

IN THE COURT OF APPEAL OF BOTSWANA  
HELD AT LOBATSE

COURT OF APPEAL CRIMINAL APPEAL NO 34/2001  
HIGH COURT CRIMINAL COMMITMENT NO F12/1999

IN THE MATTER BETWEEN:

ISHMAEL KEBOLETSENG

APPELLANT

VS

THE STATE

RESPONDENT

APPELLANT IN PERSON  
MR P. MAKGABENYANA FOR THE RESPONDENT

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J U D G M E N T

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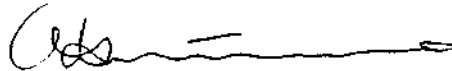
CORAM: LORD WEIR JA  
BLOFELD JA  
SUTHERLAND JA

SUTHERLAND JA:

The appellant pleaded guilty in the Magistrate's Court to a charge of rape. He was subjected to an HIV/AIDS test, which proved positive. The magistrate committed the appellant to the High Court for sentence in terms of Section 295 (1) of the Criminal Procedure and Evidence Act. The judge a quo took the view that because the complainant was 12 years of age, the charge should have been one of

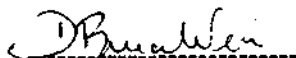
defilement of a child under 16 contrary to Section 147 (1), and substituted a conviction for that offence. The judge ascertained that the appellant was not aware at the time of the offence that he was HIV positive. He then sentenced the appellant to 15 years imprisonment, which he described as the statutory minimum term under Section 147 (3) (a).

The appellant appealed to this court against sentence only. His ground of appeal was that he was a first offender and was remorseful. However, the Court noted that the judge a quo stated when imposing sentence "the accused has not been proved to have been suffering from HIV/AIDS at the time of the commission of the offence." That being so, the precondition for the imposition of a minimum sentence of 15 years has not been established, as was made clear in Makuto v. The State Cr. App. 31/1999. Counsel for the State accepted that this was correct. We therefore quashed the sentence of 15 years and substituted a sentence of 10 years imprisonment, to run from 16<sup>th</sup> March 1999.



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LORD SUTHERLAND  
JUDGE OF APPEAL

I AGREE:



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LORD WEIR  
JUDGE OF APPEAL

I AGREE:



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SIR JOHN BLOFELD  
JUDGE OF APPEAL

DELIVERED IN OPEN COURT THIS 30<sup>TH</sup> DAY OF JANUARY 2002.