REBECCA NDAIZIVEI SEMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & HUNGWE J
HARARE, 12 November 2015

Criminal Appeal

V Chinhema, for the appellant
E Mavuto, for the respondent

HUNGWE J: After hearing counsel we allowed the appeal on the turn. Counsel for the appellant has requested that we provide our reasons in writing for this decision in light of the peculiar facts of this case and its wider impact on similar situations for the issues arising from a charge under s 79 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code"). These then are our reasons for that decision.

The appellant, a 26 year old woman, was charged with the crime of deliberate transmission of human immunodeficiency virus ("HIV") as defined in s 79 (1) (a) of the Criminal Law Code. HIV stands for human immunodeficiency virus. If left untreated, HIV can lead to the AIDS disease (acquired immunodeficiency syndrome). She protested her innocence of this abomination, but that notwithstanding, she was convicted after a protracted trial of sorts.

The facts upon which the conviction rested are unusual. These can be summarised as follows. The appellant shared the same residence with the complainant's mother at Juru Growth Point, Murehwa. Prior to her giving birth to her unborn child, the appellant attended at St Paul's Musami Mission Hospital for her ante-natal check-ups. As a result she was, on 23 March 2012 advised of her sero-positive status to HIV. The results of the tests carried out were entered into her ante-natal record card. On 13 January 2013 the appellant approached the complainant's mother at her residence in order to discuss how they would settle their water bills. Complainant is 10 months old and was born three days apart from the appellant's

daughter. In essence the two babies were of the same age. The difference was that one had plaited hair whilst the other had no plaited hair. The discussion over the water bills was conducted from the complainant's mother's dining-room. At some point, the complainant's mother left this room in order to prepare bath water for her daughter, the complainant who she left behind with the appellant. Upon her return, complainant's mother found the appellant breast-feeding the complainant and snatched her away in disgust. The complainant's mother asked appellant about her HIV status after she reported the breast-feeding incident to her husband. The appellant told the complainant's mother that she was not infected by the virus. Complainant's mother reported the matter to police and during police investigations, the appellant was tested for HIV. As one would have expected, the test confirmed her sero-positive status for HIV. The complainant and her mother upon being tested in connection with this case, were found to be negative for HIV.

In her defence the appellant explained that her daughter and the complainant were born three days apart. On this occasion, when the complainant cried in her mother's absence, she mistook her for her own daughter and immediately instinctively put her on her breast to breast-feed her. When her mother came she snatched the baby away and she in turn apologised for her error.

Crucially, the appellant conducted her own defence. She consented to the production of certain documentary evidence in the State case. Her status was admittedly positive. However, of relevance to the issues on trial was that the complainant was tested for HIV on several occasions from January 2013 till September 2013 and on each occasion she tested negative for HIV. Her mother was also tested and was proved to be negative of HIV. The appellant admitted that she knew of her positive status. She maintained that she did not intend to transmit the virus to the complainant. Despite her protestations of innocence, the appellant was convicted for **deliberate transmission of HIV.** She was sentenced to ten years imprisonment. She was unhappy with both conviction and sentence and has appealed to this court against both.

Her main ground of appeal was that the court *a quo* misdirected itself at law in concluding that the facts of the matter constitutes an offence as contemplated by s 79 (1) (a) of the Criminal Law (Codification and Reform) Act. Alternatively, the appellant argued that the conviction was unsafe as the totality of the evidence led did not prove that the appellant knew or realised there was a real risk that breast-feeding could result in the transmission of HIV from the mother to the child. As such an essential element of the offence created in s 79

was not proved. In the further alternative, the appellant argued that in light of the fact that her daughter was of the same age as the complainant, her explanation of a genuine error was reasonably possibly true thereby entitling her to an acquittal.

Kirby, in his article "The ten commandments" which appears in the *Australian National AIDS Bulletin*, (1999), made the following remarks:

> "There will be calls for law and order and a war on AIDS. Beware of those who cry out for simple solutions, for [in] combating HIV/AIDS there are none. In particular, do not put faith in the enlargement of the criminal law"

That nations have reacted to the international aids pandemic by passing legislation aimed at criminalising exposure and transmission of any disease of epidemic proportions is not new. In the nineteenth century Britain, infecting another with gonorrhoea was punishable by imprisonment. It was conventional wisdom of that epoch meant to deal with the perceived threat to national health. The United Nations has a dedicated agency, UNAIDS, to deal with the HIV/AIDS pandemic. The law has found itself enmeshed in a rapidly changing science-driven environment which has further complicated international response in the fight against the disease. In the United Kingdom, or more precisely, in England and Wales the Crown Prosecution Service has devised guidelines to be followed in the prosecution for deliberate or reckless exposure or transmission of HIV. Thus, someone who is HIV positive in England and Wales is only likely to be successfully prosecuted if they:-

- knew they were HIV positive at the time of the alleged transmission;
- understood how HIV is transmitted;
- had unprotected sex with someone negative who subsequently tests positive; and
- did not disclose their HIV diagnosis before sex; and
- can be proven to be the only likely source of transmission.[1]

This position is based on the growing body of evidence that effective antiretroviral treatment considerably reduces the risk of sexual transmission of HIV. The difficulties posed by the nature of the disease consists in the sufficiency of scientific, medical and factual evidence for the determination of proof of the direction of infection especially for the minority groups such as sex workers and gays. There has been significant developments as regards the relevance of viral load in Europe.

[1] ("HIV Transmission, the Law and the Work of the Clinical Team, January 2013.") at www.bhiva.org/documents/Guidelines/Transmission/Recklessness-HIV-transmission-final January 2013 visited 18 October 2015).

Prior to this guideline the position in England and Wales, as in other countries the world over, was similar to our fear and panic-driven current position.

The relevant section on which the appellant was charged provides:

"79 Deliberate transmission of HIV

(1) Any person who:-

(*a*) knowing that he or she is infected with HIV; or

(*b*) realising 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 realises 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 golden rule of interpretation is that the court must give effect to the plain and ordinary meaning of the words used in the statute. Thus applying that approach, in order to convict, the State needed to prove:-

(a) knowledge of the fact that the accused is HIV positive; or

(b) a realisation that there is a real risk that he or she is infected with HIV; and

(c) the act constituting a method of transmission **with the knowledge or realisation** that the act involves a real risk or possibility of infecting another person with HIV. (My own emphasis).

The section appears to have been directed at sexual transmission of the virus in that the fact that parties are not married to each other is not relevant to the commission of the offence. It seems to me, however, that what appears to have been uppermost in the mind of the law-maker was the knowledge or awareness of the fact that the accused was HIV positive and, notwithstanding that awareness, conducts himself or herself in a manner that he/she knew or realised that there was a real risk that such conduct would result in the transmission of the HIV virus to that other person, specifically, the sexual partner. *Mens rea* for this offence consists in the intention, actual or legal, to transmit the HIV virus through sexual intercourse rather than other means since those other means can be dealt with by means of

assault-related offences in the Criminal Law Code. Taking into account the gender-sensitive guidelines set out in the Southern Africa Development Community Model Law on HIV/AIDS, it was never intended to criminalise HIV transmission through breast-feeding. Had this been the intention of the legislature, certain obvious exceptions would, in my view, have been expressly spelt out. One cannot fail to see that the legislature could not have intended to criminalise a mother who had no information regarding the possibility of breast-feeding as a form of mother-to-child-transmission. Besides, the World Health Organization ("WHO") is on record as promoting breast-feeding generally, and therefore in my view, with the advent of this pandemic there would have been need for this piece of legislation to expressly spell out the circumstances in which criminal liability would attach to a breast-feeding mother. Consequently, by reference to consent and marriage and excluding the marital status in the equation, the statute must be interpreted as restricting the mischief to sexual transmission only.

Clearly, the State was required to prove that the appellant was aware that breast-feeding would result in transmission of HIV. It would appear that the prosecution assumed, as did the Court, that the appellant was aware that breast-feeding would expose the baby to HIV. There was no basis for this assumption on the record. There is no indication as to the level of appellant's education on health matters let alone, whether or how sufficiently schooled in this area of medicine, the appellant was. In my view, it was necessary for the State to tender that proof of her knowledge before such a finding was made. The court, *a quo* in its judgment states:

> "The offence of deliberate transmission of HIV is committed by an accused if he/she knows that he/she is infected with HIV and intentionally does anything or permits the doing of anything **which he/she knows will infect the complainant** or does anything which he/she realises a real risk (sic) of infecting the complainant. The act concerned can be unprotected sexual intercourse, stabbing someone with a contaminated needle or breast-feeding." (My own emphasis).

There is no indication on the record, in respect of whether the appellant knew that breast-feeding does transmit HIV. The evidence tendered in trial did not establish that the appellant knew how HIV is transmitted. On the contrary, in an affidavit produced during the State case the suggestion is made that medical evidence, presumably though evidenced-based studies, that only 15% of breast-feeding babies contract HIV from their mothers. It says the longer the child breast-feeds the higher the chances of the baby contracting HIV. What the statement suggests is nowhere near the facts disclosed by this case, which is a single act of

breast-feeding. There is no way of knowing the quantity of breast milk required in order for there to exist a real risk or possibility of transmission to the baby, let alone whether the appellant was aware of the information on HIV transmission through breast-feeding. As pointed out above, viral load, the adherence to an anti-retroviral regimen, and others factors are now known to be relevant to issues of transmission. To import non-sexual contact into s 79 in my view, appears to me to further confuse an already vague piece of drafting. In any event the general laws on assault and injury appear to me to appropriately deal with intentional exposure, if such was the intention of the drafter.

There is another aspect which requires comment. Section 79 does not appear to criminalise deliberate or negligent exposure as does other legislation in which HIV/AIDS has been criminalised. It seems that the presumption is that the catch-all phrase "realising the real risk or possibility of" was engaged to cater for foreseeability but it does not address issue of exposure. In light of recent scientific and medical researches and outcomes, there is need to revisit the section with a view to developing proper guidelines for the prosecution under that section. There are several defences which should be recognised at law which the present section, in its form, does not appear to capture. For example, previously the available knowledge did not show that with proper adherence to anti-retroviral regimen, the viral load can be reduced to such levels as to be undetectable. In that event the current scientific knowledge confirms that there the risk of transmission, even through vaginal sexual intercourse, would be so greatly reduced as not to pose a health risk.

The only defence available at present is that the complainant consented to the act with full knowledge of the accused's status and the nature of HIV. Yet there is scientific evidence pointing to several defences in light of new knowledge and recent break-through in research. Clearly, the legislature was at war with the disease resulting in a law that is difficult of application. The defences available from latest research findings must be recognised at law. The "Swiss Statement" must be part of the defence as new knowledge and appreciation of the epidemic is available. The Crown Prosecution Service Guidelines point in a positive direction in the war against the epidemic.

In light of the above it is clear to me that the prosecution was ill-conceived as the legislature did not intend that breast-feeding by infected but ignorant women be criminalised. In any event there was no proof that the appellant fully appreciated that her conduct would result in HIV transmission. In the result she was entitled to an acquittal at her trial.

It was for these reasons that we allowed the appeal and ordered that her conviction in the court *a quo* be quashed and her sentence be set aside.

CHIWESHE JP agrees:…….

Muzondo & Chinhema, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners