

IN THE COURT OF APPEAL FOR BOTSWANA
HELD AT LOBATSE

Criminal Appeal No. 3 of 2000
[High Court Criminal Committal No. (F)3 of 1999]

In the matter between:

DIKAGO DAVID Appellant

And

THE STATE Respondent

U. Mack for the Appellant
Mrs L.I. Dambe for the Respondent

J U D G M E N T

CORAM: AMISSAH P.
AGUDA J.A.
STEYN J.A.
KORSAH J.A.
FRIEDMAN J.A.

AMISSAH P.

The appellant was convicted by the Magistrate' s Court sitting at Palapye on a charge of rape contrary to section 142 of the Penal Code [Cap 08:01]. I need not state the facts because he does not dispute them. Pursuant to the amendment to section 142 of the Code made by section 3 of the Penal Code (Amendment) Act (No. 5 of 1998) he, upon conviction, immediately became liable to undergo a

test for the Human Immune-system Virus (HIV). Upon this test, he proved to be HIV positive. The amended section 142(4) provides that:

“142(4) Any person who is convicted under subsection (1) or subsection (2) and whose test for the Human-Immune system Virus under subsection (3) is positive shall be sentenced –

- (a) to a minimum term of 15 years, imprisonment or to a maximum term of life imprisonment with corporal punishment, where it is proved that such person was unaware of being Human Immune-system Virus positive; or
- (b) to a minimum term of 20 years, imprisonment or to a maximum term of life imprisonment with corporal punishment, where it is proved that on a balance of probabilities such person was aware of being Human Immune-system Virus positive.”

The Magistrate, taking the view that once the person convicted of rape tested positive, even without reference to the time when he contracted the syndrome, he became liable to the minimum sentence of 15 years imprisonment imposed by section 142(4)(a) of the Penal Code, provided he was unaware that he had the syndrome; and having no power to impose that minimum sentence, committed the case to the High Court for sentence. The High Court Judge, in accordance with the provisions of section 296 of the Criminal Procedure and Evidence Act [Cap 08:02] sentenced the appellant to 15 years imprisonment.

The appellant does not complain of the finding of guilt for the commission of the offence charged. He, nevertheless, appeals against both conviction and sentence on the ground that section 142(4)(a) of the Penal Code as amended by section 3 of

the Penal Code (Amendment) Act, 1998 is unconstitutional in so far as it offends against their freedom from discrimination guaranteed by section 15(1) and (2) of the Constitution; and that the learned Judge a quo to whom the appellant was committed for sentence after conviction failed to satisfy himself of the correctness of the decision of the Magistrate before sentencing the appellant, as required by section 296(3) of the Criminal Procedure and Evidence Act.

The very same grounds were put forward; and arguments thereon advanced in the case of Dijaje Makuto v. The State (Criminal Appeal No. 31 of 1999) in which we gave judgment today. The reasoning for the decision in that case on the above points would apply to, and are accordingly adopted, in this case.

As a result, judgment is given in this case in the following terms:

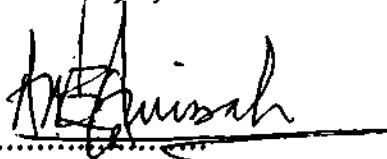
- (i) Section 142(4)(a) of the Penal Code as amended by section 3 of the Penal Code (Amendment) Act 1998, read in the restricted manner indicated in Dijaje Makuto v. The State , is not unconstitutional. As it was not shown in this case that the appellant had the HIV syndrome at the time when the offence was committed, the precondition for the imposition of the minimum sentence of 15 years imprisonment was not established. Accordingly the sentence of 15 years imprisonment is hereby set aside. The minimum sentence of 10 years imprisonment prescribed for rape by section 142(1)(i) of the Penal Code, as amended, applies and is hereby substituted as the

punishment which the appellant must undergo in this case. The sentence is to commence on the date the appellant was taken into custody.

- (2) A Judge of the High Court to whom a convicted person is referred for punishment which is above the limit of the sentencing power of the referring Magistrate, must satisfy himself of the correctness of the conviction and expressly record that fact in his judgment imposing sentence. In this case, no substantial miscarriage of justice was done by the omission of the Judge to express such satisfaction.

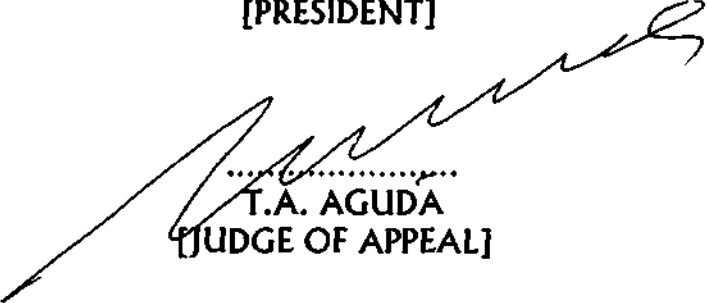
Save as altered above, the appeal against conviction and sentence is dismissed.

Delivered in open court at Lobatse on 28th July 2000



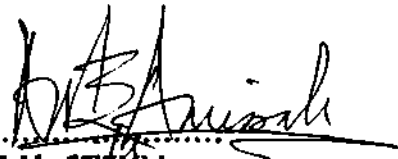
 A.N.E. AMISSAH
 [PRESIDENT]

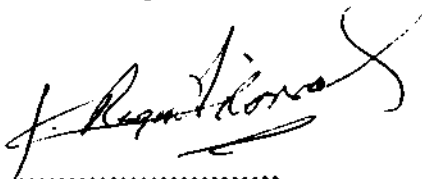
I agree:



 T.A. AGUDA
 [JUDGE OF APPEAL]

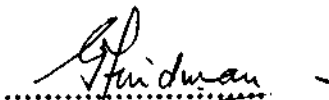
I agree:


 for
 J.H. STEYN
 [JUDGE OF APPEAL]



I agree:

.....
K.R.A. KORSAH
[JUDGE OF APPEAL]



I agree:

.....
G. FRIEDMAN
[JUDGE OF APPEAL]