

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Criminal Appeal No. 49/2000
High Court Criminal Committal No. F4/2000

In the matter between:

QAM NQUBI

Appellant

vs

THE STATE

Respondent

Mr K.P. Gaoboi for the Appellant

Mr. E. Batsalelwang for the Respondent

J U D G M E N T

CORAM: P.H. TEBBUTT J.A.
M. KUMLEBEN J.A.
LORD WEIR J.A.

KUMLEBEN J.A.

This appeal is restricted to sentence. After argument on appeal a sentence of 10 years imprisonment was substituted for the 15 years imposed by the court *a quo*. These are the reasons we undertook to furnish for so doing.

The Appellant was tried in the Magistrate's court on a charge of rape. The complainant was a nine year old girl. He was found guilty, not of rape but of defilement of a girl under the age of 16 years in terms of section 147(1) of the Penal Code as amended by Act 5 of 1998.

In compliance with section 147(2) the Magistrate ordered that the Appellant undergo a Human Immune Virus – system test to determine his status in this regard. On receipt of the result of this test the Magistrate recorded that:

“The court has the misfortune to inform the Accused that following a compulsory HIV test ... the results are now ready and they show that the Accused is HIV positive.”

The Magistrate was under the impression that a mandatory sentence of 15 years had to be imposed.

The matter was referred to the High Court for sentence in terms of Section 295 of the Criminal Procedure and Evidence Act. When the case came before Mwaikasu J the learned Judge, having determined that the conviction was in order, observed that “the medical test for HIV/AIDS ... turned out to be positive.” The evidence adduced in that court was that the Appellant was unaware of this infection at the time he committed the offence, assuming that it was present at that stage. The court accepted this. It, however, considered that a sentence of 15 years imprisonment was mandatory in terms of section 147(3)(a). In doing so the decision of this court in the matter between **Dijaje Makuto v The State Criminal Appeal No. 31 of 1999** was overlooked. In this case the court was concerned with a rape conviction and the correct sentence to be imposed having regard to the provisions of section 142(4) of the Penal Code as amended. This subsection provides for a minimum sentence of 15 years on proof that the convicted accused is HIV positive. The question raised, and calling for decision as a constitutional issue, was whether the

section applies in the absence of proof that the offender was HIV positive at the time the offence

was committed. The relevant passage in the judgment reads as follows:

"As it was not shown that the appellant had the HIV syndrome at the time of the offence of rape was committed, the precondition for the imposition of the minimum of 15 years imprisonment by section 142(4) (a) as amended has not been established."

This conclusion applies *a fortiori* in the case of a person convicted, as in this case, of a contravention of Section 147(1). Thus the court was not obliged to impose the sentence of 15 years and erred in doing so.

Counsel before us acknowledged this, and agreed that a substituted sentence of imprisonment for 10 years would be an appropriate one.

In conclusion I must draw attention to an evidential feature of this case. As I have indicated, according to the record both the Magistrate and the learned Judge simply told the Appellant that according to a medical report he was HIV positive. This is not the first case in which such a finding is dealt with in this manner that overlooks the requirements for the admissibility of documentary evidence. The medical report may be produced and placed on record as an exhibit with the consent of the accused who admits its correctness. Failing such consent and admission, the person responsible for the report must be called as a witness. This matter has been raised with the Chief Justice, and he agrees that the necessary steps are to be taken by the Registrar of the High Court to inform all prosecutors and judicial officers accordingly.

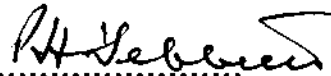
For these reasons the appeal succeeded to the extent that the period of imprisonment was reduced from 15 years to 10 years. These remarks relating to the admissibility of proof of HIV status must be drawn to the attention of all Judicial officers.

REASONS FOR THE ORDER HANDED DOWN AT LOBATSE ON THE
31st DAY OF JANUARY..... 2001.



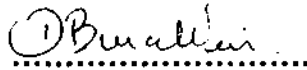
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M. KUMLEBEN
JUDGE OF APPEAL

I agree



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P.H. TEBBUTT
JUDGE OF APPEAL

I agree



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LORD WEIR
JUDGE OF APPEAL