

CONSTITUTIONALITY OF THE OFFENCE OF DELIBERATELY TRANSMITTING HIV: Case Note on the Case of *S v Mpofu & Anor* CC-5-16

BY GEOFF FELTOE

THE NATURE OF HIV AND AIDS

Before commenting upon the *Mpofu* case it is first necessary to set out nature of HIV and AIDS. The following medical facts are taken from information provided by an organisation called AVERT.¹

Human immunodeficiency virus (HIV) is a virus that attacks the immune system, which is our body's natural defence against illness. The virus destroys a type of white blood cell in the immune system called a T-helper cell, and makes copies of itself inside these cells. T-helper cells are also referred to as CD4 cells. As HIV destroys more CD4 cells and makes more copies of itself, it gradually breaks down a person's immune system. This means someone living with HIV, who is not receiving treatment, will find it harder and harder to fight off infections and diseases. HIV is found in semen, blood, vaginal and anal fluids, and breast milk. HIV cannot be transmitted through sweat, saliva or urine. Using male condoms or female condoms during sex is the best way to prevent HIV and other sexually transmitted infections. If HIV is left untreated, it may take up to 10 or 15 years for the immune system to be so severely damaged it can no longer defend itself at all. However, the speed HIV progresses will vary depending on age, health and background. Although there is currently no cure for HIV with the right treatment and support, people with HIV can live long and healthy lives. To do this, it is especially important to take treatment correctly and deal with any possible side-effects. There is effective antiretroviral treatment available so people with HIV can live a normal, healthy life. The earlier HIV is diagnosed, the sooner treatment can start -

¹ <https://www.avert.org/about-hiv-aids/what-hiv-aids>

leading to better long term health. Acquired immune deficiency syndrome (AIDS) is not a virus but a set of symptoms (or syndrome) caused by the HIV virus. AIDS is also referred to as advanced HIV infection or late-stage HIV. A person is said to have AIDS when their immune system is too weak to fight off infection, and they develop certain defining symptoms and illnesses. This is the last stage of HIV, when the infection is very advanced, and if left untreated will lead to death. Treatment for HIV means that more people are staying well, with fewer people developing AIDS.

HIV infection used to be a death sentence but it is no longer so provided that the infected person receives anti-retroviral treatment. This treatment can enable an infected person to live a long life. Nonetheless HIV infection is still a very serious matter. As the court pointed out in the *Mpofu* case:

It is well known that infection with the HIV virus can have fatal consequences particularly where the infected person is not in receipt of remedial treatment either because he is not aware of the fact of his infection or because although aware of his status, he takes a conscious decision not to avail himself of such treatment which can only be obtained upon disclosure of his condition to a care giver.²

INCIDENCE OF HIV/AIDS IN ZIMBABWE

Although the adult HIV prevalence rate in Zimbabwe has been declining over the last few years due to prevention programmes aimed at sexual behavioural change such as encouraging condom use and reducing multiple partners³ it is still high - in a 2015 UNAids report it was stated as being at 14,7% for adults between 14 and 49 with an estimated 1 300 000 adults aged 15 and over living with HIV. The figure of death due to AIDs was 29 000.⁴

The high incidence of HIV and AIDs in Zimbabwe and other countries has led to a clamour for the criminalisation and

² At para 12.

³ Ministry of Health and Child Welfare National HIV and AIDS Estimates Report 2014.

⁴ <http://www.unaids.org/en/regionscountries/countries/zimbabwe>.

imposition of harsh penalties on those who intentionally engage in activities that will lead to the transmission of HIV. This led to the creation of such an offence in Zimbabwe. This offence is provided for in section 79 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The objective of this offence is to try to prevent the deliberate transmission of HIV.

THE OFFENCE

The heading for this offence is "Deliberate transmission of HIV". This is somewhat misleading. Although the offence can be committed if the accused actually infects the complainant, it can also be committed without proof of actual infection of the complainant by the accused. Where the accused realises that there is a real risk that he or she may be infected and he or she has sexual intercourse with another realising that there was a real risk or possibility of infection, he or she is guilty of the offence. This formulation does not require actual proof of infection.

Where the State is alleging that the accused actually infected the complainant, it would have to establish that the complainant did not already have HIV before the accused allegedly infected him or her. If, for instance, the accused rapes and infects a young girl who was a virgin, it will be clear that it was the accused who infected her unless, of course, her mother infected her when she gave birth to her. But with adults it may be difficult to establish which of the two partners was infected first as this cannot be determined by medical evidence.

In cases involving sexual intercourse, the offence is committed in the two situations below:

1. The accused, who actually knows that he or she is infected with HIV, has sexual intercourse with another person knowing that this will infect that person with HIV and the complainant does not know that the accused has HIV when they have sexual relations.
2. The accused, who realises that there is a real risk or possibility that he or she is infected with HIV, has sexual intercourse with another person realising the real risk or possibility that the other person will be infected with HIV

and the complainant does not know that the accused has HIV when they have sexual relations.

It is explicitly provided that this offence is committed by an accused “whether or not that he or she is married to the other person.”

It is a defence for the accused to prove (on a balance of probabilities) that the person with whom he or she had sexual relations knew that the accused was infected with HIV or consented to have sexual relations with him or her appreciating that the nature of HIV and the possibility of becoming infected with it. This defence requires the accused to prove not only consent to sexual intercourse but also that the complainant appreciated the nature of HIV and that that the sexual intercourse could lead to that person being infected.

THE CONSTITUTIONAL CASE

The two applicants had been charged with deliberate transmission of HIV in contravention of section 79 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It was alleged that both applicants had unprotected sexual intercourse with their husbands knowing that they were infected with HIV. The applicants argued that the offence with which they had been charged violated:

1. Their right protection of law under section 18 of the pre-2013 Constitution because the offence in question is so wide, broad and vague that the law uncertain⁵; and
2. Their right under section 23 of the pre-2013 Constitution not to be discriminated against on any basis including HIV/AIDS status⁶.

Most cases HIV transmission takes place through sexual intercourse although there are other ways of transmission, such as deliberately plunging into a victim a syringe known to have been contaminated with HIV. The paper will concentrate

⁵ The 2013 Constitution does not contain a standalone protection of the law provision but it contains detailed provisions on the rights of a person who has been accused of a crime in section 70.

⁶ The equivalent provision in the 2013 Constitution is section 56.

on situations involving sexual intercourse as in the cases of both the applicants the charge arose from sexual intercourse.

THE BASIS OF THE CONSTITUTIONAL CHALLENGE

The challenge to the constitutionality of this offence was focused on the species of this offence requiring only that when the accused has sexual intercourse with another person the accused realised the real risk or possibility that he or she was infected with HIV and that there was a real risk that the other person will be infected with HIV. Counsel for the applicants argued that this formulation of the offence violated the constitutional right to protection of law as it is conjectural and vague. He contended that innocent persons are in danger of being convicted under this provision.

The court first set out the right to protection of the law requires that the law must “be expressed in clear and precise terms to enable individuals to conform their conduct to its dictates” and it must “not be so widely that expressed that its boundaries are a matter of conjecture nor ... be so vague that people affected by it must guess at its meaning.”

Applying this to the offence in question the court decided that the formulation of this offence did not violate the right to protection of the law as it was framed with sufficient clarity and precision to enable people to know what the offence entailed. For liability for crimes of intention in the Criminal Law (Codification and Reform) Act, the accused can be liable either on the basis of actual or constructive intention. Thus for the section 79 offence the accused can be liable either if he or she knew that he had HIV and he or she intended to transmit HIV or if he realised that he might have HIV and had sexual intercourse realising that there was a real risk or possibility that he might infect the other person with HIV. The requirements for proof of “constructive” intention are precisely set out in section 15 of the Code. The court decided that the definition in section 15 “of the phrase ‘real risk or possibility’ has dispelled any perceived vagueness in that phrase by the inclusion therein of the components of ‘awareness and recklessness’.”

Counsel for the applicants argued that the offence as currently worded could lead to the conviction of “innocent persons.”

He gave two examples of a person being unwittingly infected with HIV when receiving a blood transfusion and the example of a person infecting another with HIV despite using a condom because it has been scientifically established that condoms are not a hundred percent effective in preventing HIV transmission. As the court decided, neither of these situations can lead to conviction for this offence as neither actual nor constructive intention would be present. Regarding the first example the court correctly pointed out that the person who has no reason to believe that he or she is infected, for example where infection has, unknowing to him or her, been brought about by an injection with an infected needle, would not be convicted under section 79. Regarding the second example the person who has reason to believe that he or she might be HIV positive, would not be liable to be convicted under section 79 if he disclosed this belief to his partner so that the latter could make an informed decision. It could have added on the second example that if the accused did not know that wearing a condom might not prevent the transmission of HIV he or she would not even have subjectively realised that there was a real risk that HIV would be transmitted. The court said that where the accused knows or has reason to believe that that he or she infected with HIV, "public policy would require of such a person that he make full disclosure to his or her intended partner in order to afford that partner the opportunity to make an informed decision."

The Constitutional Court thus found that the offence was not vague and imprecise even when the required form of intention takes the form of so-called constructive intent. What the court should have enquired into is whether it is appropriate for this offence that constructive intention should be sufficient basis for conviction.

Where a person deliberately and maliciously actually infects another person with HIV it is fully justified to punish that person severely under the offence set out in section 79. This would apply where the State can prove for example that an uninfected person was infected by the accused who knew he or she was HIV positive, such as where he or she has been tested, has been informed that he or she is positive and has been told of the precautions necessary to avoid transmitting

it to others. Particularly blameworthy would be the person who knowing that he or she is HIV positive lies to his or her sexual partner telling him or her that he or she is not infected and that it is thus not necessary to wear a condom.⁷

But it is very different if the State is alleging that he or she had sexual relations with another when he or she realized that there was a real risk or possibility that he or she might be infected and despite that realization he or she with another person realising the real risk or possibility that the other person will be infected. The accused will typically deny that he or she realised that there was a real risk that he or she had been infected and that he or she had sexual relations taking the risk that the partner would be infected. How will the State prove that the accused, despite his or her denial, took a conscious risk? If the accused has not been tested and told that he or she is HIV positive, would the State be able to rely on the fact that the accused, to his or her knowledge, was displaying symptoms of AIDS. Would this be enough for the State would be able to persuade the court that the only reasonable inference was that the accused must have been aware he or she was infected with HIV and took a conscious risk if the accused maintains that he or she was unaware that these symptoms meant that he or she had HIV and was unaware therefore that he or she could transmit HIV. Such a person would not have been tested, told the result of the test and been counselled on how to avoid transmission. There is frequently a problem with so-called constructive intention. The very term "constructive intention" has been criticised by academic writers on the basis it could be taken to imply that an intention is artificially being attributed to the accused. The writers prefer the term "legal intention" or "*dolus eventualis*." The problem with legal intention is that there is often a very thin dividing line between subjective realisation

⁷ However, the deterrent effect of criminalization may be reduced where the accused blames previous sexual partners for infecting him or her. Such a person may be fatalistic in outlook and may act out of resentment and anger when infecting others. If he or she knows that her or she has only have a limited time left to live, a threat of lengthy incarceration may not have great influence upon him or her. Nonetheless criminalisation is justified to try to curb such vindictive behaviour.

and negligence, and there is a danger that the court may wrongly find that the accused had legal intention simply because any normal or reasonable person in his or her situation would have realised the risk. This problem is particularly acute in the context of this offence where if the accused denies that he or she realised that he or she was infected and might transmit HIV. It is difficult to see on what reliable basis the court could infer that the accused must have had the necessary realisation despite his or her denial. In this regard it is interesting to compare section 79 with the provision in section 78. Section 78 deals with deliberate infection of another with a sexually-transmitted disease such as syphilis. Section 78 has a reverse onus provision which is not to be found in section 79. Section 78(3) provides that if the prosecution proves that the accused was suffering from an STD at the time of the crime, "it shall be presumed unless the contrary is proved, that he or she knew or realised that there was a real risk or possibility that he or she was suffering from it." Although the constitutionality of this reverse onus is questionable, it was presumably inserted to try to overcome the difficulties of proving that the accused knew or realised the real risk that he or she was suffering from an STD. The same difficulties arise in respect of proving that the accused knew or realised that there was a real risk that he or she was suffering from HIV.

Additionally, the defence that the accused disclosed to the complainant that he or she was infected applies more appropriately to a situation where the accused definitely knows that he or she was infected rather than a situation where he or she has some reason to suspect that he or she is infected.

Thus there is a strong argument for confining this offence to situations where actual intention can be proven. Justice Edwin Cameron, an HIV-positive Justice of the Supreme Court of Appeal in South Africa has said: "The use of criminal law to address HIV infection is inappropriate except in rare cases in which a person acts with conscious intent to transmit HIV and does so."⁸ So too the UNAIDS organization

⁸ Burris S, Cameron E. "The case against criminalization of HIV transmission". JAMA. 2008;300:578-80

has urged “governments to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it.”⁹

As regards the discrimination argument the court pointed out that discrimination on the basis of HIV status is not prohibited by section 23. Thus while section 79 targets only persons infected with or exposed to the HIV virus - which can be regarded as discriminatory of those persons - such discrimination is not unlawful in that it is not proscribed by section 23. It went on to say that in terms of section 23 (5), where a law discriminates on the grounds of sex or gender, the challenger bears the burden of showing that the law is not reasonably justifiable in a democratic society.’ It then applied the recognised criteria for deciding this matter as follows:

The legislative objective is to halt or prevent the spread of HIV/AIDS. This objective is both important and laudable. It is sufficiently important to override the right of non-discrimination and the right to privacy. Because of the grave danger to life arising from HIV infection, the measure designed to meet the objective by prosecuting those who spread the disease deliberately or recklessly is rationally connected to, and calculated to achieve, the stated objective. Prosecution for this offence will not be arbitrary or based on irrational considerations. A court is well equipped to assess the evidence in the matter in a rational manner. The means used by the legislation to achieve the objective does not impair the rights of people more than is necessary. The sentence of up to twenty years is not disproportionate. Infection with HIV could be a death sentence for the victim. In grave cases the maximum sentence might be appropriate.

WILL CRIMINALISATION MAKE PEOPLE RELUCTANT TO BE TESTED?

This issue was not dealt with in the *Mpofu* case but a short comment should be made about it. There are two main views

⁹ Criminalization of HIV transmission [policy brief] Geneva (Switzerland): UNAIDS; 2008.

on this issue. The first is that criminalisation will discourage people from being tested. One such view is the following:

The potential to be charged with wilful HIV transmission may be a significant deterrent to being tested for HIV infection. After all, individuals who do not know that they are HIV-positive cannot logically be accused of its transmission. The consequence may be a failure to identify as many HIV-positive people as possible and higher rates of HIV spread. Studies have shown that individuals who are informed that they are HIV positive will commonly desist from high-risk sexual practices, but may not do so if they are unaware of their own status. This is important, since as many as 50% of all new HIV transmissions are attributable to people who are only recently infected.¹⁰

The second is that criminalisation will not have this effect. One such view is this,

Some argue that criminal prosecution will dissuade persons from being tested for HIV and therefore promote HIV transmission by these persons who do not know their status. Such speculation is unsupported by a single published study. No informed and reasonable person would decline HIV testing, thus placing themselves at risk of grave illness and death, just because of the publicized prosecution of some HIV-infected individuals accused of unlawfully transmitting the disease to others. It is not one's HIV infection itself that is the subject of prosecution, it is the intentional or reckless transmission of HIV to others.¹¹

The second view is surely the more supportable one. The thrust of our law must be to encourage people to be tested, especially if they suspect that they may be infected. If this criminal offence is confined to situations where the accused has been tested and as a result of the test knows that he or she is infected, then the question of the criminal offence acting as a disincentive to being tested will not arise.

¹⁰ Mark A Wainberg "Criminalizing HIV transmission may be a mistake" *Canadian Medical Association Journal* March 17, 2009 vol. 180 no. 6.

¹¹ Philip B. Berger, MD "Prosecuting for knowingly transmitting HIV is warranted" *Canadian Medical Association Journal* 2009 Jun 23; 180(13): 1368.