

REPORTABLE (2)

(1) PITY MPOFU (2) SAMUKELISIWE MLILO
v
THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GOWORA JCC, HLATSHWAYO JCC,
PATEL JCC, GUVAVA JCC & MAVANGIRA AJCC
HARARE, FEBRUARY 18, 2015 & JUNE 15, 2016

T Mpofu, for the applicants

E Mavuto, for the respondent

ZIYAMBI JCC:

[1] This matter is brought by way of referral in terms of s 24 (2) of the former Constitution of Zimbabwe (“the former Constitution) which provides as follows:

“24 Enforcement of protective provisions

(1)...

(2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious”.

The questions referred for decision concern the constitutionality of s 79 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (“the Code”). The applicants claim that s 79 violates their right to protection of the law as well as their right not to be discriminated against in terms of ss 18 and 23, respectively, of the former Constitution.

THE BACKGROUND

[2] The first applicant is a 42 year old male. On 5 September, 2012, he was arrested and subsequently charged with contravening s 79 of the Code, briefly, “deliberate transmission of HIV/AIDS”. It was alleged that the applicant had deliberately infected his wife, Geziwe Ncube with HIV. On 27 September, 2012 the applicant appeared before the magistrate for a remand hearing and requested that the matter be referred to the Supreme Court (formerly the Court which determined constitutional matters) on the following grounds:

1. Section 79 of the Code with which he is charged is too wide, broad and vague so as to render the law uncertain thereby infringing his right to protection of the law as set out in s 18 of the Constitution.
2. Section 79 of the Code violates the applicant’s fundamental right guaranteed under s 23 of the Constitution, not to be discriminated against on any basis (including his HIV/AIDS status).

[3] The second applicant is a woman aged 34 years. She was customarily married to one Joseph Marozva during the period 2008 to 2010. It was alleged, and proved at her trial, that in 2009, she fell pregnant and had to undergo routine HIV testing. Although the result was positive, she did not disclose this fact to her husband but continued to have unprotected sexual intercourse with him until he stumbled upon her antenatal card which disclosed she was taking medication for HIV/AIDS. She was convicted of contravening s 79 of the Code and remanded for sentence. At the resumption of the trial on 9 July, 2012, an application was made, and granted on 10 July 2012, referring the matter to the Supreme Court on the two grounds set out in [2] above as well as the following additional grounds:

- (3) Whether or not the criminalization of consensual sexual conduct whereby the complainant voluntarily engaged in a sexual encounter with the accused amounts to a violation of the applicant’s right to protection of the law as enshrined in s 18 of the Constitution.

- (4) Whether or not the remand and prosecution of the accused on the criminal charge under s 79 of the Criminal Code are not, on the facts, a violation of the applicant's fundamental right to personal liberty and the protection of the law.

These additional grounds were, however, not pursued by Mr *Mpofu* who confined himself to the first two questions. Accordingly this judgment will deal with the two questions set out in [2] above.

THE LEGISLATIVE PROVISIONS

[4] Section 79 of the Code:

“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”.

Section 15 of the Code:

“15 Realisation of real risk or possibility

(1) Where realisation of a real risk or possibility is an element of any crime, the test is subjective and consists of the following two components:

(a) a component of awareness, that is, whether or not the person whose conduct is in issue realised that there was a risk or possibility, other than a remote risk or possibility, that;

- (i) his or her conduct might give rise to the relevant consequence; or
 - (ii) the relevant fact or circumstance existed when he or she engaged in the conduct; and
- (b) a component of recklessness, that is, whether, despite realising the risk or possibility referred to in paragraph
- (a) the person whose conduct is in issue continued to engage in that conduct.
- (2) If a crime of which the realisation of a real risk or possibility is an element is so defined in this Code or any other enactment that;
- (a) the words describing the component of awareness are omitted, the component of awareness shall be implicit in the word “recklessly” or any derivatives of that word; or,
 - (b) the words describing the component of recklessness are omitted, the component of recklessness shall be implicit in the expression “realise a real risk or possibility” or any derivatives of that expression.
- (3) Where, in a prosecution of a crime of which the realisation of a real risk or possibility is an element, the component of awareness is proved, the component of recklessness shall be inferred from the fact that:
- (a) the relevant consequence actually ensued from the conduct of the accused; or
 - (b) the relevant fact or circumstance actually existed when the accused engaged in the conduct; as the case may be.”

Section 18 of the former Constitution:

“18 Provisions to secure protection of law

- (1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law

Section 23 of the former Constitution:

“23 Protection from discrimination on the grounds of race, etc.

- (1) Subject to the provisions of this section-
 - (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
 - (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

- (2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability are prejudiced-
- (a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or
- (b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description; and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability of the persons concerned.....” (My underlining)

THE QUESTIONS TO BE DECIDED

[5] The questions referred for determination, namely:-

1. Whether section 79 of the Code with which the applicants are charged is too wide, broad and vague so as to render the law uncertain thereby infringing on their right to protection of the law as set out in section 18 of the former Constitution; and
2. Whether section 79 of the criminal Code violates the fundamental right of the applicants, guaranteed under section 23 of the Constitution, not to be discriminated against.

are hereunder dealt with in turn.

1. *Infringement of the right to protection of the law s 18*

[6] The main attack launched by Mr *Mpofu* on s 79 of the Code is that the section is framed in terms so wide as to be violative of the protection of the law guarantee. He submitted that the offence created by the legislature in s 79 was conjectural and vague in that a person who realizes that there is a risk or possibility that he or she is infected with the HIV virus must be convicted under that provision. That would include any person who has sexual intercourse,

whether protected or otherwise, and any person who has been injected with a needle or has subjected himself to blood transfusion.

He submitted further that the offence created was ‘dangerously wide’ in that it speaks of a real risk or possibility of infecting another. Scientific research, it was submitted, had shown that condoms are not 100% effective in protecting against the risk of infection. Thus having sexual intercourse with a condom is, strictly speaking, irrelevant for the purposes of this provision. In addition, there is great danger of false incrimination as it is currently not possible in this country to determine who it is that was infected first.

[7] The counter argument advanced by the respondent was that the offence created by s 79 comprises both the common law concepts of actual intention (*dolus directus*) and legal intention (*dolus eventualis*). The offence was committed by a person who knowing or believing that he is infected with the HIV virus intentionally does or permits the doing of an act which he knows will infect another or which he realizes involves a real risk of infecting another. It was submitted that s 79 was clear and straight forward and the use of the words ‘real risk or possibility’ did not open the section to an unacceptably wide interpretation as that phrase is defined in s 15.

Section 79, it was submitted, did not criminalise sexual intercourse by a person infected with HIV but was aimed at the conduct of persons who, knowing they are infected with the HIV virus, deliberately or recklessly spread the virus to innocent partners. The section provides for a defence to an accused person that the sexual partner was, at the time of his participation in the act of intercourse, aware of his HIV status and the possibility of being infected therewith. It was submitted that the applicants’ right to protection of the law as enshrined in s18 of the former Constitution had not been infringed.

[8] The right to protection of the law entails that the law be expressed in clear and precise terms to enable individuals to conform their conduct to its dictates. A law may not be so widely expressed that its boundaries are a matter of conjecture nor may it be so vague that the people affected by it must guess at its meaning. If it does it will fail to meet the test of validity. A subject must be able to foresee to a reasonable degree the consequences which his chosen course of conduct might entail. As it was put in *The Sunday Times v The United Kingdom*¹:-

“... a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.”

[9] The right to protection of the law also includes the right not to be prosecuted under a law that is unconstitutional. Consequently, it is always open to an accused person to challenge the constitutionality of legislation under which he is charged, the onus being on him to prove the unconstitutionality².

[10] It might be mentioned here that constitutional rights and freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic values.³ Thus a law may impose certain limitations on the enjoyment of individual rights for the benefit of the public subject to the overriding consideration that such a law may not be inconsistent with the constitution.⁴

¹ (1979-80) 2 EHRR 245 at 271 (para 49)

² *Zimbabwe Township Developers v Lous Shoes* 1983 (2) ZLR 376 (S) at 382-383A)

³ Currie & De Waal 5th Edition at p 163

⁴ Section 3 former Constitution of Zimbabwe

[11] The thrust of Mr *Mpofu*'s attack on the constitutionality of s 79 of the Code is that it is expressed in terms too broad and imprecise to provide guidelines for individual conduct. He took issue in particular with s 79 (1) (b) which penalises a constructive intent to commit the offence, arguing that at most only an actual intent ought to be required. I cannot agree. As the respondent submitted, the offence created in s 79 embraces the common law concepts of actual (*dolus directus*) and constructive (*dolus eventualis*) intent. Both the offender who has an actual intent to infect another and the one who is reckless as to whether or not his actions will result in the infection of another are caught by s 79. The section is specifically directed at these two categories of persons and these only. The definition in s 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'. S79 is in my view formulated in sufficiently clear terms to enable a subject to foresee the consequences of his actions.

[12] It is to be borne in mind that one is here concerned with a person who is aware that he (and the word 'he' is meant to include 'she') is infected with the HIV/AIDS virus or has reason to believe he might be so infected. Public policy would, in my judgment, require of such a person that he make full disclosure to his intended partner in order to afford that partner the opportunity to make an informed decision. The fears expressed by Mr *Mpofu* in regard to the use of ineffective condoms and blood transfusions can be allayed by full disclosure of such fears to the intended partner. In my view the section, framed as it is, affords the protection of the law not only to the accused persons but to all members of the public - to accused persons who can avail themselves of the defence afforded to them in s 79 as well as to members of the public who are entitled to be protected against the wanton and reckless conduct of persons who fall foul of the provisions of the section.

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. As I perceive it, the applicants' objection to the disclosure of their status springs from a desire to safeguard their privacy. That desire must, however, be weighed against the intended partner's rights prominent among which is the right to life.

[13] I take the view that s 79 is cast in terms sufficiently precise and adequate to provide guidance for individual conduct. Taking the two examples given by Mr *Mpofu*, of the 'innocent people': 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 s 79. The elements of subjective awareness and recklessness would be absent. Similarly, the person who has reason to believe that he might be HIV positive, would not be liable to be convicted under s 79 if he disclosed this belief to his partner so that the latter could make an informed decision. The section in my view poses no danger of conviction to these persons.

[14] I conclude that the right of the applicants, enshrined in s18 of the former Constitution, to protection of the law has not been infringed by s 79 of the Code.

2. Whether section 79 of the criminal Code violates the applicant's fundamental right guaranteed under section 23 of the Constitution

[15] At the outset it must be noted that the right afforded by s 23 is not a right not to be discriminated against on **any basis**. The underlined portions of subs (2) of s 23⁵ show that

⁵ Supra at para [4]

discrimination on grounds of HIV/ AIDS or other status is not listed therein as a constitutionally enshrined right. In that connection the following observations by MCNALLY JA in *Kombayi v Registrar General* 2001 (2) ZLR 356 (S)⁶ are pertinent:

“There are two reasons why this argument is fallacious. The first is that s23 of the constitution protects the individual from discrimination on a number of grounds, but lack of education is not one of them. The types of discrimination that are prohibited are discrimination by “race, tribe, place of origin, political opinions, colour, creed or gender ...”

The argument advanced on behalf of the applicants is that s 79 of the Code infringes their right protected by s 23 (1) not to be discriminated against in that it discriminates against those persons who are HIV positive by imposing on them restrictions which other members of the community are not subjected to and exerts on them a higher standard of social interaction not exerted on other citizens. The section, so the submission went, negates the ability to conduct normal human relations in that a person infected with the HIV virus or one exposed to it would have to educate every potential sexual partner on the ‘biology of HIV and ensure that they have fully understood and appreciated the nature of HIV before indulging’. It was submitted that the defence of disclosure to the intended partner, afforded to persons charged under s 79 was ‘too burdensome’ for any human being. It was accordingly submitted that the limitations imposed on the applicants’ constitutional rights by s 79 of the Code are not reasonably justified in a democratic society.

[16] The fallacy of this argument lies in the fact that as stated above the Constitution does not deal with the right claimed by the applicants. Not all discrimination is proscribed by s 23. What is proscribed is discrimination on the grounds underlined above. These are: “race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability”. Discrimination on the basis of HIV status is not prohibited by s 23. Thus while s 79 targets

⁶ See also *S v Banana* 2000 (1)ZLR 607 (S) at 635

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 s 23. I must accordingly disagree with the submission on behalf of the respondent that s 79 of the Code *infringes the applicants' right not to be discriminated against in terms of s 23 (1) of the former Constitution*. As was observed in the *Kombayi* and *Banana* cases (*supra*), s 23 (2) limits the type of discrimination which is proscribed by the Constitution. This emerges clearly when the section is read as a whole.

[17] In terms of s23 (5), where a law discriminates on the grounds of sex or gender, the challenger bears the burden of showing that “that law or, as the case may be, the thing done under the authority thereof is not reasonably justifiable in a democratic society”. Thus in the *Banana* case, GUBBAY CJ remarked as follows:-

“The burden of proof is on the challenger (*ZIMBABWE TOWNSHIP DEVELOPERS v LOUS SHOES* 1983 (2) ZLR 376 (S) at 382-383A) to prove that the impugned enactment goes further than is reasonably justified in a democratic society, and not upon the state to show that it does...

In effect the court will consider three criteria in determining whether or not the limitation upon the protection is permissible in the sense of not being shown to be arbitrary or excessive. These criteria were identified in *Nyambirai v National Social Security Authority and Anor* 1995 (2) ZLR 1 (S) at 13 D-F. [They] are whether:

1. The legislative objective which the limitation is designed to promote is sufficiently important to justify overriding the fundamental right concerned;
2. The measures designed or framed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations;
3. The means used to impair the right or freedom are no more than is necessary to accomplish the objective.”

Both parties made submissions on this issue the applicants alleging that s79 being such a law was not reasonably justifiable in a democratic society while the respondents submitted that it was and the criteria set out above had been met by s79.

The nature of the discrimination alleged by the applicants renders s23 (5) irrelevant to the determination of the issue at hand. However, even if a consideration of the above criteria was necessary, it is my view that, as will appear hereunder, the applicants have failed to discharge the onus on them to show that the said criteria have not been satisfied.

THE LEGISLATIVE OBJECTIVE

[18] As correctly submitted by the respondent the objective of the s 79 is to halt or prevent the spread of HIV/AIDS. In view of the fatal nature of the disease, the objective is not only important but laudable. I am not persuaded that the objective of preventing the spread of the disease has been shown not to be sufficiently important to warrant the overriding of the applicants' right (or perceived right) to non-discrimination.

THE MEASURES DESIGNED TO MEET THE OBJECTIVE

[19] Because of the grave danger to life presented by infection with the HIV virus, s 79 providing as it does for the prosecution of persons accused of spreading the disease by deliberately or recklessly infecting others with it, is rationally connected to, and calculated to achieve, the stated objective. Prosecution in terms of s 79 would not be arbitrary or based on irrational considerations. The purpose of a prosecution is to investigate the guilt of a person accused of criminal conduct and to assess the evidence in a rational manner. A court of law is well equipped to do so.

THE MEANS USED TO IMPAIR THE RIGHT

[20] It was submitted on behalf of the applicants that the sentence imposed by the legislature is draconian. The respondents on the other hand submitted that the wording of the statutory provision allows for a sentence of up to 20 years to be imposed. It is clear that the graver the case the more severe the sentence which will be justified, and that each case will be determined on its particular merits. As pointed out above, an infection with the HIV virus could be fatal for the victim. In effect, in some if not all cases, a sentence of death will have been imposed

on the partner by the actions of the accused person. In these circumstances a court might well in its discretion consider the maximum sentence to be appropriate.

[21] Accordingly, I am of the view that the applicants have failed to discharge the onus on them to establish that s 79 of the Code is unconstitutional.

[22] The applications are dismissed.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

GWAUNZA JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC:

I agree

MAVANGIRA AJCC:

I agree

Zimbabwe Lawyers for Human Rights, applicants' legal practitioners

National Prosecuting Authority, respondent's legal practitioners