not supplying reasons for sentence – no reasons requested by court below – matter requiring expeditious decision by this Court – principle of individualisation of sentence restated and applied.

JUDGMENT

NAVSA JA:

[1] The appellant pleaded guilty to and was convicted of 99 counts of fraud in the Bellville Magistrates' Court. On 30 July 2001 she was sentenced to 60 days' imprisonment on each count, of which 40 days' imprisonment was suspended on condition that she was not convicted of fraud or theft or any attempt thereto committed during the period of suspension. The cumulative total sentence amounted to 16 years and 3 months' imprisonment. The unsuspended term of imprisonment amounted to 5 years, 5 months and 2 days.

[2] The appellant served part of her sentence but was released on bail pending her appeal to the Cape High Court. That appeal was dismissed (per Hlophe JP and Franks AJ). The court below granted leave to appeal that decision and further extended bail pending the outcome of the present appeal.

[3] Before us the appellant applied to have evidence by way of affidavits admitted on appeal. The affidavits reveal that the appellant discovered, after she was sentenced, that she had contracted the Human Immunodeficiency Virus (HIV), which had caused her to develop full-blown Acquired Immunodeficiency Syndrome (AIDS). As

a result her life expectancy has been drastically reduced. She and the doctors treating her describe the treatment she is receiving which is not available to her in prison. This evidence is set out in greater detail later in this judgment. The state did not oppose the admission of the evidence and, for reasons that will become apparent, it was admitted on appeal.

[4] The following are the appellant's grounds of appeal:

(a) The magistrate did not supply reasons for the sentence imposed by him and the Cape High Court was therefore not at liberty to deal with the question of sentence as though it had been properly imposed;

(b) The appellant's legal representative before the court below did not properly present her case on appeal and she could therefore not be considered to have had a fair appeal as envisaged by the Constitution;

(c) The appellant's HIV/AIDS status entitled her to a lesser sentence.

[5] The accused was represented at her trial and her legal representative presented the following facts from the side-bar (the appellant did not testify):

The appellant was 26 years old and was the mother of a 7-year old daughter who had been placed in the father's custody. She was a first offender. The appellant completed matric and had been in several jobs after that. When she committed the offences in question she had been unemployed. The appellant perpetrated the fraud of which she had been convicted by paying for goods with cheques from chequebooks obtained by false pretences. She committed the offences in concert with others.

[6] A probation officer's pre-sentencing report was handed in during the trial before the magistrate. The following additional relevant facts appear from the report. The appellant's father disappeared from her life when she was very young. Her mother married another man and left her in the care and custody of her maternal grandmother. Whilst growing up she moved from relative to relative. During the period 1995 to 1999 the appellant worked for a total of six employers. She contracted tuberculosis in prison while awaiting trial, for which she received treatment. The appellant

expressed remorse to the probation officer. The latter recorded that it was difficult to confirm the information supplied by the appellant because of lack of time and the absence of contactable family members, but that some of the information supplied by the appellant (other than that recorded above) was false. It was, however, recorded in the appellant's favour that the head of the prison in which the appellant had been detained described her as well-mannered and co-operative. The probation officer considered the offence with which the appellant had been charged as serious, but did not make any recommendation in respect of sentence.

[7] That then was the sum total of the material available to the magistrate in respect of sentencing. The magistrate supplied no reasons for the sentence imposed by him. Reasons were not requested and the court below proceeded without the benefit of the magistrate's reasons.

[8] The appellant's former legal representative did not apply to have the evidence referred to in para [3] admitted in the court below. It appears that all that he did was to make a submission (encompassed in three very brief paragraphs in heads of argument)

that the appellant's HIV status entitled her to a lesser sentence as any sentence of imprisonment imposed would affect her more harshly than it would a healthy person.

[9] At this stage it is necessary to set out in some detail the evidence presented to us: On applying for bail pending the present appeal, the appellant described how, without the proper treatment for AIDS, she would die within a few months ─ even with treatment, her life expectancy has been drastically reduced. She described further how, in a government-sponsored initiative, she is receiving antiretroviral treatment at Groote Schuur hospital in Cape Town. Whilst awaiting trial in prison she contracted tuberculosis very quickly because she had been HIV positive. The treatment received at the hospital was not available in prison. The appellant contracted shingles and thrush flowing from her AIDS condition. She described in her affidavit how her diet in prison and a lack of the range of necessary vitamins are not conducive to combating her present condition. Whilst in prison the appellant became sicker. In her words: 'My immune system crashed.'. Her exposure to opportunistic infections in prison increases the risk to her health.

[11] The doctors treating the appellant at Groote Schuur confirm that her return to prison will have a serious impact on her health and that, without proper treatment, she will die prematurely. They confirm the effectiveness of highly active antiretroviral therapy in the treatment of AIDS. The head of the prison in which the appellant served part of her sentence confirmed by way of a letter that nevirapine, a vital antiretroviral drug in the fight against AIDS, is unavailable in any prison.

[12] The following is the essential part of a very brief judgment in the court below:

'The appellant who pleaded guilty knew exactly what she was doing. When she is in prison she will still be entitled to receive her treatment. 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. In my view the sentence fits the crime. She was very lucky to get this kind of sentence for the crimes she committed.

I would dismiss the appeal against sentence as being altogether without merit.'

[13] In *S v Calitz en 'n Ander* 2003 (1) SACR 116 (SCA) this Court

said the following at 121*i-j*:

'Hoe dit ook al sy, dit moet beklemtoon word dat die behoorlike beskerming, enersyds, van 'n appellant se grondwetlike reg tot appèl en, andersyds, die gemeenskap se belang dat oortreders behoorlik gestraf word, van 'n regterlike amptenaar vereis dat deeglike aandag gegee word aan die formulering en verstrekking van vonnisredes. Daarsonder word gesonde strafregpleging belemmer.'

[14] The notice of appeal in the court below consisted of a letter by the appellant herself. The legal representative who appeared on her behalf in the court below did not deem it necessary to improve on or supplement it.

[15] As stated earlier, the appellant's legal representative in the court below appeared to have contented himself with a submission from the Bar that the appellant's AIDS status entitled her to a lesser sentence. He did not consider it necessary to request the magistrate prior to the hearing in the court below to supply reasons for the sentence imposed. Neither did the court below.

[16] In my view, the court below erred: first, in not considering that it was necessary to call on the magistrate to supply reasons for the

sentence imposed; and, second, in failing to appreciate that, on the new issue raised, it did not have sufficient evidential material or an adequate notice of appeal before it.

[17] Whilst it is correct that any illness does not *per se* entitle a convicted person to escape imprisonment, the facts presented to us by the appellant and the issue raised before the court below comprise matter forming part of the totality of the circumstances of a convicted person that ought to be considered in order to do justice both to the person to be sentenced and to society. See *S v Berliner* 1967 (2) 193 (A) at 199F-G and *S v C* 1996 (2) SACR 503 (T) at 511*g*-*h*. This Court has for decades emphasised the importance of the individualisation of sentence. See in this regard *S v Blank* 1995 (1) SACR 62 (A) at 70*f*-71*c*.

[18] In *S v Cloete* 1995 (1) SACR 367 (W) and *S v C*, supra, it was held that a court, in considering an appropriate sentence, may take into account a convicted person's ill-health and how it may relate to the effect of a contemplated sentence. Thus, for example, a particular sentence may be rendered more burdensome by reason of an offender's state of health.

[19] In respect of treatment that may or may not be available in particular prisons, an appropriate order - after an investigation of all the facts - may address the needs of the person to be sentenced.

[20] In the present case, where a pertinent issue was raised on appeal, it ought rightly to have been considered and explored further. Ideally the matter ought to be remitted to the magistrate for a reconsideration of the appropriate sentence. However, the circumstances in the present case are such as to warrant an expeditious decision. We have all the necessary facts at our disposal and given the history of the matter and the misdirections alluded to, we are at large in deciding an appropriate sentence.

[21] The appellant was arrested on 19 July 2000 and remained in custody until she was sentenced on 30 July 2001. She remained in prison until 24 November 2003 when she was released on bail pending the outcome of her appeal in the court below. The appellant thus spent slightly more than 40 months in detention. Having regard to all the factors referred to above, including the fact that the appellant may die soon, and considering the seriousness of the offence, the interests of the appellant and of society, I agree with the

submission by counsel for the State and the appellant that further imprisonment is unwarranted. In my view, a sentence of imprisonment equal to the time spent in prison subsequent to the date on which the appellant had been sentenced by the magistrate is an appropriate one.

[22] The following order is made:

The appeal is upheld. The sentence imposed by the trial court is set aside and the following sentence is substituted:

'The accused is sentenced to imprisonment for a period of two years, three months and 25 days.'

The substituted sentence is antedated to 30 July 2001.

[23] The effect of the substituted sentence is that the appellant is not to undergo any further period of imprisonment.

_____
M S NAVSA
JUDGE OF APPEAL

CONCUR:

PONNAN JA
MAYA AJA