

NEVISON MPOFU  
**versus**  
THE STATE

HIGH COURT OF ZIMBABWE  
MATHONSI AND TAKUVA JJ  
BULAWAYO 16 OCTOBER 2017 AND 19 OCTOBER 2017

### **Criminal Appeal**

*L Jamela* for the appellant  
*T Hove* for the respondent

**MATHONSI J:** The applicant, a 39 year old security guard employed by Umguza Rural District Council, appeared before a regional magistrate on 4 November 2016 charged with deliberately transmitting HIV as defined in s79 (1) (a) of the Criminal Law [Codification and Reform] Act [Chapter 9:23] it being alleged that on 26 October 2016 at No 78 Paronavale Road Douglasdale Bulawayo he had intentionally had unprotected sexual intercourse with the complainant who is HIV negative, well knowing that he was himself infected with the HIV virus. In so doing he had exposed the complainant to HIV infection.

The appellant pleaded guilty to the charge and was, upon conviction, sentenced to 13 years imprisonment of which 3 years imprisonment was suspended for 5 years on condition of future good behaviour. He was unhappy and noted an appeal to this court against both conviction and sentence. In respect of conviction the appellant took issue with the fact that the court *a quo* did not properly explain the charge to him as an unrepresented accused person. The court *a quo* improperly accepted his guilty plea when some of his answers to the allegations and facts were not in the affirmative and in some instances inaudible and that although he tendered a plea of guilty that plea was not a genuine one.

The appellant challenged the sentence imposed as being so severe as to induce a sense of shock regard being had to the guilty plea and the weighty mitigating factors which far outweighed the aggravating ones. The facts are that the appellant had proposed love to the 30 year old complainant when the two met at Egodini bus terminus on 7 June 2016. They

commenced having an affair. On 2 October 2016 the appellant invited the complainant to his place of residence in Douglsadale Bulawayo where at about 1700 hours they had protected sexual intercourse.

Subsequent to that the complainant suggested that they should proceed to New Start Centre for HIV testing which the appellant agreed to. He however kept dodging the testing until 26 October 2016 when the complainant visited him at his home. The two of them had unprotected sexual intercourse. The following day the complainant accompanied the appellant to Renkini long distance bus terminus where, upon arrival, she demanded to search the appellant's bag. It is then that she beheld ARV pills and upon questioning the appellant about that discovery he lied that the pills belonged to an uncle of his who was in Nkayi. A report was subsequently made to the police leading to his arrest.

During the truncated trial it was indeed common cause that the appellant was HIV positive and that he had unprotected sexual intercourse with the complainant thereby exposing her to infection. The court *a quo* canvassed the essential elements of the offence with the appellant and he admitted the facts. The appellant's medical card showing that he was registered at Nkayi Hospital for ARV programme was produced and so was that of the complainant which showed that she had presented at Mpilo General Hospital and tested negative to HIV.

*Mr Jamela* for the appellant attacked the plea recording proceedings on the ground that when going through the facts the court *a quo* had not adequately explained them to the unrepresented appellant. This is so because the court had not broken down into a number of questions the allegation that he had, well known that he was infected with HIV, intentionally had unprotected sexual intercourse with the complainant who is HIV negative thereby exposing her to HIV infection. This was prejudicial to the appellant in that he did not understand the nature of the offence. *Mr Jamela* submitted that each element of the offence should have been explained to the unrepresented accused in turn and his responses recorded. The court fell in error by short-circuiting the procedure for plea recording. He relied on the authority of *S v Machokoto* 1996 (2) ZLR 190 (H) where the court strongly criticized the cursory manner in which the court had put the questions to an unrepresented accused person facing a stock theft charge thereby stifling what could have been a claim of right.

That may well be so but I am not persuaded in this case that there was any prejudice to the appellant or that any potential defence he may have had was stifled by the manner in which the essential elements were canvassed. This is because the section under which the appellant was charged admits of essentially one defence, namely that the victim consented to the act in question. In terms of s79;

- “(1) Any person who—
- (a) knowing that he or she is infected with HIV; or
  - (b) realizing that there is a real risk or possibility that he or she is infected with HIV; intentionally does anything or permits the doing of anything which he or she knows will infect, or does anything which he or she realizes involves a real risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV, whether or not he or she is married to that other person, and shall be liable to imprisonment for a period not exceeding twenty years.
- (2) It shall be a defence to a charge under subsection (1) for the accused to prove that the other person concerned—
- (a) knew that the accused was infected with HIV; and
  - (b) consented to the act in question, appreciating the nature of HIV and the possibility of becoming infected with it.”

The facts of this matter, whether put to the appellant in bits and pieces clearly show that the appellant did not have a defence. As I have said he admitted being infected. He admitted knowingly having sexual intercourse with the complainant well knowing his own status which he had not disclosed to the complainant. Therefore that defence was not available to him whether represented or unrepresented. Accordingly there was no misdirection whatsoever in the conviction.

It is however in the sentence that the court *a quo* fell into error. The mitigating factors far outweighed the aggravation. The penal provision imposes a maximum prison sentence of 20 years even where there has been a transmission of HIV. In this matter, there was no transmission given that at the time of going to trial the complainant was HIV negative. The

appellant even requested a postponement of sentencing to cater for the window period of possible infection. It was not given.

This is a person who pleaded guilty to the charge and should have benefited from the guilty plea: *S v Buka* 1995 (2) ZLR 135 (S); *S v Ramashu and others* S 25-93. He is a first offender. I also agree with Mr *Jamela* for the appellant that owing to modern medical development in the world HIV is now medically manageable and no longer poses the same scary risk that it did in the past. Having regard to all those factors the sentence imposed induces a sense of shock and calls for interference by this court especially as it is a fact that the appellant is already living with HIV. A lengthy prison term is therefore undesirable in those circumstances. The appellant needs to manage his condition clinically and subjecting him to a lengthy term incarceration serves no useful purpose.

In the result it is ordered that;

1. The appeal against conviction is hereby dismissed.
2. The appeal against sentence succeeds
3. The sentence of the court *a quo* is hereby set aside and in its place is substituted the sentence of 5 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition the appellant does not within that period commit any offence involving deliberately transmitting HIV for which upon conviction he is sentenced to imprisonment without the option of a fine.

Effective sentence; 2 years imprisonment

Takuva J agrees.....

*Zimbabwe Lawyers for Human rights*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners