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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

Case Number: A228/2018

6/12/2018

L[....] M[....] M[....]

Appellant

And

THE STATE

Respondent

JUDGMENT

NKOSI AJ

[1] This an appeal against sentence. The appellant was convicted of robbery with aggravating circumstances, unlawful possession of firearm, discharging a firearm in a built up area and attempted murder. He was sentence to ten (10) years imprisonment for robbery with aggravating circumstances, three (3) years for unlawful possession of a firearm, two (2) years for discharging a firearm in a built up area and five (5) years for attempted murder. The sentences in respect of discharging a firearm in a built up area and attempted murder were ordered to run concurrently with the sentence for robbery with aggravating circumstances. The appellant was therefore sentenced to an effective thirteen (13) years imprisonment. Leave to appeal was granted by the trial court only in respect of sentence.

[2] On or about the 26 December 2010 at or nearby Mamelodi KFC, the

appellant and his co-perpetrator, robbed two Protea Coin security guards of a firearm, cellphone and a depositor box containing cash. They fired several shots at these security guards who at that moment were giving chase. The security guards returned fire and the appellant was shot and found in possession of the stolen firearm, cellphone and depositor box with cash. His co-perpetrator remains at large.

[3] During the process of sentencing the appellant elected to disclose his health status by informing the court that he was HIV positive and has contracted tuberculosis. In light of his health condition and other mitigating factors, the court sentenced him to an effective 13 years imprisonment.

Ad Sentence

[4] Counsel for the appellant submitted that although the trial court was made aware of the HIV and TB status of the appellant, it failed to conduct an enquiry to establish the extent of the appellants' ill health before sentencing him. Counsel further submitted that the sentence should be set aside on appeal and the matter be referred back to the trial court, to investigate the health condition of the appellant before passing sentence. In this regard Counsel relied on *S v Magida*¹ wherein the court said:

"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 compromise 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".

It is therefore clear that in appropriate circumstances, ill health in particular HIV and Aids maybe a substantial and compelling reason justifying a deviation from the minimum sentence regime.

[5] In *Magida*² the appellant was convicted on 99 counts of fraud and

¹ *S v Magida* 2005(2) SACR 591 SCA

² *S v Magida* (supra)

sentenced to 16 years and 3 months of imprisonment and a portion of her sentence was suspended. She discovered after being sentenced that she had contracted HIV which had developed into full blown Aids. Her appeal against sentence was dismissed by the appeal court. The Supreme Court of appeal allowed further evidence by way of affidavits which established that without proper treatment, the appellant would die in a matter of few months. The matter was not referred back to the trial court but dealt with by the Supreme Court of appeal expeditiously due to the appellant's drastically reduced life expectancy and ill health. The sentence was set aside and a lesser one imposed which saw the appellant released from prison.

[6] The circumstances in *Magida's* case are distinguishable from the present case in that the appellant discovered in prison, waiting to be sentenced that he had contracted HIV. He informed the court that he was on treatment which he was receiving from prison officials. Clearly his condition has not developed into a full blown Aids and it would seem his HIV status is at its early stages.

[7] The court *a quo* took into account the fact that he had been in custody for over two years before sentence and his ill health when sentencing the appellant in respect of the robbery charge. The court *a quo* correctly concluded that these factors could not be ignored and that they constituted substantial and compelling circumstances to justify a deviation from a minimum sentence of 15 years for a first offender.

[8] In my view the court did not misdirect itself when sentencing the appellant and I therefore propose the following order:

The appeal against sentence is dismissed.

NE NKOSI

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

DS MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Appellant : Adv. LA van Wyk
Instructed by : Legal-aid South Africa

Counsel on behalf of Respondent : Adv. LA More
Instructed by : State Attorneys Pretoria

Date of Hearing : 25 October 2018
Date of Judgment : 6 December 2018