

UNIVERSITY OF KWAZULU-NATAL

SCHOOL OF LAW, HOWARD COLLEGE

THE USE OF THE CRIMINAL LAW IN RESPONDING TO THE EXPOSURE OR
TRANSMISSION OF HIV TO OTHERS: A COMPARATIVE ANALYSIS OF THE LAWS
IN BOTSWANA, SOUTH AFRICA AND ZIMBABWE

BY

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DECLARATION

(ii)

I, Nesira Singh, hereby declare that this dissertation is my own original work unless specifically indicated otherwise in this text, and has not, to my knowledge, been substituted to any other university in full or partial fulfilment of the requirement of any other degree or qualification. All the information taken from the work of others has been acknowledged.

Signed at Umzinto on this 3rd day of March 2021.

A solid black rectangular box used to redact the signature of the author.

N. Singh

DEDICATION

(iii)

I dedicate this dissertation to my mother, Indira Singh, without whose love and encouragement, I would not have attempted this dissertation. I also dedicate this dissertation to my supervisor, Professor Ann Strode, without whose continued support and guidance, I would not have completed this dissertation.

ACRONYMS

(iv)

AIDS	Acquired Immune Deficiency Syndrome
ARVs	Antiretrovirals
HIV	Human Immunodeficiency Virus
OHCHR	Office of the High Commissioner for Human Rights
UNO	United Nations Organisation
UNAIDS	Joint United Nations Programme on HIV/AIDS
RSA	Republic of South Africa
ZLHR	Zimbabwean Lawyers for Human Rights

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Chapter 1: Introduction

1. Background

In 2020, there were approximately 38 million people globally living with the Human Immunodeficiency Virus (HIV).¹ Eastern and Southern Africa bears the brunt of the global epidemic, with the highest number of people living with HIV (20.7 million).² This region also has the highest number of Acquired Immunodeficiency Syndrome (AIDS) related deaths (300 000) and new HIV infections at 730 000 in 2019 alone.³ Although there are now 15 million people accessing treatment, with 95% of pregnant women accessing anti-retroviral (ARVs) to prevent mother-to-child transmission and 72% of people living with HIV are accessing ARVs, HIV/AIDS continues to be a major health issue for the peoples of Botswana, South Africa and Zimbabwe.⁴

Early governmental responses to HIV were, in many instances, a knee-jerk reaction of coerciveness and discrimination.⁵ Fueled in part by the massive outcry against the disease and the need to protect the HIV negative persons, ‘policymakers and politicians have been tempted to punish those... with, and at risk of, HIV...(T)hey have tried to find in punitive approaches a quick solution to the problem of HIV. One way was to use criminal laws against people living with HIV’.⁶ ‘Since medical science lacks the technology to cure or stop the spread of HIV, many (were) demanding that the law be employed for protection.’⁷

Countries dealt with the ensuing challenges either by amendments to their existing legislations or by HIV specific legislation to address growing needs and emerging challenges.

¹ UNAIDS factsheet as accessed at <https://www.unaids.org/en/resources/fact-sheet> on 23 February 2021.

² Note 1 above.

³ Note 1 above.

⁴ Note 1 above.

⁵ A. Strode and B. Grant ‘A critical review of the extent to which HIV/AIDS and human rights international guidelines have been implemented in the Southern African Development Community’ 2007 Vol 28, 1 *Obiter* pp. 70-83(14).

⁶ E. Cameron ‘Why HIV criminalization is bad policy and why I’m proud that advocacy against it is being led by people living with HIV’ Foreword to ‘Advancing HIV Justice 2: Building momentum in global advocacy against HIV criminalization’ (2016) HIV Justice Network as accessed at <https://www.hivjustice.net/news/justice-edwin-cameron-why-hiv-criminalisation-is-bad-policy-and-why-im-proud-that-advocacy-against-it-is-being-led-by-people-living-with-hiv/twork> on 22/5/2019.

⁷ C. Levine: ‘Public health and civil liberties’ (1986) Hastings Center Report 2.

Hence the governments of Botswana, South Africa and Zimbabwe have developed legislation to respond to these challenges. While Botswana has passed the Public Health Act with s116 concerning the transmission of HIV,⁸ it has also increased penalties for those convicted of rape while exposing or infecting another with HIV⁹. South Africa decided in 2001, not to enact new laws that would criminalize exposure to HIV/AIDS.¹⁰ South Africa does, however, have compulsory testing for accused persons facing sexual offences.¹¹ Zimbabwe promulgated s79 of the Zimbabwean Criminal Law (Codification and Reform) Act 23 of 2004 criminalizing deliberate transmission of HIV.

More than a decade after these countries took their differing legislative responses to the criminalization of HIV exposure, there is value in conducting a comparison between their unique approaches. The effects of each country's response would be considered especially the critiques leveled by civil society, the cases that have emerged and the need for lobbying for change in both Botswana and Zimbabwe.

The prosecution of individuals who expose HIV to others is in practice, often very difficult when considering the various elements of a crime, that have to be proved beyond a reasonable doubt. In addition, an individual's actual knowledge of HIV, the intention of a particular individual and the many gains in the field of science make for a difficult, if not impossible, prosecution.¹² HIV is not the death sentence it used to be and this fact has important ramifications for the application of the criminal law as evident in the South African Law Reform Commission's report.¹³ Just because someone is HIV positive does not, from a clinical perspective, mean that they are infectious. Factual transmission is difficult to prove as well as the required criminal law intention, among other concerns as contained in the report of the Law Commission.¹⁴

The United Nations High Commission for Human Rights [OHCHR] and the Joint United Nations Programme on HIV/AIDS [UNAIDS] held international conferences and in 1996, the

⁸ S116 Public Health Act 2013.

⁹ S147 The Penal Code (Amendment) Act 5 of 1998.

¹⁰ SA Law Commission Project 85 Fifth Interim Report on Aspect of the Law Relating To AIDS available at https://www.justice.gov.za/salrc/reports/r_prj85_hivschools_1998aug.pdf on 11 June 2019.

¹¹ Chapter 5 The Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007.

¹² W. Van Kouwen and K. Bruinenberg, '*Supreme Court of the Netherlands, Criminal Division (Hoge Raad der Nederlanden, Strafkamer)*' Journal of Criminal Law, Vathek Publishing Ltd available at <http://www.journals.sagepub.com/doi/abs/10.1350/jcla.2006.70.6.485>, accessed on 14 March 2019.

¹³ South African Law Reform Commission HIV/AIDS: Criminalization (Discussion Paper 0068/2008, Project 85) Pretoria: SALRC, (2008) available at http://www.justice.gov.za/salrc/reports/r_prj85_harmb_2001apr.pdf accessed on 14 March 2019.

¹⁴ Note 13 above.

international community developed the International AIDS Guidelines on HIV and AIDS [the International Guidelines] as a guidance for governments to best promote, protect and preserve human rights while tackling the HIV crisis. The International Guidelines call for the termination of overly broad criminalization of HIV exposure [and transmission].¹⁵ They denounce the criminalization of HIV exposure as an effective means to address HIV.¹⁶ The International Guidelines contain the guiding principles on the use of the criminal law in respect of HIV exposure.¹⁷

There are contrasting and conflicting messages if HIV exposure is criminalized. On the one hand, the public health messages encourage testing, voluntary counseling and treatment while criminalization of such transmission or exposure will thwart the progress made in this regard. These contrasting messages only serve as a stumbling block in the effort to tackle the HIV issue, with people being afraid to access treatment, lest it lead to prosecution.¹⁸

2. Purpose and objectives of dissertation

This purpose of this paper is to compare the response of Botswana, South Africa and Zimbabwe in respect of exposure and transmission to HIV/AIDS in relation to the UNAIDS International Guidelines and among each other and examine the cases that have since emerged from their courts. The primary objectives of research work entails the following structure:

- 2.1 To review the legislation dealing with criminalization of HIV exposure and transmission;
- 2.2 To analyze cases and how the Courts dealt with applying such criminalization clauses;
- 2.3 To compare the approaches of each country to each other and the UNAIDS International Guidelines and consider the need to lobby for change.

3. Research methodology

¹⁵ International Guidelines on HIV/AIDS and Human Rights 2006 UNHCHR and UNAIDS as accessed at https://data.unaids.org/publications/irc-pub02/jc905-guideline6_en.pdf on 22 May 2019 Guideline 4.

¹⁶ Note 15 above.

¹⁷ Note 16 above.

¹⁸ *Mpofu P. & Mlilo S. v The State*, Constitutional Court of Zimbabwe CCZ 08/13 available at <https://juriafrigue.com/eng/tags/pitty-mpofu/> accessed on 20 March 2019.

The method of research employed in this research paper is largely analytical and library-based material related to the criminalization of the exposure to HIV. A comparative analysis of the law in Botswana, South Africa and Zimbabwe is undertaken.

4. Research Questions and rationale

The international community does not use criminal law to respond to exposure of HIV. Thus there is merit in conducting research to ascertain the extent to which Botswana, South Africa and Zimbabwe are following the international norms. Are they in or out of step with the international community? This is particularly important as we are globally, the area most affected by HIV and AIDS.

Based on this rationale this paper aims at answering the following research questions:

- 4.1. What is the international human rights position on the use of criminal law to respond to HIV exposure?
- 4.2. What is Botswana's, South Africa's and Zimbabwe's response to the issue of criminalization of HIV exposure? How does it measure against the UN Guidelines?
- 4.3. To what extent do the three countries meet the norm and what are the lessons learnt from such analysis?
- 4.4. What law reform is needed to bring these countries in line with the UN Guidelines?

5. Chapter overview

This paper will contain the following chapters and concentrate on the issues listed below.

Chapter 1: introduction, purpose, methodology, rationale, research questions and limitation clause.

Chapter 2: Background, Why is the criminalization of HIV transmission, 'bad law'? What is the position of the experts on HIV transmission? The United Nations Guidelines, why was it drafted, what does it contain, what does it hope to achieve?

Chapter 3: What is Botswana's response to the deliberate or negligent exposure of others to HIV?

Chapter 4: What is South Africa's response to the deliberate or negligent exposure of others to HIV?

Chapter 5: What is Zimbabwe's response to the deliberate or negligent exposure of others to HIV?

Chapter 6: Analysis of these different approaches, findings and need for law reform.

Chapter 7: Conclusion:

6. *Limitations*

The limitations to this study are that other forms of deliberate or negligent exposure of HIV, affecting the following communities, will be excluded from this paper, due to the restriction of space: sex workers, men who have sex with men, migrant workers and prisoners.

Chapter 2: What is the International Human Rights Position on the use of Criminal Law to Respond to HIV Exposure and Transmission?

2.1 Background

Ever since the onset of the HIV epidemic, governments have been given the mammoth task to manage the response to the virus and to protect their citizens. The use of the criminal law as part of the response has always been a sensitive matter, as it concerns ‘innocent people’ on the one hand, being infected unwittingly by the virus and on the other hand, the encroachment of the human rights of HIV positive individuals who were once ‘innocently’ infected by others.

The issue of criminalization of HIV and whether the willful or negligent transmission of HIV should be an offence has been a contentious issue. Some of the early responses to the HIV epidemic included the use of the criminal law to prosecute people who infected others with HIV. However, human rights activists objected to the use of the criminal law in responses to HIV. Resultantly, they have advocated for international norms which set out when the use of the criminal law would be consistent with human rights. The most important of these were ‘the International Guidelines on HIV/AIDS’ and Human Rights [hereinafter ‘International Guidelines’] issued in 1996 in Geneva, at the Second International Consultation on HIV/AIDS and Human Rights.¹⁹ Guideline 4 states as follows:

‘Most of these [criminal] laws are appallingly broad. And many of the prosecutions under them have been wickedly unjust. Sometimes scientific evidence about how HIV is transmitted, and how low the risk of transmitting the virus is, is ignored. And critical criminal legal and human rights principles are disregarded. These are enshrined in the International Guidelines on HIV and Human Rights.’²⁰

‘The International Guidelines designate’ plans of action for governments in sectors of law, administrative policy and practice that will protect human rights, provide for its dissemination and international human rights obligations for governments to follow in their response to the HIV epidemic.²¹ ‘These International Guidelines’ have assisted governments in their national strategy development and implementation for tackling HIV within the human rights environment.

¹⁹ Note 15 above.

²⁰ Note 6 above.

²¹ Note 15 above Intro p9.

At the ‘Second International Consultation on HIV/AIDS’, some summations were reached, among them being: A rights-based response to the virus will include ‘establishing appropriate governmental institutional responsibilities, implementing law reform and support services and promoting a supportive environment for groups vulnerable to HIV and for those living with HIV’.²²

States were encouraged to consider particularly vulnerable populations, as these are often marginalized groups who are further targeted by the criminal law will not seek medical help. In the context of that particular State’s unique political, cultural and religious backgrounds as per Guideline 4:

‘States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups’.²³

In amplification of Guideline 4 above, neither criminal nor public health laws must contain explicit crimes against the deliberate and intentional transmission of HIV. Rather, states are encouraged to use existing criminal laws to such cases of deliberate and intentional transmission of HIV. Elements of the offence, especially with regard to foreseeability, intent, causality and consent must be established legally to give rise to a verdict of guilty and/or a more-tougher sentence.

2.2 Why is the criminalization of the transmission of HIV/AIDs ‘bad law’?

Notwithstanding that the criminal law is an effective tool in controlling and combatting certain behavior, it is, in the context of HIVAIDS transmission, mostly ineffectual and unhelpful for the following reasons:

(i) Criminalization of HIV transmission is not an effective means to reduce the spread of HIV.

According to UNAIDS, ‘applying criminal law to HIV risk behavior has not been shown to incapacitate, rehabilitate, or deter offenders.’²⁴ Prosecuting and the

²² Note 15 above, p16, point (c).

²³ Note 15 above, p29.

²⁴ R. Jurgens, J. Cohen, E. Cameron, S. Burris, M. Clayton, R.Elliott, R. Pearhouse, A. Gathumbi and D. Cupido ‘*Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*’. UNAIDS. Geneva,

resultant conviction of an accused person, will not stop HIV transmission. In fact, transmission can continue in prisons, where there are increased risk behaviors, less or no access to condoms, lack of access to clean injecting equipment and increased sexual violence. Further, there is no compelling evidence to show that having such criminal sanctions will “rehabilitate” a person such that they avoid future conduct that carries the risk of HIV transmission.’²⁵ Instead, supportive counselling will more likely ‘address underlying reasons for engaging in activities that risk HIV transmission.’²⁶ There is also no evidence to suggest that the threat of prosecution will deter ‘conduct that poses a risk of transmission.’²⁷ It is important to note here that ‘the greatest risk of HIV transmission (the first months following infection) most people do not yet know that they are HIV-positive.’²⁸ Hence the question arises: how could a criminal sanction prevent transmission of HIV when the human subject labors under ignorance of having the very virus that she has been transmitting?

(ii) *Applying a criminal law sanction to HIV transmission fuels stigma and discrimination*

Given the deep seated prejudice that people with HIV/AIDS have suffered since the start of the epidemic, criminalizing the transmission of the virus will backtrack on the progress that many communities have made in changing mindsets, getting people to access treatment and counselling and addressing HIV issues within a human-rights framework. In particular this has occurred as those infected are from marginalized groups. Instead, the message is that HIV is a crime and that those who are HIV positive should be treated with contempt and removed from society.

(iii) *It is unlikely to ‘reduce women’s vulnerability to HIV*

2002. Accessed at www.unaids.org as quoted (2009) *Ten reasons to oppose the criminalization of HIV exposure or transmission*, Reproductive Health Matters, 17:34, 163-172, DOI: 10.1016/S0968-8080(09)34462-6

²⁵ R. Jurgens, J. Cohen, E. Cameron, S. Burris, M. Clayton, R. Elliott, R. Pearhouse, A. Gathumbi and D. Cupido ‘Summary of main issues and conclusions. *International Consultation on the Criminalization of HIV Transmission*’, UNAIDS and UNDP 31 October-2 November 2007. Geneva, 2008. As quoted in (2009) ‘*Ten reasons to oppose the criminalization of HIV exposure or transmission*’, Reproductive Health Matters, 17:34, 163-172, DOI: 10.1016/S0968-8080(09)34462-6’.

²⁶ R. Jurgens, J. Cohen, E. Cameron, S. Burris, M. Clayton, R. Elliott, R. Pearhouse, A. Gathumbi and D. Cupido (2009) ‘*Ten reasons to oppose the criminalization of HIV exposure or transmission*’, Reproductive Health Matters, p165.

²⁷ Note 26 above.

²⁸ Note 26 above.

In fact, it may harm women rather than assist them.’²⁹ This can be mostly attributed to the fact that women, more than men, access healthcare, especially during pre-natal care and are consequently more likely to be aware of their positive status before their partners. Forced disclosures would consequently risk ‘violence, eviction, disinheritance, loss of their children’, they are ‘more likely to be blamed for HIV infection’ and could possibly be ‘prosecuted for mother to child transmission.’³⁰ Far from protecting women, if anything, HIV criminalization can serve to worsen gender inequalities.

- a. In rare cases where people intentionally pass on HIV, intending to spread the virus for their own malevolent reasons, the existing criminal laws protecting the bodily integrity of the person can be used to prosecute such individuals. Crimes against injury [*iniuria*] against another’s bodily integrity [*corpus*], which are available in all legal systems, can be invoked to prosecute such HIV transmission. This is a better way of handling the disease as opposed to creating specific legislation fueling the ‘HIV/AIDS exceptionalism response’ and saving governments money, the latter which could be better used in healthcare programs. Prosecutions of such transmission could not justifiably be applied to cases where the transmitter of the virus was unaware of their HIV positive status; did not grasp how the virus is transmitted; disclosed or had reason to believe that their partner was aware of their status, was afraid to disclose due to fear of ‘violence or other serious negative consequences’ practiced safe sex measures or had a prior agreement on ‘a level of mutually acceptable risk with the other person.’³¹
- b. Criminal sanctions for HIV transmission are often arbitrarily applied. Given the “wide discretion regarding which cases are prosecuted creates great scope for selective...prosecution”³² ‘...[C]riminal penalties are in fact futile and counterproductive. Often criminal sanctions are invoked in sensational circumstances...[against those] most marginalized and stigmatized in a society’³³. It may also lead to convictions without proper scientific proof of transmission. It is difficult to prove which party transmitted the virus. Even

²⁹ Note 26 above, p163.

³⁰ Note 26 above, p167.

³¹ Note 26 above, p164.

³² Note 26 above, p168.

³³ Note 26 above, p168.

sophisticated and expensive ‘phylogenetic testing...only indicates similarities in the viruses; it does not prove beyond reasonable doubt the source of the virus’³⁴. Such scientific evidence will not easily be grasped by the role-players of the criminal justice system, this falling outside their area of expertise. Also, phylogenetic testing is costly. An important consideration is the violation of privacy of medical records in a state’s efforts to procure a prosecution. This could have the effect of a reduction in the number of people accessing such services [medical or counselling].

- c. Criminalizing HIV ‘...transmission effectively shifts the total burden of HIV prevention onto people living with HIV rather than using proven methods to empower them to avoid the onward transmission of HIV.’³⁵ Governments ought to be focusing on capacitating HIV positive people as opposed to fashioning suspicion between them and their medical professionals or counselors.

In short, criminalizing HIV transmission is in effect a step back in time, nullifying the many gains made by civil society and governments since the start of the disease in addressing stigma, discrimination and encouraging voluntary counseling and testing. People would be unlikely to test for the virus lest that very result could be the information that leads to their eventual prosecution. Human rights activists internationally agree that ‘respect for human rights is an ally in the containment of AIDS and that discriminatory legal measures harm rather than help.’³⁶

(iv) *What is the best practice in legislation on HIV exposure and transmission: The Expert Consensus Statement?*

Prosecutions for transmission of HIV often are almost always not assisted by the latest scientific developments and medical evidence.³⁷ In 2018, twenty scientists from various countries met to develop an Expert Consensus Statement, addressing the use (or lack) of science and to safeguard that accurate science informs the application of law in all matters

³⁴ Note 26 above, p168.

³⁵ Note 26 above, p168.

³⁶ Note 26 above, p203.

³⁷ E. Cameron, E. Swanson: ‘Public health and human rights-the AIDS crisis in South Africa’ (1992), SAJHR 200 – 233.

concerning HIV. This statement has been ‘endorsed by additional scientists...the International AIDS Society, the International Association of Providers of AIDS Care and the Joint United Nations Programme on HIV/AIDS.’³⁸ The purpose of developing such an expert consensus statement is to help all the role-players in criminal cases concerning HIV transmission, be better informed about the most recent position on ‘individual HIV transmission dynamics...long term impact of chronic HIV infection...and the application of phylogenetic analysis as evidence’.³⁹ It further analyzes the possibility of HIV transmission among individuals at a particular point in time, in light of their particular physiological position, in terms of the act they engaged in, under particular circumstances in time.

The Consensus Statement also aimed to inform the legal audience about up to date scientific evidence and scientific concepts, in a manner comprehensible to them. It is not a public health document rather, it considers an individual’s risk of ‘the possibility of HIV transmission during a single, specific act was positioned along a continuum of risk, noting that the possibility of HIV transmission varies according to a range of intersecting factors including viral load, condom use and other risk reduction practices’.⁴⁰

Preeminent scientific and medical information was used along with assistance from UNAIDS legal experts. They based the statement on a ‘systemic review of randomized clinical trials, randomized clinical trials and comparative studies’.⁴¹

It was agreed that, contrary to public perception, ‘HIV is a relatively fragile virus that is transmitted through specific well-described routes’.⁴² In order for the virus to transmit, there has to be an adequate quantity of the virus in the particular bodily fluid; there must be a sufficient amount of the bodily fluid in question that must be in contact with the recipient ‘mucous membranes, damaged tissue or inflamed ulcers, but not intact skin’ and that ‘the virus must overcome the person’s innate immune defenses so that infection can be established and propagated’.⁴³ Hence most regular activities carry no risk of HIV transmission as all these circumstances are not present.

³⁸ R.Barre-Sinoussi, et al ‘*Expert consensus statement on the science of HIV in the context of criminal law*’ JIAS 2018 1- 12.

³⁹ Note 38 above, p2.

⁴⁰ Note 38 above, p2.

⁴¹ Note 38 above, p2.

⁴² Note 38 above p3.

⁴³ Note 38 above, p3.

Factors which influence the transmission of HIV must be taken into account when considering the use of the criminal law. It must be noted that the risk of HIV transmission differs from person to person, according to a series of 'intersecting factors. When multiple intersecting factors are present, their effect is minimized or amplified to various degrees.'⁴⁴The following are important factors that influence the transmission of HIV:

a. Correct condom usage.

As both 'latex and polyurethane condoms act as an impermeable physical barrier through which HIV cannot pass,'⁴⁵correct condom usage during the entire sex act, be it either a male or a female condom, stops the passing on of HIV.

b. Male circumcision

The expert consensus statement puts the likelihood of transmission of HIV from a HIV positive female to a HIV negative male to 'approximately 50%.'⁴⁶

c. Risk Reduction practices

Practices like 'withdrawal or strategic positioning decrease the possibility of HIV transmission'.⁴⁷

d. Low or undetectable viral load

The use of antiretroviral therapy stops the HIV virus from replicating and in turn decreased the viral load a person carries. Levels can drop to undetectable levels which can lesson HIV transmission. They have 'not identified any cases of sexual transmission from a person with an undetectable viral load'.⁴⁸ There has also been no transmission from 'people on antiretroviral therapy who had a stable viral load below 400 copies/MI', while some trials found 'no HIV transmission from people with a viral load below 200 copies/MI'⁴⁹ Even in cases where the HIV positive partner was

⁴⁴ Note 38 above, p3.

⁴⁵ Note 38 above, p3.

⁴⁶ Note 38 above, p5.

⁴⁷ Note 38 above, p5.

⁴⁸ Note 38 above, p4.

⁴⁹ Note 38 above, p4.

not on ARV treatment, but had a viral load that was low but detectable, there were no cases of transmission.⁵⁰ Some small groups of HIV infected people ‘referred to as long-term non-progressors’⁵¹ have a small viral load yet they do not take anti-retroviral treatment therapy as their immune systems can control the HIV in their system.

e. Pre-exposure Prophylaxis [PrEP]

PrEP is the use of antiretroviral treatment before HIV exposure. The expert consensus statement describes the use of PrEP as ‘more than 95% effective’⁵² against HIV acquisition.

f. Post-exposure Prophylaxis [PEP]

PEP is the use of antiretroviral treatment for a short-term after exposure to the HIV virus. According to the Consensus Statement, ‘up to 100% [success rate] among patients using newer treatments’ are reported with about ‘81% among patients using older-style treatments’.⁵³

5. *Establishing Proof of Transmission*

In all criminal prosecutions, certain elements of a crime have to be proved depending on the crime the person is charged with. In most jurisdictions, these elements include intention, causality and foreseeability. On the element of causation, actual transmission must be proved. The international human rights position is that there should be actual transmission but many laws allow the prosecution of just exposure.

Mere medical records cannot prove transmission between people. They can merely establish the ‘first positive test and the last negative test...[and since] viral loads and CD4 counts show considerable inter and intra-individual variation...[they] cannot be used to

⁵⁰ Note 38 above, p4.

⁵¹ Note 38 above, p4.

⁵² Note 38 above, p4.

⁵³ Note 38 above, p5.

determine exactly when someone acquired HIV'.⁵⁴ The question of who infected whom 'cannot be based on who tested HIV positive first'.⁵⁵

There must also be a recognition of the risks relating to various sexual acts:

a. Oral sex

HIV transmission, in cases where oral sex is performed on a person with the AIDS virus, even when such person's viral load is not low, and no other risk reduction practices are present, such possibility of transmission 'varies from none to negligible depending on the context... [Hence O]ral sex is promoted as a safer sex option for partners of different HIV status'.⁵⁶ In fact, the possibility of transmission is low, that 'scientists were unable to establish a statistically sound estimate'.⁵⁷

b. Vaginal-penile sex

The risk of HIV transmission in vaginal-penile intercourse, where the person that is HIV positive, does not have a low viral load nor where a condom is used, is, in terms of the expert consensus statement, 'low...and decreased further if no ejaculation occurs inside the HIV negative partner's body'.⁵⁸

c. Anal-penile intercourse

The risk of HIV transmission, in the absence of condom use and where the HIV positive partner's viral load is not low, irrespective of whether the receptive partner's gender, 'is low....the likelihood is lower where the HIV positive partner takes the receptive rather than the insertive role'.⁵⁹ Transmission is further reduced if the HIV positive insertive partner does not ejaculate in the receptive person.

The impact of treatment on transmitting the virus was discussed in detail. Another important consideration is that 'phylogenetic analysis alone cannot prove beyond a reasonable doubt that one person infected another although it can be used to exonerate a defendant'.⁶⁰

⁵⁴ Note 38 above, p7.

⁵⁵ Note 38 above, p7.

⁵⁶ Note 38 above, p5.

⁵⁷ Note 38 above, p5.

⁵⁸ Note 38 above, p5.

⁵⁹ Note 38 above, p5.

⁶⁰ Note 38 above, p7.

6. *Can it be proved that HIV infection will result in death from AIDS?*

In the early days of the virus, HIV meant a death sentence but since, there has been remarkable progress in treatment which in turn means an improved quality of life for people with the HIV virus. The use of ARVs ‘dramatically reduce HIV-associated disease progression.’⁶¹ Most people using ARVs will reach the level of having an undetectable viral load while having a healthy immune system. This will lead to them having a ‘radically increased life expectancy [such that cause of death in such peoples has shifted] from traditional AIDS-defining illnesses to non-HIV-related causes.’⁶²

Criminal law considers the likely injury triggered by a particular act and the probability of the offence itself. It is vital to consider the changes in lifestyle for anyone affected with the virus from what was once hopelessness to one of a long healthy life while laboring under what is a chronic ailment.

Recent media reports a cure for HIV. The Lancet HIV reports follow up testing of bloods and tissues of a patient called ‘the London Patient’, referring to ‘a man living with HIV who was diagnosed with Hodgkins disease and who consequently received a stem-cell transplant from a donor who carried a mutation in the CCR5 gene (CCR5 32/ 32). CCR5 is a key receptor for most strains of HIV and, therefore, T cells or microphages that do not express CCR5 are protected from infection with strains of HIV that use this receptor’.⁶³ For 30 months the ‘London Patient’ ‘plasma HIV RNA has remained undetectable’.⁶⁴ The patient has ceased ART. Experts examining the London Patient estimate that the ‘future viral rebound while off ART is negligible’.⁶⁵

A second patient, known as the ‘Berlin Patient’ also had ‘a stem-cell transplant from a CCR5 32/ 32 donor and been off ART for more than 13 years with an undetectable plasma HIV RNA...[with] no virus detected in almost all samples except for some blood samples and one sample from rectal tissue, in which traces of HIV were detected’.⁶⁶

⁶¹ Note 38 above, p7.

⁶² Note 38 above, p7.

⁶³ J.M. Zerbató, S.R. Lewin: ‘*A cure for HIV: How would we know?*’ The Lancet HIV March 10, 2020. Accessed online at [https://doi.org/10.1016.S2352-3018\(20\)30075-8](https://doi.org/10.1016.S2352-3018(20)30075-8) on 20 March 2020.

⁶⁴ Note 63 above.

⁶⁵ Note 63 above.

⁶⁶ Note 63 above.

In both the London and the Berlin patient there was a noted drop of antibodies to HIV proteins after the stem-cell transplant, ‘but the antibodies still persisted.’⁶⁷ The question now for the experts is, how exactly to define a cure for infection from the virus? Now, there is also a possibility, in the case of stem cell replacement with a particular donor, of not being on ARVs and having ‘no intact HIV virus,’⁶⁸ thus leading the life similar to that of being uninfected by the AIDS virus.

In light of these improved outcomes for HIV infected peoples, surely the criminal law position needs to be amended to consider such progressive scientific feats, especially since the effect of HIV infection may not be serious bodily harm nor death, but perhaps treatment by taking a single pill daily or a stem-cell replacement followed by a normal life? The criminal laws were mostly promulgated in the dark days of the disease when it was ‘incurable,...fatal and ...rampant’ and are out of sync with the reality of the consequences of infection.⁶⁹

7. *Conclusion*

Ever since the outbreak of the HIV epidemic, governments, via the use of punitive HIV criminalization laws, have been ‘tempted to punish those of us with, and at risk of, HIV. [T]hey have tried to find in punitive approaches a quick solution to the problem of HIV’.⁷⁰ In addition to these laws being ‘appallingly broad’ and ‘wickedly unjust’ they often fly in the face of the International Guidelines and the UNAIDS guidance note [above p1].⁷¹

Scientific advances have changed the day to day implications of living with the virus to what is ‘now a medically manageable disease’.⁷² The effect of criminal prosecution and conviction can be life-changing on a person. ‘HIV criminalization is **bad, bad** [my emphasis] policy’... with ‘no evidence that it works’.⁷³ In fact, the opposite can be expected, with it eroding on human rights and freedoms, it promoting stigma and

⁶⁷ Note 63 above.

⁶⁸ Note 63 above.

⁶⁹ Cameron E, Swanson E, ‘*Public Health and Human Rights- The AIDS Crisis in South Africa*’, 8 S. Afr.J. on Hum. Rts.200 (1992).

⁷⁰ Note 6 above.

⁷¹ Note above.

⁷² Note 6 above.

⁷³ Note 6 above.

discrimination and it undermining ‘scientific advances and proven public health strategies that open the path to vanquishing AIDS by 2030’.⁷⁴

⁷⁴ Note 6 above.

Chapter 3: Criminalization of the transmission of or exposure to HIV in Botswana

3.1. Background

The landlocked country of the Republic of Botswana is Africa's oldest democracy.⁷⁵ The country has a population just above two million people, yet it is severely affected by the HIV/AIDS epidemic in the world.⁷⁶ The United Nations factsheets for Botswana place the number of people living with HIV as being between 330 000 and 400 000.⁷⁷ Of this number, there are 14 000 children living with HIV and 200 000 women living with HIV.⁷⁸ The adult prevalence rate is 20.3 percent with new infections for both adults and children being as high as 8500⁷⁹ in 2018. There are approximately 65 000 children orphaned by HIV.⁸⁰ Of note, is that 81 percent of people, that is, 300 000 people living with HIV, have suppressed viral loads, that is, they are non-infectious HIV positive persons.⁸¹ This high percentage can be attributed to its successful ARV programs. What this in effect means is that this particular group are on treatment and are adhering to such treatment regimens. As they are virally suppressed, they are not infectious.⁸² Notably, this has impacted on the criminal law. Significantly, Botswana was the first country in Africa to provide antiretroviral (ARVs) to qualifying individuals.⁸³

In order to control the HIV crisis that it was facing, the Republic of Botswana had elected to use the criminal law as part of its response. Botswana has responded to the pandemic directly in the form of the Public Health Act of 2013 and in an indirect manner by introducing harsher penalties for persons convicted of rape, who subsequently tested positive for HIV.⁸⁴ These provisions also apply to the crime of defilement of a child under 16 years of age.⁸⁵ There is thus, compulsory testing of convicted rapists, that is, after the conviction stage.⁸⁶ There have also been some human rights challenges to some of the more punitive provisions.

⁷⁵ ^ *'BBC News | Africa | Election for Africa's oldest democracy'* news.bbc.co.uk. Archived from the original on 14 January 2019. Retrieved 13 January 2019.

⁷⁶ ^ Jump up to: ^ *'HIV and Aids in Botswana'*. Avert International Aids Charity. Archived from the original on 28 February 2009. Retrieved 21 June 2016.

⁷⁷ UN AIDS info Country factsheets for 2018 available at: <http://www.UN> accessed on 18 June 2019.

⁷⁸ Note 77 above.

⁷⁹ Note 77 above.

⁸⁰ Note 77 above. Here a child is referred to someone aged 0 to 17 years of age.

⁸¹ Note 77 above.

⁸² Note 38 above.

⁸³ Z. Kebonang, *'The challenges of HIV/AIDS Criminal Legislation in Botswana'* (2012) Botswana-UPenn Scholarly Publications9 available at http://repository.upenn.edu/botswana_schol/9 p190.

⁸⁴ Section 142 of the Penal Code of Republic of Botswana.

⁸⁵ Note 84 above.

⁸⁶ Note 84 above.

3.2. What is Botswana's legislative response to the transmission or exposure of others to HIV?

Botswana has increased its definition of rape making it gender neutral.⁸⁷ Same sex relations were decriminalized in 2019⁸⁸ after the high Court ruled that laws against homosexual relations were unconstitutional.⁸⁹ Botswana initially used existing laws on nuisance, exposure to dangerous things and offences endangering life and health, to control HIV transmission. Minimum sentences were initially used to deal with harsher penalties especially for HIV positive rapists. Later on, in 2013, specific legislation was passed to deal with HIV transmission.

Botswana has a Penal Code and in terms of s184, on the laws governing nuisance and offences against health and convenience, any person who 'unlawfully and negligently' spreads any 'disease dangerous to life, is guilty of an offence'.⁹⁰ This section has been used to prosecute people [see point 3.3 below for such examples]. Section 58 of the Penal Code⁹¹ which deals with exposure of infected persons and things, also criminalizes '...willful exposure of another to a communicable disease without taking proper precautions against spreading the disease.'⁹² These 'proper precautions' are not defined in the Act.⁹³ Section 230 of the Penal Code (Amendment Act)⁹⁴ governs offences endangering life and health. This section provides that '...any person who unlawfully causes grievous harm to another byany offensive weapon or any other means whatever is guilty of an offence...'⁹⁵ Here penalties range from 7 to 14 years imprisonment.⁹⁶

In 2013 Botswana passed the Public Health Act.⁹⁷ S116 concerns the transmission of HIV, with Subsection (1) obliging all persons who know that they are HIV positive, to '....take reasonable measures and precautions to prevent the transmission of HIV to others'.⁹⁸ The section goes on to oblige persons who are aware of being HIV positive or 'carrying HIV

⁸⁷ Section 141 of Penal Code (Amendment Act) 1998.

⁸⁸ BBC News as accessed at <https://www.bbc.com/news/world-africa-48594162> on 11 June 2019.

⁸⁹ Note 88 above.

⁹⁰ Section 184 of Penal Code (Amendment Act) 1998.

⁹¹ Section 58, Penal Code (Amendment Act) 2013.

⁹² Note 88 above.

⁹³ Note 88 above.

⁹⁴ Penal Code (Amendment Act) 2013.

⁹⁵ Section 230 of Penal Code.

⁹⁶ Note 95 above.

⁹⁷ Public Health Act (Chapter 63:01) of 2013.

⁹⁸ Public Health Act 2013, Section 116(1) (a).

antibodies' not to 'place another person at risk of becoming infected with HIV'.⁹⁹ The latter is reiterated in subsection (2).¹⁰⁰ No penalties are provided in the Act. The Act requires people who are aware of being HIV positive, to 'inform in advance any sexual contact'¹⁰¹ with the threat of psychological and medical assessment¹⁰² and restrictions on behavior, movement and isolation.¹⁰³ Section 16 prohibits the publication of any such proceeding [thus making research into such transgressions impossible]. No cases of people charged with contravention of the section has been found.

The Penal Code (Amendment) Act¹⁰⁴ was amended in 1998 to introduce minimum sentences. The main aim of section 142 seems to be 'for the law to punish those that intentionally infected others as a form of willful malfeasance.'¹⁰⁵ In other words it appears that the courts viewed the criminal law as having a legitimate purpose in helping the state address the spread of HIV. Although the aim of this section was to punish those who deliberately infect others, its effect was much broader causing persons who were unaware that they were HIV positive to fall within the ambit of the provision. In 2000, the Appeal Court ruled that only in cases where the perpetrator knew of his HIV positive status, at the time of the offence, is such enhanced sentencing for HIV positive perpetrators constitutional.¹⁰⁶

Section 147 which deals with the defilement of person under 16 years states, apply *mutatis mutandis* with respect to HIV testing. Penalties are similar with corporal punishment being optional for defilement.

Both rape and defilement crimes are similar: both sections call for the forced testing of convicted rapists. Although this is after the court has pronounced a guilty verdict, their forced testing still raises issues of violation of their 'rights to bodily and psychological integrity...[T]he HIV status of the accused [would be] public knowledge. The intrusion is therefore significant and far reaching'.¹⁰⁷

⁹⁹ Note 14 above, Section (1) (c).

¹⁰⁰ Public Health Act 2013, Section 116 Subsection (2).

¹⁰¹ Public Health Act 2013, Subsection 116 (1) (b).

¹⁰² Public Health Act 2013, Subsections 3, 4, 6, 7, 8.

¹⁰³ Public Health Act 2013, Subsections 9, 10, 11, 12, 13, 14.

¹⁰⁴ The Penal Code (Amendment) Act 5 of 1998.

¹⁰⁵ Note 83 above.

¹⁰⁶ *Lejony v The State* 2000 (2) BLR 145 (CA) at para F.

¹⁰⁷ K. Naidoo and K. Govender: 'Compulsory HIV Testing of alleged sexual offenders – a human rights violation'.

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3.3. *How are the courts applying these laws?*

In 2013, a Zimbabwean woman in Botswana, who was caught breastfeeding her neighbors' child, was charged with common nuisance, under section 184 of the Penal Code.¹⁰⁸ The charge was due to be raised to 'deliberately infecting another person with HIV' if the child tested positive.¹⁰⁹ Initial reports were negative.¹¹⁰

In 2007 a man was charged with transgression of s184 of the Penal Code.¹¹¹ He was later acquitted.¹¹² The complainant contended that she was asleep when she found the accused on top of her, having sexual intercourse with her.¹¹³ She later found ARV tablets belonging to the accused and thereafter she went to test for HIV.¹¹⁴ She tested negative.¹¹⁵ The State had failed to prove that a condom was not used even though it had accepted that there was sexual intercourse without consent.¹¹⁶ This implied that should the state have proved the use of a condom, a conviction would have followed.¹¹⁷

One of the earlier cases to test the constitutionality of the enhanced provisions¹¹⁸ was the *Lejony* matter.¹¹⁹ The facts of the *Lejony*¹²⁰ case were as follows: the accused and the victim had a five month relationship before the accused was arrested on a charge of unlawfully and carnally knowing a person under the age of 16 years.¹²¹ The victim was fifteen years and the accused, twenty-one years of age at the time of the offence.¹²² They had been living together without any objection by the parents of the victim, up until she had fallen pregnant.¹²³ All

¹⁰⁸ 'Botswana: Woman from Zimbabwe faces 'deliberate HIV transmission' charge for breastfeeding neighbour's baby' as accessed at <http://www.hivjustice.net/cases/Botswana-woman-from-zimbabwe-faces-deliberate-hiv-transmission-charge-for-breastfeeding-neighboursbaby/> as accessed on 9 November 2020.

¹⁰⁹ Note 108 above.

¹¹⁰ Note 108 above.

¹¹¹ BOPA Daily News, 27 November 2007: *Botswana: Lawyer on trial for sexual HIV exposure* as accessed at <http://criminalisation.gnpplus.net/country/botswana>.

¹¹² Note 111 above.

¹¹³ Note 111 above.

¹¹⁴ Note 111 above.

¹¹⁵ Note 111 above.

¹¹⁶ Note 108 above.

¹¹⁷ Note 108 above.

¹¹⁸ S147(3) (a) of the Penal Code.

¹¹⁹ *State v Lejony* 2000 (1) BLR 326 (HC).

¹²⁰ Note 119 above.

¹²¹ Note 119 above.

¹²² Note 119 above.

¹²³ Note 119 above.

occasions where sexual intercourse was consensual and the evidence had shown that the victim was sexually active, at the outset of the relationship.¹²⁴

After his conviction, he tested positive for HIV.¹²⁵ He faced a minimum of 15 years imprisonment and a maximum sentence of life imprisonment, to either include or exclude corporal punishment¹²⁶ in terms of section 142(4) (a) of the Penal Code (Amendment) Act 5 of 1998. The court considered the evidence relating to when, in time, the accused became HIV positive. The learned Mosojane J. found that ‘it would be dangerous in the circumstances to assume that the accused was her first sex mate or that she did not have other similar relationships’.¹²⁷ The Court dismissed the state’s arguments, that the legislation had intended for every person, testing positive for HIV after conviction, to be punished, irrespective of when they had contracted the disease, finding such construction to be ‘...absurd,’¹²⁸ and that in effect it will punish all HIV positive convicted persons.¹²⁹ The Court sentenced the accused to ten years imprisonment in terms of the old Act. The State appealed the decision.¹³⁰ The Appeal Court reasoned as follows, in respect of the evidence before the trial court:

1. That it was not shown that the accused was aware of his status before the test was administered;
2. That the evidence before the trial court did not show if the accused had HIV at the time of commission of the incident;
3. Not all people, found to be HIV positive after conviction, was intended to be punished, by the legislature.
4. The possibility exists that the accused got HIV from the victim.¹³¹

The appeal was dismissed. The decision could be considered a win for human rights as the court found that Parliament did not anticipate including persons who were not at all culpable but merely became so because they happen to be HIV positive after being found guilty. The

¹²⁴ Note 119 above.

¹²⁵ Note 119 above.

¹²⁶ S147 (3) (a) of the Penal Law(Amendment) Act 2013.

¹²⁷ Note 119 above, p 327 at para B.

¹²⁸ Note 119 above, p327 para D.

¹²⁹ Note 119 above, p328.

¹³⁰ Note 119 above.

¹³¹ Note 119 above.

court also found that the provision in question affected rights and liberties which must in the absence of clarity be given a restrictive interpretation.¹³²

It is submitted that the loss in *Lejony*¹³³ is that the court missed an opportunity to narrow s147 (3) such that an accused had to be aware of their HIV positive status, prior to the commission of the offence. Instead the court reiterated that the court would have punished the accused in terms of s147 (3) (a) had the accused been HIV positive though unaware of his status at the time of commission of the offence clearly indicating its approval for the punishment of all carriers of the HIV virus, irrespective of their cognizance of being HIV positive. This was a missed opportunity to correct the position such that all accused, irrespective of status, face the same legislative consequences and not that only HIV positive convicted persons. Further, the Court did not consider actual transmission of the disease but mere exposure. In its application of S147(3), the Court did not ask for evidence to show that the victim was actually HIV positive after the incident or evidence that she caught the virus from the sexual encounter in question.

The Court further did not consider the window period or period in which the accused is sero-converting and still reflecting negative, while in fact being highly infectious. Also, no particular notice was made to the type of testing required for accurate results. Certainly the effect of the 1998 amendment seems to ‘be more about retribution and therefore raises doubts about their efficacy in dealing with the problem of HIV transmission... [and it will] deter people from voluntarily testing for HIV/AIDS’.¹³⁴ [For further discussion of issue of HIV transmission see chapter 2, page 6]. Perhaps the Court could have addressed many of these factors if both accused person and complainant were tested after the rape occurred and tests confirmed the window period. Further, a full enquiry into the complainant’s HIV status before the incident. The court should also consider intervening factors that could occur after the incident that could affect his HIV status.

The case of *Lejony*¹³⁵ was followed by the *Makuto* case,¹³⁶ here the Court of Appeal sitting at Lobatse set out the facts as follows:

¹³² Note 83 above, p192.

¹³³ Note 119 above.

¹³⁴ Note 83 above, p193.

¹³⁵ Note 119 above.

¹³⁶ *Makuto v The State* 2000 (2) BLR 130 (CA).

The appellant was convicted of rape in the magistrate's court.¹³⁷ He was tested for HIV in terms of section 142(2) as amended by section 3 of the Penal Code (Amendment) Act of 1998 and found to be HIV positive.¹³⁸ The enhanced punishment, of fifteen years minimum, applied (to a person unaware of his HIV positive status).¹³⁹

At the sentencing court, the appellant received sixteen years plus two light strokes of the cane.¹⁴⁰ The appellant then appealed the matter contenting that section 142 (4) (a) of the Penal Code (Amendment) Act of 1998, was discriminatory in that it proscribed for harsher sentences for those convicted of rape who were found to be HIV positive, thus making it unconstitutional, as it was in violation of section 15 (the equality clause) of Botswana's Constitution.¹⁴¹ The Appellant further advanced that was unfair to assume that a person testing positive for HIV, upon conviction of rape, must have passed on the HIV virus to the complainant, thus deserving tougher punishment.¹⁴²

The appeal court considered the constitutionality of issues, in light of section 15 of the Constitution, which prohibits discrimination in terms of any law¹⁴³ and it prohibits discriminatory treatment in terms of any law or by any public authority or person holding public office.¹⁴⁴ The court found that HIV positive people, while not specifically mentioned in the Constitution, were in fact protected by it.¹⁴⁵ The court then considered justification for such discrimination. It took judicial notice of HIV reaching pandemic proportions and affecting twenty percent of its people.¹⁴⁶ The court reasoned that: 'In the face of the gravity of the crisis.....it would be imprudent and irresponsible if it (Parliament) did not act...'¹⁴⁷ Clearly increased minimum sentences was one way the Court saw as using laws to protect its non-HIV infected people from HIV positive people raping and thus spreading the virus.

Regarding passing on HIV by the perpetrator onto the complainant, the court noted the judgment of Judge Mosojane in *S v Lejony*¹⁴⁸ with approval, finding that it was not the

¹³⁷ Note 136 above.

¹³⁸ Note 136 above.

¹³⁹ Note 136 above.

¹⁴⁰ Note 136 above.

¹⁴¹ Note 136 above.

¹⁴² Note 136 above.

¹⁴³ S15 (1) of the Constitution.

¹⁴⁴ Note 143 above s(2).

¹⁴⁵ Note 136 above at p133.

¹⁴⁶ Note 136 above, p135.

¹⁴⁷ Note 136 above, p136.

¹⁴⁸ Note 136 above.

intention of Parliament to have stricter penalties for men who were not HIV positive before the commission of the act of rape, for which they were convicted.¹⁴⁹ The Court reasoned that in order for the HIV status of the offender to ‘make sense’¹⁵⁰ it would have to be ‘related to, and affecting the offender when he commits the rape; it would therefore have to be in existence at the time of the offence’.¹⁵¹ Thus the court found that a narrow interpretation that confines the reach of Section 142 (4) of the Penal Code (Amendment) Act 5 of 1998 to HIV positive people at the time of commission of the act, would be constitutionally sound. The court noted, as it did in *Lejony*¹⁵² above, that the possibility exists of the accused getting HIV from his victim. Thus the court, found the legislation

‘reasonably necessaryto abridge the freedom from discrimination provision of the Constitution, in order to combat the spread of HIV/AIDS pandemicand to deter the increasing incidence of rape...It matters not whether he was aware of it [his positive status] or not’.¹⁵³

As the Appellant was only tested after conviction and not at the time of the actual offence the court reduced his sentence to ten years.

In 2006, the case of *Magapatona*,¹⁵⁴ the appeal court once more had to deal with similar case. Here the appellant was convicted of rape.¹⁵⁵ He was subsequently tested for HIV and a positive result emerged.¹⁵⁶ The High Court sentenced him to 15 years and 2 strokes of the cane.¹⁵⁷ On appeal, the State conceded that the sentence was too harsh and that a fitting sentence would be ten years.¹⁵⁸ The Appeal Court subsequently reduced the sentence to ten years imprisonment,¹⁵⁹ noting that it could not have been the intention of Parliament to impose additional punishment on an offender, who became HIV positive after the commission of the rape.¹⁶⁰

¹⁴⁹ Note 136 above.

¹⁵⁰ Note 136 above, p139.

¹⁵¹ Note 136 above, p139.

¹⁵² Note 119 above.

¹⁵³ Note 136 above, p140

¹⁵⁴ *Magapatona v The State* 2006 (2) BLR 510 (CA).

¹⁵⁵ Note 154 above.

¹⁵⁶ Note 154 above.

¹⁵⁷ Note 154 above.

¹⁵⁸ Note 154 above.

¹⁵⁹ Note 154 above.

¹⁶⁰ Note 154 above.

Lejony,¹⁶¹ *Makuto*¹⁶² and *Matlapeng*¹⁶³ confirm the above reasoning of the court. Section 142 (4), in order to pass constitutional muster, was read to be ineffective in all these cases. The court noted that the HIV tests did ‘not show for how long the person tested had been HIV positive’.¹⁶⁴ He went on to suggest that the section in question be revisited by draftsmen and the Attorney-General.¹⁶⁵ It has thus emerged that the ‘practical challenges associated with testing after rape[made it] ...very difficult to establish temporal causality between rape and HIV transmission...’¹⁶⁶ Furthermore, in terms of the statutory framework the victim’s status is unknown as there is no obligation for the victim to undergo a test. Perhaps her status, immediately after the rape, would assist in providing greater clarity of the facts on their respective HIV status. This status, if negative, would have to be confirmed after the window period for sero-conversion. Of course the difficulties of proving transmission of the HIV virus are another minefield. A compounding factor in sentencing an accused, is that of the HIV positive accused, who was aware but did not understand the implications of his HIV status, although admittedly, given the widespread messaging by the Department of Health in Botswana, this would be difficult to prove. The courts in *Lejony*¹⁶⁷ above are clear, that such accused would be sentenced to increased penalties. Interestingly, none of the above sections allow the State access to the accused’s medical records. That would have allowed the court to get a fuller picture of his status and awareness thereof.

The provisions of s142 and s147 above¹⁶⁸ quite simply, provide that if you rape, and are HIV positive, then you face a harsher sentence. The overly broad problem has been corrected by the courts.¹⁶⁹

3.4. Conclusion

The laws of Botswana have thus far not specifically considered the criminal intention required or the deliberate passing of the HIV virus from one person to another through non-

¹⁶¹ Note 119 above.

¹⁶² Note 136 above.

¹⁶³ *Matlapeng v The State* [2001] 1 B.L.R. 161, CA.

¹⁶⁴ Note 154 above, p512.

¹⁶⁵ Note 154 above, p512.

¹⁶⁶ Note 83 above p191.

¹⁶⁷ Note 119 above.

¹⁶⁸ S142 and 147 of Penal Law (Amendment) Act 2013.

¹⁶⁹ Note 63 above.

consensual sex. Thus-far strict liability is held for convicted rapists that have exposed their victims to HIV in terms of s142 and 147 of the Criminal Amendment Act.¹⁷⁰

While the above cases concern situations of rape, the transmission of HIV can also occur in consensual sexual relations where one partner intentionally and deliberately infected the other partner. Here results of HIV infection could vary from some people being able to live without the virus progressing [see chapter 2 page 11 for more information on transmission]. Others could start ARVs and lead a normal life while others quickly develops full blown AIDS and become very ill or possibly die, without any other intervening factor. In these circumstances, the laws that are used to protect bodily integrity like assaults or grievous assaults to murder could be used to prosecute such individuals.¹⁷¹ Laws for assaults both common to assaults occasioning actual bodily harm could be applicable here. In the very rare scenario of death, laws governing loss of life can apply. There is no need for a specific law to protect against willful and deliberate transmission.

In all the cases discussed above, involving cases of rape or defilement, there was no actual transmission that was proved. Instead, the Court dealt with mere exposure cases to the HIV virus. This is entirely out to step with the UNAIDS Universal Guidelines.¹⁷²

Botswana was one of the first countries in Southern Africa to increase penalties, create minimum sentence legislation for some sexual offences, increase the definition of rape to include more variation of sexual penetration and to make it gender neutral. However, Botswana has to consider the Universal Guidelines and the many gains in treatment and care in the field of HIV management. The use of corporal punishment for offenders must also be removed to bring it in line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of which Botswana is a signatory to.¹⁷³

¹⁷⁰ Note 168 above.

¹⁷¹ Section 246 to 249 of Botswanan Penal Law.

¹⁷² Note 15 above.

¹⁷³ Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1).

Chapter 4: Criminalization of the exposure and transmission of HIV in South Africa

4.1. *Background*

At the southernmost tip of Africa lies the Republic of South Africa, a democratic nation since 1994. Her population is estimated at 58.78million¹⁷⁴ with approximately 7 700 000 living with HIV.¹⁷⁵ The HIV prevalence rate among young adults (15-49 years) in the country, was 20.4%¹⁷⁶ according to the Joint United Nations Programme on HIV/AIDS (UNAIDS). In South Africa there were 240 000 people newly infected with HIV in 2018 alone with 71 000 deaths from AIDS-related illness.¹⁷⁷ This is progress from 2010 when new infections stood at 390 000 and deaths at 140 000.¹⁷⁸ In 2018 in South Africa, 90% of HIV infected people knew their status; 62% of people living with the disease were on treatment and 54% of this group having suppressed viral loads.¹⁷⁹ 87% of pregnant women who were living with HIV managed to access antiretroviral treatment thus preventing transmission of HIV to about 53 000 new born children.¹⁸⁰

During President Mbeki's era, government-endorsed AIDS denialism resulted in the refusal of the government to provide anti-retroviral treatment and treatment for prevention of mother-to-child transmission. In 2002 the Constitutional Court, the highest court in South Africa, ruled in favor of the Treatment Action Campaign (TAC), (the latter being a civil group formed to advocate for affordable HIV treatment), ordering the government to provide anti-retroviral drugs to all pregnant mothers to prevent mother to child transmission of HIV.¹⁸¹ The TAC's ongoing advocacy helped pressure the government into making anti-retroviral treatment available to all South Africans. According to UNAIDS, in 2018, 87% of HIV positive pregnant woman accessed ARVs '...preventing 53 000 new HIV infections among newborns...' with 'early infant diagnosis...at more than 89%'.¹⁸²

Most transmission of HIV occurs through consensual sexual relations. There has, however been some cases of deliberate infection of HIV that led to a public outcry for an appropriate

¹⁷⁴ <https://www.statssa.gov.za/publications/P0302/P03022019.pdf>.

¹⁷⁵ <http://www.unaids.org/en/regionscountries/countries/southafrica>.

¹⁷⁶ Note 175 above.

¹⁷⁷ Note 175 above.

¹⁷⁸ Note 175 above.

¹⁷⁹ Note 175 above.

¹⁸⁰ Note 175 above.

¹⁸¹ *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16 2002 (5) SA 703 2002 (10) BCLR 1075 (5 July 2002).

⁹ Note 175 above.

legislative response to address these issue of criminalizing the exposure and transmission of HIV¹⁸³ and the issue of compulsory¹⁸⁴ testing of persons in sexual offences cases. South Africa has one of the highest rape statistics in the world.¹⁸⁵

4.2. What has been South Africa's legislative response to the exposure or transmission of HIV to others?

The South African government has not introduced an HIV specific offence choosing instead to use the existing common law to address cases of transmission and exposure of HIV. However, a number of other legislative provisions which relate to HIV and the criminal law, were introduced, namely:

(i) Compulsory HIV testing of alleged sexual offenders

The Criminal Law (Sexual Offences and Related Matters) Amendment Act¹⁸⁶ allows for the compulsory testing of persons who have been arrested for a sexual offence and for the provision of such information to the victims.¹⁸⁷ In terms of part 2 of Chapter 5 of the Act¹⁸⁸ either the complainant, the investigating officer or an interested party can apply to a magistrate in chambers, for the compulsory testing and disclosure of the HIV status of the accused person, within a period of 90 days from the date of the alleged assault.¹⁸⁹ Only when the Magistrate finds that a *prima facie* case exists against the accused person can the testing be ordered. The results of such test can be disclosed to the victim and the accused person, to enable the victim to make more informed health decisions and for the victim to institute civil action against the accused if so desired. The results of the HIV tests can be used in the subsequent criminal proceedings. Section 37 aims to protect the results of the testing while section 38 aims to protect against trumped up charges with the aim of only obtaining the accused's HIV status.

¹⁸³ SA Law Commission Project 85 Fifth Interim Report on Aspect of the Law Relating To AIDS available at https://www.justice.gov.za/salrc/reports/r_prj85_harmb_2001apr.pdf as access on 20 March 2020.

¹⁸⁴ SA Law Commission Discussion Paper 84 Project 85 available at https://www.gov.za/sites/default/files/gcis_document/201409/dp84prj85sxof1999oct-1.pdf as accessed on 20 March 2020.

¹⁸⁵ Rape stats in 2009 and in 2020, 42 289 as accessed at <https://www.saps.gov.za/services/crimestats.php> on 1 August 2020.

¹⁸⁶ Act 32 of 2007.

¹⁸⁷ Note 186 above.

¹⁸⁸ Note 186 above.

¹⁸⁹ Note 186 above.

Commentators Naidoo and Govender argue that the forced testing of the offender is a ‘violation of section 12(2) of the [South African] Constitution, which guarantees everyone the right to bodily and psychological integrity’.¹⁹⁰ They go on to note that ‘...it will be virtually impossible for the confidentiality of the report to be maintained by the victim’ as it is unrealistic to expect the victim ‘who perceives that he or she has been infected with a life-threatening disease’¹⁹¹ to respect the perpetrator’s rights to confidentiality and privacy. Practically, this Act could be allowing the HIV status of the accused to be ‘public knowledge’ with the resulting intrusion into the rights of the accused being ‘significant and far reaching’.¹⁹² Most importantly, the HIV status of the accused ‘bears no practical relevance to the treatment of the survivor’.¹⁹³ The practical reality is that ‘[t]he benefits ...are largely illusory as the information plays no meaningful role in the treatment provided. Providing PEP ...occurs irrespective of the knowledge of the HIV status of the accused’.¹⁹⁴ Significantly, the results could be a false negative and lead the victim to refuse ART in the case of the perpetrator being in the window period for sero-conversion.

Once a person has been raped, the Sexual Offences Amendment Act, as it is known, allows for access to post exposure prophylaxis (PEP) to all victims irrespective of a charge being laid or not, at state expense.¹⁹⁵ [A charge could be laid at SAPS or the rape could be reported at a hospital or other designated health establishment] in order for PEP to be accessed.¹⁹⁶

(ii) Minimum Sentences Legislation

According to the Criminal Law Amendment Act,¹⁹⁷ the penalty of life imprisonment shall apply to, among others, any of the following offences:

Life imprisonment applies for all perpetrators of rape where the perpetrator knew that he [or she, as the offence is gender neutral], had the HIV virus or AIDS. Clearly, the legislature wanted to protect the ‘victims’ interests related to psychological harm in enacting this

¹⁹⁰ Note 107 above.

¹⁹¹ Note 107 above.

¹⁹² Note 107 above.

¹⁹³ Note 107 above.

¹⁹⁴ PEP refers to Post-exposure prophylaxis, an emergency treatment for HIV. It's a short course of antiretroviral drugs that can stop HIV infection if taken properly according to Avert as accessed at <https://www.avert.org/learn-share/hiv-fact-sheets/emergency-treatment> on 5 November 2020.

¹⁹⁵ Note 107 above.

¹⁹⁶ Note 107 above.

¹⁹⁷ Act 105 of 1997.

provision'.¹⁹⁸ According to this law, mere exposure is enough to trigger the operation of its protection, i.e. the victim need not test positive for HIV.

Some reform made sexual offences gender neutral as well as extending traditional definitions of rape. A mandatory high sentence was perceived as ensuring 'appropriate retribution and...greater consistency in sentencing'¹⁹⁹ plus 'high sentences were viewed by many as necessary to curb the spread of HIV to women and children from sexual assault'. However, these minimum sentences are in effect, flexible and a court may depart from them in the event of the court finding 'substantial and compelling' circumstances or where the implementation of such a minimum sentence will be 'unjust'.²⁰⁰ These 'substantial and compelling' circumstances remain undefined in legislation or case law.²⁰¹ The courts are in effect, falling back on determining sentences in the way they always have, that is, by balancing the aggravating and mitigating circumstances, in the light of the particular circumstances of the matter before them.²⁰²

In South Africa, the transmission of HIV calls for the minimum sentence of life imprisonment where the transmission occurs during non-consensual intercourse.²⁰³

Legislation has been enacted that specifies what does not qualify as mitigating factors.²⁰⁴

4.3. *How are the courts applying these laws?*

Two cases have been brought before the South African courts where the common law was used to prosecute the exposure and transmission of HIV. The first criminal case was that of *S v Nyalungu*.²⁰⁵ Here the accused was convicted for rape and attempted murder in 2004. The

¹⁹⁸ Note 184 p272.

¹⁹⁹ M O'Donovan and J Redpath 2006. '*The Impact of Minimum Sentencing in South Africa*', Open Society Foundation for South Africa, Report 2 as accessed at <https://static.pmg.org.za/docs/2007/071030research.pdf>. On 12 May 2019.

²⁰⁰ *S v Malgas* 2001 1 SAC R 469 (SCA).

²⁰¹ Note 200 above.

²⁰² Note 13 above.

²⁰³ Section 51 of Criminal Law Amendment Act 105 of 1997.

²⁰⁴ See Criminal Law (Sentencing) Amendment Act (2007), section 51(3). According to the Act, the following factors 'may not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence in a case of rape: (i) The complainant's previous sexual history; (ii) an apparent lack of physical injury to the complainant; (iii) an only accused person's cultural or religious beliefs about rape; or (iv) any relationship between the accused person and the complainant'.

²⁰⁵ *S v Nyalungu* (2005) JOL 13254 (T) (unreported).

minimum sentence of life imprisonment would apply unless substantial and compelling circumstances exist that justified departure from the minimum sentence.

The complainant testified that she was walking along a train track when she was approached by an unknown man, who produced a knife, dragged her to nearby bushes and he then raped her.²⁰⁶ The accused was then caught matching the description and the subsequent DNA test was a match.²⁰⁷ During the trial an admission was placed on the court record of his prior awareness of his HIV positive state.²⁰⁸ The court consequently convicted him on the count of attempted murder.²⁰⁹

Jordaan J in his judgment noted that the common way of transmission of HIV ‘is through sexual intercourse’ and that it was ‘inevitable that criminal law systems across the world ...and our Criminal Law should start to acknowledge that persons, who are aware that they are infected with the HIV-virus, can infect other persons who are not carriers of the virus’.²¹⁰ [my translation].

The court examined the offence of attempted murder. In South African law, it ‘is a formally described crime and not a consequential crime’,²¹¹ [my interpretation]. As such, causality is not a requirement. The court analyzed the intention that was present. Jordaan J did not find that the accused had direct intention to cause the complainant’s death by infecting her with the HIV virus²¹² but rather guilt, in the form of *dolus eventualis* was present as the evidence presented showed his awareness of the virus, knowledge that the virus could be transmitted through sexual intercourse,²¹³ knowledge that the HIV virus could cause the death of another person, yet, despite this knowledge, he persisted in raping the complainant.²¹⁴

In the present case, however, the complainant was not tested for HIV. She had in fact refused to undergo testing. The court, on the other-hand, found this irrelevant and likened the facts in *Nyalungu* to the more common cases of attempted murder, where X would fire at the complainant and miss, yet still be guilty of attempted murder. The court reasoned that as long as the act of shooting was completed, with the intention of bringing about the death of the

²⁰⁶ Note 205 above.

²⁰⁷ Note 205 above.

²⁰⁸ Note 205 above.

²⁰⁹ Note 205 above.

²¹⁰ Note 205 above.

²¹¹ Note 205 above.

²¹² Note 205” above.

²¹³ Note 205 above.

²¹⁴ Note 205 above.

deceased, the fact that the result did not ensue does not mean that an attempt was not proven. According to the court, culpability stemmed from the mental state of the accused and not from the actual harm suffered by the complainant.²¹⁵

The learned judge also found that by committing an act in South Africa, for the offence of attempted murder, he must commit more than one crime. Applied to the example above, this means that X must be guilty of discharging a fire-arm as well as the completed attempt to kill the complainant by firing at her.²¹⁶ The court convicted the accused of the offence of attempted murder as well as rape, the two counts being taken together for sentence. A term of life imprisonment was consequently imposed.

South African academics have hailed this decision as ‘manifestation of the assurance given by the SALC’²¹⁷ that the common law can indeed be used to prosecute the criminal transmission or in this case, exposure to HIV, without the need for the creation of an HIV specific offence.

The decision has met with criticism. Most notably, the use of the analogy by the court, of the typical case of attempted murder, that being: X shooting at the complainant and missing, yet being convicted of attempted murder, has its shortcomings. With the considerable amount of progress that medical science has made in the 15 years since the delivery of this judgment, in the field of HIV medicine, one cannot justly equate the firing of a firearm with the act of sexual intercourse, the consequential emission of semen that may or may not then make contact with the victim and the HIV [that we now understand to have a less than 0.004 percent of transmission] which may or may not be actually transferred. Aside from the actual facts, that many factors may either increase or decrease the risk of HIV transmission, the actor in the shooting scenario has direct intention whereas the accused was found by the court to have intention in the form of *dolus eventualis*. The analogy is overly simplistic [at the time of the judgment] and now, 15 years later, entirely irrelevant.

Also, it is worth noting that while the HIV status of the complainant may not have been relevant at the stage of conviction of *Nyalungu*,²¹⁸ it is an important factor at the stage of sentencing.²¹⁹ The extent of harm inflicted on the victim is entirely relevant on the particular

²¹⁵ Note 205 above.

²¹⁶ Note 205 above.

²¹⁷ S Bhamjee, ‘A tale of attempted murder and HIV’, *Obiter* 2008 p317.

²¹⁸ Note 205 above.

²¹⁹ S Terblanche, ‘A Guide to Sentencing In South Africa’, LexisNexis ISBN/ISSN: 9780409109948.

sentence being contemplated by the court.²²⁰ It is common practice that the more serious the harm to a particular victim, then more serious the penal penalty to be imposed on the accused as proportionality is an important factor in sentencing. It seems reasonable then, for the impact of the offence on the complainant to be considered as this could hold either mitigating or aggravating information and this seems vital in aiding the court into reaching an appropriate decision. In effect, mere exposure of the victim to HIV is sufficient for a charge of attempted murder.

In *S v Phiri*²²¹ the second South African case of criminal prosecution for HIV transmission or exposure, the facts of the case were as follows: In 2010, the complainant met the accused when she had visited a clinic for an HIV test.²²² The accused, Phiri, was employed at the clinic as an HIV/AIDS counsellor.²²³ The complainant was then tested by the accused and found to be HIV negative.²²⁴ Following this, a romantic relationship developed between them and they had sexual relations on two occasions.²²⁵ According to the complainant, she had requested the accused to use a condom but the accused had refused.²²⁶ The complainant then tested positive.²²⁷ Throughout the trial, it was not in dispute that Phiri was HIV-positive in the three years prior to making the complainant's acquaintance and that he was aware of this position.²²⁸ The complainant had tested as part of routine prenatal testing. (She was pregnant with her former partner's child).²²⁹ The only issue in dispute at trial was whether or not the accused had used a condom during the two sexual encounters.²³⁰ The accused was subsequently convicted of attempted murder and sentenced to 6 years imprisonment.²³¹

Phiri appealed claiming that he ought to be convicted on the lesser count of assault with intent to cause grievous bodily harm.²³² The appeal court rejected this argument stating that the state did not have to prove actual transmission of the HIV virus to the complainant. It sufficed to prove that the accused, while in awareness of his HIV positive status, engaged in sexual intercourse with the complainant who he knew to be HIV negative, without any barrier

²²⁰ Note 205 above.

²²¹ *S v Phiri* 2014 (1) SACR 211 (GNP).

²²² Note 221 above.

²²³ Note 221 above.

²²⁴ Note 221 above.

²²⁵ Note 221 above.

²²⁶ Note 221 above.

²²⁷ Note 221 above.

²²⁸ Note 221 above.

²²⁹ Note 221 above.

²³⁰ Note 221 above.

²³¹ Note 221 above.

²³² Note 221 above.

of protection. Here court reasoned that intention, the form of *dolus eventualis*, that is, a form of indirect intention, was present. The court based its reasoning on the fact that at the time, there was ‘no cure’ for HIV and that being HIV positive ‘lead to a reduced life span’.²³³ The appeal court referred to the earlier decision of *S v Nyalungu*²³⁴ and found no basis to disturb the conviction.

Phiri also appealed the sentence of six years on the basis of consensual intercourse in a romantic relationship. The appeal court rejected this argument. It went on to find Phiri’s conduct ‘reckless’.²³⁵

Cases involving the application of minimum sentences where the perpetrator was HIV positive and where he raped his victim, are often before courts. In *CN*²³⁶ the appellant convicted of two counts of rape, of a child, kidnapping and attempted murder. The facts of the matter was as follows: the complainant, a 16 year old girl, was on her way home, at night, when she was taken by CN and raped throughout the night.²³⁷ The accused did not use a condom.²³⁸ After the report of the incident, the complainant was tested for HIV and pregnancy.²³⁹ The result was negative for both tests.²⁴⁰ The accused, on the other hand, had asked for his ARV medicine.²⁴¹ He subsequently was tested twice, after the court had ordered that he be tested for HIV.²⁴² All tests showed a positive result.²⁴³ It further emerged in evidence, that a year prior to the incident, the accused had discovered his HIV positive status.²⁴⁴

The trial court had applied the minimum sentences of life imprisonment for both counts of rape, 5 years for kidnapping and 10 years for the charge of attempted murder.²⁴⁵ All sentences were ordered to run concurrently, i.e. the sentence of life imprisonment for all sentences.²⁴⁶ The appeal court found “no substantial and compelling circumstances to justify

²³³ Note 221 above, p4 para 9.

²³⁴ Note 221 above.

²³⁵ Note 221 above, p5.

²³⁶ *CN v The State* Appeal No: A851-15 NGHC.

²³⁷ Note 236 above.

²³⁸ Note 236 above.

²³⁹ Note 236 above.

²⁴⁰ Note 236 above.

²⁴¹ Note 236 above.

²⁴² Note 236 above.

²⁴³ Note 236 above.

²⁴⁴ Note 236 above.

²⁴⁵ Note 236 above.

²⁴⁶ Note 236 above.

the imposition of sentences less than the prescribed minimum sentences²⁴⁷. Hence the sentence of life imprisonment was confirmed.²⁴⁸ This was a fairly recent decision, that is, the appeal was heard in 2018. At that point, no transmission of HIV was proved to have taken place, rather mere exposure to the HIV virus. The conviction on attempted murder, was not proven, thus being out of steps with the advances of ARVs on HIV positive people. The possible defence of the accused being on ARVs and thus not infectious, was not even canvassed by his defence counsel. South Africa too, has convicted mere exposure [from a no-infectious source] and not in keep with the Experts Consensus Statement.²⁴⁹

4.4. Conclusion

An important change in the landscape was the availability of ARVs and PEP to rape survivors, and an improved management of the HIV virus. These advances have the following effects on the legislative changes made by South Africa in the management of HIV: The issue of mandatory testing of an alleged perpetrator of a sexual assault victim in effect has no effect on assisting such victim, as victims have to get PEP²⁵⁰ and other emergency medicines, immediately following such attack. A delayed HIV report serves no purpose to such victim. Furthermore, given the many advances in HIV treatment, the quality of life of an HIV positive person is far improved, allowing many to lead near normal lives. Distinctions can be drawn between a person living with HIV and a person who has suffered a near fatal attack, the former often being able to lead a fairly normal life.

Despite the changes in life expectancy of HIV-positive persons on ARV treatment, because HIV diminished or shortened a person's lifespan, intentionally infecting someone could [still] constitute attempted murder.²⁵¹ Perhaps the court ought to consider the effect of the transmission of HIV on a complainant before handing down sentence. After all, in the run of the mill attempted murder cases involving a physical injury, a medical report is important in assisting a court reach a just sentence. The effect on the quality of life of the victim, in determining an appropriate sentence is a vital consideration.

²⁴⁷ Note 236 above.

²⁴⁸ Note 236 above.

²⁴⁹ Note 38 above.

²⁵⁰ Note 107 above.

²⁵¹ Note 217 above.

As in the case of *CN*, the court is still handing down sentences for attempted murder where, the accused was HIV positive, but transmission of HIV has not been proved, but rather mere exposure to the virus was established.²⁵²

The minimum sentences legislation has ensured some peremptory sentences for perpetrators of sexual assaults and rapes, including rapes where there has been exposure or transmission to HIV.²⁵³ In effect, a court can deviate from such minimum sentences and fall back on traditional methods of determining appropriate sentences, where such court finds the undefined, [and so leaving the court itself to determine what makes for] ‘substantial and compelling circumstances’.²⁵⁴

²⁵² Note 236 above.

²⁵³ Section 51 of Criminal Law Amendment Act 105 of 1997.

²⁵⁴ Note 200 above.

Chapter 5: Criminalization of the exposure and transmission of HIV in the Republic of Zimbabwe

5.1. Background

Zimbabwe lies to the east of Africa, bordering South Africa and Zambia, Mozambique and Botswana. An independent state since 1980, it has a population of 14 906 993 million,²⁵⁵ with a Zanu PF led government since independence. HIV and AIDS is pandemic in Zimbabwe. The first case of HIV was reported in 1985.²⁵⁶ The country is reported to hold the third highest numbers of cases in Sub-Saharan Africa.²⁵⁷ The Republic of Zimbabwe was the first country in Africa to agree to the adherence of the World Health Organization's (WHO) recommended steps for Antiretroviral Therapy (ART)²⁵⁸. In 1997, Zimbabwe became the first African country to introduce the female condom.²⁵⁹

In 2018 there were 1 300 000 people living with the AIDS virus with a prevalence rate of 12.7% among adults in the 15 to 49 year category.²⁶⁰ 38 000 people were new infection of the virus with 22 000 AIDS-related deaths were recorded.²⁶¹ There has been a 60% less AIDS-related deaths since 2010, from 54 000 to 22 000 with a similar decrease in new HIV infections from 62 000 to 38 000 for the same period.²⁶²

‘In 2018 in Zimbabwe, 90% of people living with HIV knew their status and 88% of people living with HIV were on treatment’ while ‘94% of pregnant women living with HIV accessed antiretroviral medicine’.²⁶³ Same sex relations between men and sex work are illegal in Zimbabwe which makes it hard to provide HIV services to these populations.²⁶⁴

5.2. What is Zimbabwe’s legislative response to the exposure and transmission of HIV?

²⁵⁵ <https://www.worldometers.info/world-population/zimbabwe-population/> as accessed on 11 September 2020.

²⁵⁶ J. Rodriguez ‘*Aids in Zimbabwe: How Sociopolitical Issues hinder The Fight Against HIV/AIDS*’ as accessed at <http://history.emory.edu/home/documents/endeavors/volume1/Jovonnas.pdf> on 8/24/2020 p4.

²⁵⁷ Note 256 above.

²⁵⁸ ‘*A Comparative analysis of national HIV policies in six African Countires with generalized epidemmics*’ WHO Retrieved 202-03-27 as quoted in https://en.wikipedia.org/wiki/HIV/AIDS_in_Zimbabwe as accessed on 20-4 2020.

²⁵⁹ Note 256 above.

²⁶⁰ UNAIDS as accessed a <https://www.unaids.org/en/regionscountries/countries/zimbabwe> as accessed on 24 April 2020.

²⁶¹ Note 255 above.

²⁶² Note 255 above.

²⁶³ Note 255 above.

²⁶⁴ Section 73 of Criminal Law Amendment Act as quoted in as quoted in Wikipedia as accessed at https://en.wikipedia.org/wiki/HIV/AIDS_in_Zimbabwe on 20-4-2020.

Zimbabwe preceded other African countries with the promulgation of laws that addressed the transmission of HIV.²⁶⁵ The legislation was modelled on the failed N'Djamena model law from West Africa²⁶⁶ and as such, it contained the several similar issues (Zimbabwe passed the first version of Section 79 in 2001 and updated in 2004 to include people who were suspected they were HIV-positive, but were not yet diagnosed).²⁶⁷

Section 79 of the Criminal Law (Codification and Reform) Act 23 of 2004, the criminal law code, concerns the deliberate transmission of HIV. Notwithstanding that s79 above concerns deliberate transmission of HIV, the application of this section by judges, have concerned cases of both exposure and transmission.

Section 80 provides for a mandatory prison sentence of at least 10 years to be imposed upon a person who was infected with HIV when he or she commits certain sexual crimes including rape; aggravated indecent assault; indecent assault; sexual intercourse with a young person; and an indecent act with a young person involving penetration of the body which involves a risk of transmission of HIV.²⁶⁸ It is important to note that this minimum sentence applies regardless of whether they were aware of their HIV status. A person has to be tested within 30 days.²⁶⁹

5.3. *How are the courts applying these laws?*

In the early 90's, the Zimbabwean judiciary was criticized for the lack of a human rights-centered judicial approach as well as for straying 'from elementary conceptions of public health and disease-prevention'.²⁷⁰ The judiciary has since been faced with more cases involving the prosecution of exposure to HIV [which is often framed as transmission of HIV].

The first criminal conviction in Zimbabwe was in 2008, involving 'a 26-year-old woman who had mutually consensual sex with a male partner, pleaded guilty to non-disclosure prior to unprotected sex. She was given a five year suspended sentence, primarily because the

²⁶⁵ Zimbabwe : *HIV-specific criminal law on Trial*, as accessed at <http://www.hivjustice.net/news/zimbabwe-hiv-specific-criminal-law-on-trial-zlhr> on 11/7/2018.

²⁶⁶ Zimbabwe : *HIV-specific criminal law on Trial*, as accessed at <http://www.hivjustice.net/news/zimbabwe-hiv-specific-criminal-law-on-trial-zlhr> on 11/7/2018.

²⁶⁷ Note 266 above.

²⁶⁸ S80, Criminal Law (Codification and Reform) Act 23 of 2004.

²⁶⁹ Note 268 above.

²⁷⁰ Achmat Z, Cameron E, 'Judges policy on AIDS: Prisons and medical ethics' The SALJ VOL 112 (Part1) Feb 1995.

partner-who had tried to withdraw the charges-did not test HIV-positive.”²⁷¹ In 2010, a man was fined for lying about his girlfriend infecting him, the latter also tested HIV negative.²⁷²

The case of *S v Semba*,²⁷³ a young mother was charged with the contravention of section 79 of the Criminal Law Code. The facts of the matter were as follows: Semba shared living quarters with the mother of the complainant, at Juru Growth Point, Murehwa.²⁷⁴ While Semba was pregnant, she had accessed ante-natal services at St Paul’s Musami Hospital.²⁷⁵ In March 2012, she was told of her HIV positive status.²⁷⁶ She had subsequently given birth and she was breastfeeding her baby, born three days apart from the complainant.²⁷⁷ On the 13 of January 2013, Semba approached the complainant’s mother to discuss their water bill, at the complainant’s mother’s dining room. The Complainant’s mother left, then returned to find Semba breastfeeding the complainant.²⁷⁸ The child was taken away and Semba denied being infected with the virus.²⁷⁹ After the report to the police, Ms Semba was tested and found to be HIV positive while the Complainant and her mother were HIV negative.²⁸⁰

At the trial, the accused had explained that when the complainant had cried, the accused had mistook her for her own child and instinctively put the complainant on the breast to feed her.²⁸¹ When the complainant’s mother had returned, she snatched the complainant away while the accused apologized for her error.²⁸² Despite this reasonable explanation, the accused was convicted of the deliberate transmission of HIV and sentenced to ten years imprisonment.

The accused then appealed the conviction and sentence, citing a misdirection by the trial court that the actions of the appellant ‘constituted an offence as contemplated by s79 (1) (a) of the Criminal Law (Codification and Reform) Act’.²⁸³ In the alternative, the appellant argued that ‘the conviction was unsafe... [as] the evidence led did not prove that the appellant knew or realized that there was a real risk that breastfeeding could result in the

²⁷¹ Note 266 above.

²⁷² Note 266 above.

²⁷³ *Rebecca Ndaizevei Semba v State* HH 299-17 CRB RMW 95/14 [2017] ZWHHC 299 (12 November 2015).

²⁷⁴ Note 273 above.

²⁷⁵ Note 273 above.

²⁷⁶ Note 273 above.

²⁷⁷ Note 273 above.

²⁷⁸ Note 273 above.

²⁷⁹ Note 273 above.

²⁸⁰ Note 273 above.

²⁸¹ Note 273 above.

²⁸² Note 273 above.

²⁸³ Note 273 above, p2.

transmission of HIV from the mother to the child’.²⁸⁴ In addition, the appellant argued that her ‘explanation of genuine error was reasonably possibly true thereby entitling her to an acquittal’.²⁸⁵

The appeal court, via Hungwe J, criticized the use of the criminal law in the ‘combatting of HIV/AIDS’²⁸⁶ while considering international AIDS literature²⁸⁷, effective antiretroviral treatment considerably reduces the risk of sexual transmission of HIV, ‘²⁸⁸ noting that the ‘relevance of viral load in Europe’.²⁸⁹

A more traditional assessment of the elements of the offence was considered where the court found that there must, in the transmission of HIV ‘**with the knowledge or realization** that the act involves a real risk or possibility of infecting another person with HIV’ [Judge Hungwe’s emphasis]. The intention of the legislature was considered that is, ‘the sexual transmission of the virus’²⁹⁰ and the court found that the legislature did not intend to criminalize ‘breastfeeding as a form of mother-to-child-transmission’.²⁹¹ Hence the court found that application of the statute must be restricted ‘to sexual transmission only’,²⁹² clearly stating that had the lawmakers intended to criminalize such situation, such exception, they ‘would have been expressly spelt out’.²⁹³ The appeal court acknowledged the ‘scientific evidence pointing to several defences in light of new knowledge and recent break-through in research’ and that ‘the ‘Swiss Statement’ must be part of the defence.’²⁹⁴ In line with this reasoning, the enlightened appeal court subsequently upheld the appeal.

In the case of *Perfect Ngwenya*, the appellant was convicted of the deliberate transmission of HIV, i.e. section 79 of the Criminal Code²⁹⁵ and sentenced to 8 years imprisonment with 3 suspended for good behavior. He appealed both conviction and sentence, his main ground being ‘the absence of evidence to sustain [the] charge’. The appeal court noted the proven facts of the matter as follows: Ngwenya and the complainant had an affair from August

²⁸⁴ Note 273 above, p2.

²⁸⁵ Note 273 above, p3.

²⁸⁶ Note 273 above, p3.

²⁸⁷ Note 273 above, p3.

²⁸⁸ Note 273 above p4.

²⁸⁹ Note 273 above, p4.

²⁹⁰ Note 273 above.

²⁹¹ Note 273 above.

²⁹² Note 273 above.

²⁹³ Note 273 above, p5.

²⁹⁴ Note 273 above, p6.

²⁹⁵ *Perfect Ngwenya versus The State* HB 59-17.

2013.²⁹⁶ He thereafter tested positive, on 26 June 2014.²⁹⁷ He did not disclose his positive status to the complainant.²⁹⁸ The Complainant found the appellant's HIV medication on 4 September 2014.²⁹⁹ The complainant had previously tested negative for HIV in 2012, prior to her relationship.³⁰⁰

The appeal court per Judge Moyo noted that 'it is common cause that the parties engaged in unprotected sex afterthe appellant became aware of his HIV positive status'.³⁰¹ The court reduced the sentence to 3 years, after considering that Ngwenya was a first offender, hypertensive and on HIV therapy.³⁰²

Pitty Mpofu and Samukelisiwe Mlilo approached the Constitutional Court of Zimbabwe, in terms of s24(2) of the former Constitution of Zimbabwe,³⁰³ claiming that s79 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] "...violated 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."³⁰⁴

Mpofu, a 45 year old male, was charged with contravening s79 of the Code. It was alleged that he had deliberately infected his wife, with HIV 'sometime between October 2009 and June 2011, although he wasn't diagnosed until 'sometime in 2010'.³⁰⁵ While still before the Magistrates Court, Mpofu requested referral to the Supreme Court on grounds that the section was 'too wide, broad and vague...[and as such] infringing his right to protection of the law as set out in s18 of the Constitution.'³⁰⁶ Furthermore, Mpofu claimed that S79 violated his right not to be discriminated against in terms of s23 of the Constitution.³⁰⁷

Mlilo, the second applicant, was a 34 year old woman, who was married and fell pregnant in 2009. *Mlilo* discovered her HIV positive while accessing ante-natal services.³⁰⁸ She continued to have unprotected sexual relations with her spouse, without disclosing her status

²⁹⁶ Note 295 above.

²⁹⁷ Note 295 above.

²⁹⁸ Note 295 above.

²⁹⁹ Note 295 above.

³⁰⁰ Note 295 above.

³⁰¹ Note 295 above, p2.

³⁰² Note 295 above, p3.

³⁰³ The independence Constitution was a result the 1979 Lancaster House Agreement. The new constitution was approved in the referendum of 16 March 2013. The parliament approved it on 9 May 2013. S24(2) allows for a referral of any question regarding the contravention of the Declaration of Rights, to the Supreme Court.

³⁰⁴ Note 18 above.

³⁰⁵ Note 18 above.

³⁰⁶ Note 18 above, p2.

³⁰⁷ Note 18 above, p2.

³⁰⁸ Note 18 above, p2.

to him.³⁰⁹ Eventually her husband discovered her HIV positive status and *Mlilo* was charged and convicted for contravention of s79 of the Code, ‘despite there being no proof of her that she had infected her husband. She claim[ed]...that her husband initially made the complainant in revenge for her own complaint of gender-based violence following the breakdown of their marriage’.³¹⁰ Before sentence, *Mlilo* approached court for referral to the Supreme Court, on the grounds raised by *Mpofu*, as well as 2 additional grounds. Zimbabwean Lawyers for Human Rights took on both *Mpofu* and *Mlilo*’s cases, claiming ‘both were unfairly convicted of ‘deliberate transmission of HIV’ in 2012’.³¹¹ The Constitutional Court, in the judgment of Ziyambi JCC, dealt with the 2 grounds raised by *Mpofu* above, as follows:

- a) Infringement of the right to protection of the law (s18 of the pre-2013 Constitution)
Court decided that s79 ‘did not criminalize sexual intercourse by a person infected with HIV’ but rather aimed at persons who ‘knowing that they are infected with HIV, deliberately or recklessly spread the virus to innocent partners’.³¹² The Court concluded that there has been no infringement of s 18 i.e. the right to protection of the law.
- b) The court was, throughout its judgment, proceeding from the premise that HIV infection is a death sentence and completely disregarded the progress in treatment in the past years.³¹³ From that perspective, it is not surprising that he weighed the right of the uninfected party [to life, as he saw it] more heavily than the accused’s right to privacy.

The court found that as the anti-discrimination clause in the former Constitution, did not specifically mention HIV/AIDS [as it was not even discovered when the pre-2013 Zimbabwean Constitution was promulgated],³¹⁴ arguments of unfair discrimination on account of HIV status was not valid and it failed to accept it as a physical disability

³⁰⁹ Note 18 above, p2.

³¹⁰ Note 18 above.

³¹¹ JB Bernard: ‘Zimbabwe: HIV-specific criminal law on trial: ZLHR launches campaign highlighting impact of overly broad HIV criminalization on women’ as accessed at <http://www.hivjustice.net/news/zimbabwe-hiv-specific-criminal-law-on-trial-zlhr-launc...> as accessed on 11/7/2018.

³¹² Note 311 above.

³¹³ Note 311 above.

³¹⁴ The first Constitution was as a result of the 1979 Lancaster House meetings and the first case of HIV in Zimbabwe was in 1985 [note 2 and note 5 above].

[as contained in s23 of the former constitution].³¹⁵ The court also missed the opportunity to examine the difficulties of legal intention (*dolus eventualis* or constructive intention) in the case of a person who has ‘the possibility of being infected’ with HIV. The court decided that section 79 ‘was not vague and imprecise even when the required form of intention takes the form of so-called constructive intent [without enquiring]...whether it is appropriate for this offence that constructive intention should be sufficient basis for conviction’.³¹⁶

The court went on to find that the legislative intentions of s79 was ‘not only important but laudable’ is ‘rationally connected to ...the ...objective’ and that its sentences, of twenty years, ‘appropriate’.³¹⁷ As such the Constitutional Court of Zimbabwe dismissed the application that s79 of the Code as unconstitutional.

It is submitted that the court’s analysis was too superficial, completely disregarding important considerations of window periods of the virus, difficulties in attaining status (especially before the sexual act itself), the nature of sexual intercourse and the difficulties in obtaining accurate results. No meaningful engagement by the judge of the different dynamics of testing, sexual intercourse nor the element of intention was properly carried out. Instead, the court found that s79 was ‘formulated in sufficiently clear terms to enable a subject to foresee the consequences of his actions’.³¹⁸

In response to the largely inequitable effects of S79, NGOs, civil society and people living with HIV and AIDS have called for its repeal.

‘Dr Tsitsi Apollo, the Deputy Director HIV/AIDS and Sexually Transmitted Infections in the Ministry of Health and Child Care told participants attending a Symposium on HIV and Law in Harare recently,... that government, in partnership with other stakeholders, is working towards ensuring that everyone in Zimbabwe knows their HIV status and is linked to appropriate high-quality HIV prevention, care and treatment and support services by 2020... however, attainment of this goal

³¹⁵ Note 18 above , p9.

³¹⁶ Note 69 above.

³¹⁷ Note 18 above, p12 and p13.

³¹⁸ Note 18 above, p8.

is hampered in part by legislation that criminalizes the willful transmission of HIV'.³¹⁹

She went on to say such law is 'retrogressive and unhelpful in the fight against the pandemic' and that 'the unintended consequences far outweigh the... aims'.³²⁰ She further 'noted that the legislation had an adverse impact on the 90-90-90 campaign'.^{321 322} She maintained that 'the law should be grounded with scientific evidence to facilitate service delivery' while acknowledging that in terms of the current law, 'everyone is a potential criminal, including pregnant and lactating women...[notwithstanding that] programming encourages exclusive breastfeeding, even among HIV positive women'.³²³

In February 2020, women parliamentarians called for the 'decriminalization of willful HIV transmission'³²⁴ claiming that it is women who were most affected by the law. S79 is in the process of being repealed.³²⁵

Sentencing in terms of s80 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In *Machangara* matter³²⁶ the 19 year old applicant, pleaded guilty to contravening section 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] to sexual intercourse on diverse occasions with a 15 year old girl. The girl was pregnant. He tested HIV positive in terms of s80 of the Act³²⁷ while the complainant was negative. The Court sentenced him to the minimum mandatory sentence of 10 years because he had been found to be HIV positive in terms of s 80 of the same Act.³²⁸ The onerous requirement, of S80 (2) (b) of having to prove

³¹⁹ The Legal Monitor, publication by Zimbabwean Lawyers for Human Rights as accessed at <https://africandefenders.org/zimbabwe-lawyers-for-human-rights-legal-monitor> on 6 July 2020.

³²⁰ Note 319 above.

³²¹ Note 319 above.

³²² The 90-90-90 campaign is an international initiative to ensure that by 2020, 90% of people living with HIV will know their status, 90% of HIV positive diagnosed with HIV will receive ARV therapy and 90% of the latter group will have viral suppression according to UNAIDS.

³²³ Note 319 above.

³²⁴ *Zimbabwe: Women parliamentarians call for the decriminalisation of willful HIV transmission* as accessed at <http://www.hivjustice.net/news-from-other-sources/zimbabwe-women-parliamentarians> as accessed on 10/7/2020.

³²⁵ Note 324 above.

³²⁶ *S v Machangara* (B1150/15) [2016] ZWHHC 16 (13 January 2016).

³²⁷ Note 326 above.

³²⁸ Note 326 above.

HIV positive status within 30 days of the incident, makes for lesser use of this section by courts.

5.3. *Conclusion*

Currently, in terms of the law, the transmission of others to HIV and in practice, the exposure of others to HIV is also a criminal offence in Zimbabwe. The cases described above show selective prosecution in these cases with women being prosecuted more than men. This is particularly through the ante-natal care process. However, in an about turn, following the pressure from NGOs and the decisions from courts, the Legal, Justice and Parliamentary Affairs Minister, Ziyambi Ziyambi,³²⁹ announced the repeal of section 79 of the Criminal Law (Codification and Reform) Act.³³⁰ Section 53(2) of the Marriages Amendment Bill, 2019, repeals S79.³³¹ It is now before the Senate.³³² The minimum sentences for rape in terms of s80 are in practice few and far between as the requirements of s80 are difficult to prove. More sentencing guidelines will assist courts to reach just and more consistency in sentences.

The Republic of Zimbabwe has realized that Section 79 of the Criminal Law (Codification and Reform) Act 23 of 2004 is in effect unfair, especially in the case of women and it is ineffective in controlling the spread of HIV and AIDS.³³³ It is in the process of repealing this law and restoring a more human rights centered approach to management of the virus.

³²⁹ Zimbabwe: Repeal of legal provision that criminalizes ‘willful’ transmission of HIV approved by cabinet May 13, 2019 as accessed at <http://www.hivjustice.net/storify/zimbabwe-repeal-of-legal-provision-that-criminalises-wil...on> 12/6/2019.

³³⁰ Note 88 above.

³³¹ Criminal Law (Codification and Reform) Act 23 of 2004.

³³² <https://allafrica.com/stories/202006080681.html> as accessed on 8/6/2020.

³³³ Note 329 above.

Chapter 6: A comparative analysis of the criminalization of HIV in Botswana, South Africa and Zimbabwe

6.1. Introduction

The attack started in the 1980's, when Southern African countries began experiencing their first cases of HIV. The offensive took the form of: legislative changes from 'minor changes to existing penal code provisions, to major overhauls of sexual offence law'.³³⁴ All three countries under study have made changes to their sexual offences legislation³³⁵ bringing it in line with their Constitutions. Reforms thus included changes to the definition of rape, so that it became gender neutral³³⁶ in the cases of Botswana and South Africa, covering a wider variety of acts as previously.³³⁷ Zimbabwe, while not expanding the definition of rape to include males, has increased penalties for rape and aggravated indecent assault, both going up to life imprisonment.³³⁸

Botswana has introduced the Public Health Act,³³⁹ criminalizing the transmission of HIV and it has revised its Penal Code, to include harsher sentences for HIV positive rapists.³⁴⁰ South Africa does not have a criminal code and it had enacted the Sexual Offences Act of 2007. Zimbabwe, on the other hand, replaced its previous sexual offences legislation with a Criminal Code comprising revised and codified sexual offences, criminalizing the transmission of HIV.³⁴¹ All three countries refer to HIV in the new legislation. Details of these law reforms are set out below.

6.2 HIV specific sexual offences

(a) Use of Existing laws

Initially, all three countries were using their existing laws to cope with exposure and transmission of HIV to others. In Botswana, laws governing nuisance and offences against health and convenience,³⁴² exposure of infected persons and things³⁴³ and offences

³³⁴ Thompson J and Simmonds FN 2012. Rape Sentencing Study A Review of Statutory Sentencing Provisions for Rape, Defilement, and Sexual Assault in East, Central and Southern Africa. Lusaka Population Council.

³³⁵ Penal Code (Amendment) Act 2013 (Botswana), Sexual Offences Act 2007 (South Africa) and Criminal Law (Codification and Reform Act 23 of 2004 (Zimbabwe).

³³⁶ Section 141 of the Penal Code (Botswana).

³³⁷ Section 3 Sexual Offences Act 32 of 2007 (South Africa).

³³⁸ S65 (1) (b) and s66 (2) of Criminal Law (Codification and Reform) Act 2004 Chapter 9:23 Act 23 of 2004.

³³⁹ Public Health Act 2013.

³⁴⁰ S142 Penal Code (Amendment) Act 5 of 1998 was amended in 1998.

³⁴¹ Note 334 above, p6.

³⁴² Section 184 of the Penal Code of Botswana.

³⁴³ Section 58 of the Penal Code of Botswana.

endangering life and health³⁴⁴ were used to deal with the exposure and transmission of HIV. South Africa used its common law offences of attempted murder and assault to cover instances of HIV exposure and transmission. Zimbabwe passed the first version of the Sexual Offences law in 2001, being the first country to pass HIV specific legislation among all three countries.

(b) HIV Specific Legislation

In 2013 Botswana passed the Public Health Act.³⁴⁵ S116 concerns the transmission of HIV, with specific obligations and duties on HIV positive persons.³⁴⁶ An exposure to HIV can be dealt with in terms of s116 (1). Penalties are not specifically mentioned in the Act. No cases of transgression are found as the law itself prevents the publication of such cases. In South Africa, the legislator made a specific policy decision not to introduce a HIV specific offence. Instead, the common law crimes of attempted murder or assault can be used. Mere exposure of the victim to HIV is sufficient for a charge of attempted murder. There are no specific penalties for the crimes of attempted murder and assault. Zimbabwe was the first African country to pass HIV specific legislation in the form of the old Sexual Offences Act of 2001. This former was then repealed and the Criminal Law (Codification and Reform) Act, 2004 (2006) which codified the criminal law of Zimbabwe came into effect. S79 governs the exposure or transmission of HIV. Transgressions of section 79 can yield imprisonment of up to 20 years.³⁴⁷ The legislator is in the process of repealing this law.³⁴⁸

This study established that these laws had been in use and that there were case laws dealing with the transmission or exposure of others to HIV in Botswana, South Africa and Zimbabwe. There were earlier reports in Botswana³⁴⁹ and in Zimbabwe,³⁵⁰ of a woman breastfeeding her neighbor's child, in both countries. This appeared to be once off cases. This research yielded no other reports. Earlier cases in Botswana³⁵¹ and Zimbabwe³⁵² have had criminal cases following the discovery of ARVs belonging to the sexual partner, while in

³⁴⁴ Section 230 of the Penal Code of Botswana.

³⁴⁵ Public Health Act S116.

³⁴⁶ S116 of the Public Health Act 2013.

³⁴⁷ Section 79 of the Criminal Law (Codification and Reform Act) Act 23 of 2004.

³⁴⁸ Zimbabwe: Repeal of legal provision that criminalizes 'willful' transmission of HIV approved by cabinet May 13, 2019 as accessed at <http://www.hivjustice.net/storify/zimbabwe-repeal-of-legal-provision-that-criminalises-wil...on> 12/6/2019.

³⁴⁹ Botswana: *Woman from Zimbabwe faces 'deliberate HIV transmission' charge for breastfeeding neighbour's baby* as accessed at <http://www.hivjustice.net/cases/Botswana-woman-from-zimbabwe-faces-deliberate-hiv-transmission-charge-for-breastfeeding-neighboursbaby/> as accessed on 9 November 2020.

³⁵⁰ . HH 299-17 CRB RMW 95/14 [2017] ZWHHC 299 (12 November 2015).

³⁵¹ BOPA Daily News, 27 November 2007: *Botswana: Lawyer on trial for sexual HIV exposure* as accessed at <http://criminalisation.gnplus.net/country/botswana>.

³⁵² *Perfect Ngwenya versus The State* HB 59-17.

South Africa³⁵³, such charges were laid following an HIV positive result from the sexual partner. In many of these cases, knowledge of HIV positive status had only come about after once party accessed prenatal services.³⁵⁴ In all these cases, although notably older, earlier cases, the courts have failed to enquire into the use of ARVs and failed to consider the actual level of infectiousness of the HIV positive partner. In all these cases, there was no proof of actual transmission of HIV but at most, mere exposure to HIV.

(c) *Mandatory Testing*

In two of the three countries being studied there was the mandatory HIV testing of sexual offenders in certain circumstances.³⁵⁵ Botswana and South Africa have enacted legislation allowing for the ‘mandatory testing and disclosure of an accused’s HIV status, for purposes of prosecution and sentencing’.³⁵⁶ The study found that the two countries take totally different approaches to the HIV testing and have introduced it for different purposes. Botswana only allows for the testing of an accused person after conviction and before s/he is sentenced.³⁵⁷ The purpose of the testing in this instance is solely for the purposes of deterring an appropriate sentence. South Africa, on the other hand, only allows for testing of accused persons for HIV within 90 days from date of the alleged sexual assault, upon application to a Magistrate.³⁵⁸ The purpose of testing in South Africa is to provide the victim with information on whether they have been exposed to HIV during the commission of a sexual offence.³⁵⁹ Both these reasons for compulsory testing are out of date as a convicted rapist could have acquired HIV from other sources before testing but after the actual incident, as in the case of Botswana. In the South African scenario, the accessing of medical assistance by the victim in sexual offences cases is immediately after such attack with the perpetrator’s HIV status having no bearing on the accessing of such medical assistance.

Secondly, in Botswana, it must have been proved beyond a reasonable doubt that the accused indeed committed the sexual offence before they may be tested for HIV. South Africa,

³⁵³ *S v Phiri* 2014 (1) SACR 211 (GNP).

³⁵⁴ *S v Phiri* 2014 (1) SACR 211 (GNP) [South Africa], *Samukelisiwe Mlilo v State* CCZ 5/2016 Const Application No CCZ 08/13 [Zimbabwe].

³⁵⁵ S142 (3) Penal Code (Amendment) Act 5 of 1998 (Botswana) and Criminal Law (Sexual Offences And Related Matters) Amendment Act 32 of 2007 (South Africa).

³⁵⁶ Note 1 above, p11.

³⁵⁷ Section 142(3) of the Penal Code (Amendment) Act of 1998.

³⁵⁸ Section 30 (1) (a) of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

³⁵⁹ Note 18 above.

however, all that is required is a *prima facie* case against an accused person in a sexual offence and a magistrate can then order such tests for HIV.³⁶⁰ The infringement into the privacy of the accused is more far reaching in South Africa, when an accused person may be acquitted yet suffer stigma of his health status being known to the victim(and through her to others).

Finally, in Botswana, the legislation does not specifically provide that the information on the convicted person's HIV status be revealed to the victim whilst in South Africa this is a key element of the provision.

At the end of a trial, the HIV status of a convicted rapist serves no assistance to the court in determining a fair sentence as no certain conclusions can be reached about the exposure to HIV at the time of the incident, to the complainant. Also, given the irrelevance of the status of the perpetrator to the victim, in the wake of a sexual assault, in taking medical protective measures, i.e. PEP and emergency contraception, legislation allowing such compulsory testing should be repealed in both Botswana and South Africa.

(d) Minimum Sentence Legislation

This study found firstly, that in all three countries, HIV exposure or HIV infection of the victim has been treated as an aggravating factor at the sentencing stage in sexual offences.³⁶¹ All three countries provide that a person who transmits HIV to others or exposes them to HIV will be eligible for a higher sentence. In Zimbabwe, courts can consider any disease transmitted at the time of the rape³⁶² when considering an appropriate sentence. Only Botswana and South Africa imposes such harsher sentences through using statutory minimum sentence legislation dealing with the penalties for sexual offences.³⁶³ Whilst Botswana has introduced harsher penalties for specific sexual offences,³⁶⁴ South Africa has dedicated minimum sentence legislation.³⁶⁵ Zimbabwe has generally left sentencing within the

³⁶⁰ Note 18 above.

³⁶¹ 'Section 142 of the Penal Code (Botswana); Section 51 of Criminal Law Amendment Act 105 of 1997 (South Africa) and Section 65(2)(i) Criminal Law (Codification and Reform Act 23 of 2004 (Zimbabwe)'.

³⁶² Section 65(2)(i) Criminal Law (Codification and Reform Act 23 of 2004 (Zimbabwe).

³⁶³ Section 142 of the Penal Code (Botswana) and Section 51 of Criminal Law Amendment Act 105 of 1997 (South Africa).

³⁶⁴ Section 142 of the Penal Code of Republic of Botswana.

³⁶⁵ Section 51 of Criminal Law Amendment Act 105 of 1997 (South Africa).

discretion of the presiding officer³⁶⁶ save in the limited case of sentencing in terms of S80.³⁶⁷ In Botswana, The minimum sentence for rape is 15 years where the perpetrator was unaware of being HIV positive and 20 years where the perpetrator was aware of being HIV positive.³⁶⁸ In South Africa, the transmission of HIV calls for the minimum sentence of life imprisonment where the exposure or transmission occurs during non-consensual intercourse.³⁶⁹ Zimbabwe has a 10 year minimum sentence for HIV positive perpetrators when s/he commits certain sexual crimes, irrespective of awareness of their HIV status.³⁷⁰ It has, however, to be proven that such person is HIV positive within 30 days of the commission of the offence³⁷¹. In *Machangara* the court did not consider special circumstances and did not depart from the minimum sentences.³⁷²

South Africa introduced minimum sentence legislation for serious offences including among others, rape and certain sexual offences.³⁷³ However, these minimum sentences are in effect, flexible and a court may depart them in the event of the court finding ‘substantial and compelling’ circumstances or where the implementation of such a minimum sentence will be ‘unjust’.³⁷⁴ These ‘substantial and compelling’ circumstances remain undefined in legislation or case law. These minimum sentences ‘remain in effect largely discretionary’.³⁷⁵ In Botswana, there has been comparatively modest reforms of the criminal law, with higher sentences for sexual offences.³⁷⁶ By enacting the Penal Code (Amendment) Act, of 1998, Botswana became one of the first countries in Southern Africa to increase penalties for specific sexual offences.³⁷⁷ Rape was redefined and a statutory minimum sentence is in place.³⁷⁸ The minimum sentence for rape or defilement is ten years up to life imprisonment.³⁷⁹ Only Zimbabwe does not focus exclusively on HIV but harsher sentences

³⁶⁶ G Feltoe: *Sentencing of rape offenders* UZ Law Journal ISSN 2617-20146.

³⁶⁷ Section 80 of the Criminal Law (Codification and Reform Act 23 of 2004.

³⁶⁸ Section 142 of the Penal Code of Republic of Botswana.

³⁶⁹ Section 51 of Criminal Law Amendment Act 105 of 1997.

³⁷⁰ Note 367 above.

³⁷¹ Note 367 above – s80(2) (b).

³⁷² *S v Machangara* (B1150/15) [2016] ZWHHC 16 (13 January 2016).

³⁷³ Note 365 above.

³⁷⁴ *S v Malgas* 2001 1 SAC R 469 (SCA).

³⁷⁵ J Thompson and FN Simmonds ‘*Rape Sentencing Study*’ Population Council as accessed at https://knowledgecommons.popcouncil.org/departments_sbsr-rh/12/ on 20 June 2019.

³⁷⁶ Section 142 of the Penal Code of Republic of Botswana.

³⁷⁷ Note 364 above.

³⁷⁸ S141 and 142 of Penal Code Of Republic of Botswana.

³⁷⁹ Note 32 above.

may be imposed for any sexually transmitted infection even those that are not life threatening.³⁸⁰

No minimum sentences applies for children in both Botswana and South Africa.³⁸¹ In Zimbabwe, children must only be imprisoned as a last measure and then too, for only the shortest period of time.³⁸²

A child is someone under 18 years of age in all three countries.³⁸³ Two countries have specific legislation for children in conflict with the law i.e. Botswana³⁸⁴ and South Africa.³⁸⁵ Zimbabwe's child justice system 'is fragmented' and 'there is a need...for a policy that specifically caters for the juvenile justice system'.³⁸⁶

In South Africa only, legislation has been enacted that specifies what does not qualify as mitigating factors to justify departure of the minimum sentences.³⁸⁷

Only Botswana has corporal punishment for males only, for both child and adult offenders.^{388,389} This sentence can be included for rape or defilement of a child and other offences.³⁹⁰ No corporal punishment for any offence is allowed in South Africa,³⁹¹ since 1996. Zimbabwe has outlawed corporal punishment in 2019.³⁹²

The minimum sentence in Botswana for HIV exposure or transmission is 15 years with or without corporal punishment, if the perpetrator was unaware of his HIV positive status or 20 years with or without corporal punishment, if aware of his HIV positive status. Concurrent

³⁸⁰ Section 65(2)(i) Criminal Law (Codification and Reform Act 23 of 2004 (Zimbabwe).

³⁸¹ Centre for Child Law v Minister for Justice and Constitutional Development. 2009 (2) SACR 477 (CC) (South Africa).

³⁸² S81 of the Zimbabwean Constitution.

³⁸³ Children's Act 2009 (Botswana), Child Justice Act (South Africa) and s81 of the Zimbabwean Constitution.

³⁸⁴ Children's Act 2009.

³⁸⁵ Child Justice Act 75 of 2008.

³⁸⁶ R. Ruparanganda and R Ruparanganda : '*Reformations In Zimbabwe's Juvenile Justice System*' Africa Journal of Social Work Vol 6 No1 (2016).

³⁸⁷ Criminal Law (Sentencing) Amendment Act (2007), section 51(3). According to the Act, the following factors may not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence in a case of rape:-

(i) The complainant's previous sexual history; (ii) an apparent lack of physical injury to the complainant; (iii) an only accused person's cultural or religious beliefs about rape; or (iv) any relationship between the accused person and the complainant.

³⁸⁸ Section 28(2) of the Penal Code.

³⁸⁹ Section 28(3) For adults males corporal punishment could be administered, not more than 12 strokes, for adult males less than 40 years of age.

³⁹⁰ Section 142 of Penal Code of Botswana.

³⁹¹ Section 10 South African Schools Act 84 of 1996.

³⁹² *The State v. Willard Chokuramba*, CCZ 10/19, Constitutional Application No. CCZ 29/15. Unconstitutionality of judicial corporal punishment – 3 April 2019.

sentences are not permitted³⁹³ in Botswana. South Africa allows for life imprisonment when rape is accompanied by HIV exposure³⁹⁴ in cases where the perpetrator knew that s/he was HIV positive. In Zimbabwe, one can be sentenced up to life for rape and attempted rape.³⁹⁵ In Botswana the court is not eager to apply enhanced sentences³⁹⁶ in the absence of proof³⁹⁷ with the courts striking down the offending legislation. In South Africa, life imprisonment is being handed down to rape perpetrators who are HIV positive³⁹⁸ for mere exposure to rape. In Zimbabwe too, life imprisonment are being handed down for rapists³⁹⁹ though there are differing sentences for rapes and child rapes.⁴⁰⁰ In both Botswana⁴⁰¹ and Zimbabwe⁴⁰², the courts were faced with constitutional issues in respect of the application of these HIV specific provisions. No Constitutional cases have come before the South African Constitutional Court in respect of constitutional issues for transmission or exposure to HIV.

Table 1 below reflects the sentencing trends:

Table 1: Sentencing practices in Botswana, South Africa and Zimbabwe

Country	Case	Charge	Sentence
Botswana	<i>Lejony v The State</i>	Defilement	10 years
	<i>Magapatona v The State</i>	Rape	15 years and 2 strokes with the cane
	<i>Koorakile and Others v The State</i>	Rape	15 years
South Africa	<i>CN v State</i>	2 counts of rape	Life imprisonment for both
	<i>Mazibuko v S</i>	Rape and attempted murder	Life imprisonment for rape and 12 years for attempted murder
	<i>Bailey v S</i>	Rape	Life imprisonment
Zimbabwe	<i>S v Nhomboka</i>	Rape	20 years

³⁹³ Note 375, p20.

³⁹⁴ Criminal Law Amendment Act 105 of 1997.

³⁹⁵ Note 43 above.

³⁹⁶ Section 142 (4) (a) of the Penal Code (Amendment) Act of 1998.

³⁹⁷ *Makuto v The State* 2000 (2) BLR 130 (CA).

³⁹⁸ *CN v The State* Appeal No: A851-15 NGHC (Unreported).

³⁹⁹ *S v Chirembwe* HH-162-15.

⁴⁰⁰ Feltoe G: 'Sentencing of rape offenders' p198 University of Zimbabwe Law Journal 2019.

⁴⁰¹ *Makuto v The State* 2000 (2) BLR 130 (CA).

⁴⁰² *Pitty Mpofu (2) Samukelisiwe Mlilo v State* CCZ 5/2016 Const Application No CCZ 08/13.

	<i>S v Zunidza</i>	Rape	15 years
	<i>S v Cap. Kamupakara</i>	Rape	6 years (2 suspended)

It is important to note that Botswana court have been slow to impose enhanced penalties for HIV positive convicted rapists, where it cannot be shown that that person actually exposed or transmitted HIV to the victim.⁴⁰³ Zimbabwe has a dearth of rape cases with varying sentences, which leads academics to call for more detailed sentencing guidelines, a sexual offenders' register and the introduction of offences covering sexual grooming of children,⁴⁰⁴ in the hope of more consistency and suitability of sentences. Notwithstanding s80, the difficulty of proof of HIV positive status within a 30 day time period, makes for not much use by courts. It is not uncommon for some sentences to be suspended for child rapists.⁴⁰⁵ Similar laments were made in South Africa recently by the judiciary⁴⁰⁶ when having to pronounce sentence.

Both Botswana and South Africa have more or less consistent higher sentences, with Zimbabwe lacking in such consistency.⁴⁰⁷ However, sentencing guidelines in respect of sexual offences will assist courts in all 3 jurisdictions, in achieving greater consistency and clarity when sentencing sexual offenders.

Both in Botswana and Zimbabwe, there has been call for reform of the law to bring it more in line with the United Nations Universal Guidelines on HIV and AIDS.⁴⁰⁸ In Botswana, the court in *Matlapeng*⁴⁰⁹ calls for revision by the court⁴¹⁰ as the HIV result, if positive, would

⁴⁰³ *Magapatona v The State* 2006 (2) BLR 510 (CA)

⁴⁰⁴ Feltoe G: 'Sentencing of rape offenders' p198 University of Zimbabwe Law Journal 2019.

⁴⁰⁵ In *S v Nyamande* HH-719-14 a 54 year old male had sexual relations with a 14 year old girl over the course of 6 months and made her pregnant. He was given a suspended sentence. *S v Matare* HH-410-16 a 36 year old man had sexual relations with a 15year old and he was given a suspended sentence.

⁴⁰⁶ E Cameron: 'Imprisoning the Nation: Minimum Sentences in South African Law' p10. In *S v Vilakazi* 2012 (6) SA 353 (SCA) para 10, 'Nugent JA said that a sophisticated system to construct guidelines to secure consistency in sentencing was subsequently recommended by the South African Law Reform Commission in December 2000 – a recommendation made after a comprehensive review of sentencing practice in this country and abroad'. But the sophisticated guideline-system the SALRC recommended, which 'would have been welcome to many judges who face the difficult task of sentencing', was never introduced.' Dans Distinguished Lecture, University Of Western Cape 2017 as accessed at <https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf> on 26Feb2021.

⁴⁰⁷ Feltoe G: 'Sentencing of rape offenders' p198 University of Zimbabwe Law Journal 2019.

⁴⁰⁸ Note 15 above.

⁴⁰⁹ *Matlapeng v The State* [2001] 1 B.L.R. 161, CA.

⁴¹⁰ Note 409 above.

not be enough to establish temporal causality between the complainant and the perpetrator.⁴¹¹ While in Zimbabwe, civil society has campaigned for s79's repeal.⁴¹² It is currently in the process of being repealed.⁴¹³ South Africa too it is submitted, should bring in their legislation to cover cases of actual transmission of HIV and not mere exposure. More awareness must be made to the legal profession of the many progresses in science regarding the actual infectiousness of HIV positive people and the actual chances of HIV transmission. In countries where the standard in criminal court for convictions is proof beyond reasonable doubt, such knowledge would have far reaching impact on those facing charges involving allegations of HIV exposure or transmission.

6.3. *Discussion*

In this study, all three countries have an enormous HIV issue facing their peoples. All three countries have sought to manage the pandemic with legislation as well as health and social interventions.

Key strengths in the legal response include that they have all responded to HIV and the risks that it can pose to others. They have used the criminal law rather than the civil law to punish those who deliberately expose or infect others – this does provide justice for victims. They have increased sentences where HIV exposure or infection has occurred. There has been human rights litigation which has resulted in courts narrowing down certain provisions.

Nevertheless, there are challenges such as the failure to accept the new scientific evidence that the risks of HIV infection go down if for example, an accused person is on ARV treatment. In none of the cases before any of the courts in either Botswana, South Africa nor Zimbabwe was the actual transmission of HIV proved to have taken place, beyond a reasonable doubt, which is the legal standard in a criminal trial. Instead, mere exposure to the HIV virus meant convictions were being handed down without consideration of the impact of the advances of ARVs on the treatment of HIV being considered.⁴¹⁴ Furthermore, this means the possible defence of the accused being on ARVs and thus not infectious, being canvassed

⁴¹¹ Note 409 above.

⁴¹² Zimbabwe: Repeal of legal provision that criminalizes 'willful' transmission of HIV approved by cabinet May 13, 2019 as accessed at <http://www.hivjustice.net/storify/zimbabwe-repeal-of-legal-provision-that-criminalises-wil...on> 12/6/2019.

⁴¹³ Note 412 above.

⁴¹⁴ Note 38 above.

and without the actual percentages of the possibility of transmission being considered in most cases.

The life expectancy of HIV-positive persons on ARV treatment should be an important factor when considering sentence, with the courts needing to consider the effect of both this and the low risk of transmission of HIV on a complainant⁴¹⁵ before handing down an appropriate sentence. Medical evidence is indispensable in assisting a court understand the ramifications of HIV on a person and thus allowing the court to reach a just sentence. The effect of HIV on the quality of life of the victim, in determining an appropriate sentence is a vital consideration. After-all, we are dealing with a medical condition and medical evidence is essential.

Certain laws have a disparate impact on women or HIV positive people, raising constitutional issues.⁴¹⁶ Charges laid after discovery of status at pre-natal and anti-natal clinics⁴¹⁷ thus discouraging the accessing of such services and having unfair effect on women[as they more often interact with the health system. Mandatory testing in Botswana and South Africa served no purpose for informed sentencing in Botswana nor was it of any assistance to victims in the case of South Africa. Notwithstanding that the international human rights position is the prosecution of actual transmission of HIV and not mere exposure, many laws in effect allow for the prosecution of mere exposure. The International Guidelines state that

‘exceptions to voluntary testing would need specific judicial authorization, granted only after due evaluation of the important considerations involved in terms of privacy and liberty...and that such compulsory testing can constitute a deprivation of liberty and a violation of the right to security of the person’.⁴¹⁸

Such testing ‘bears no practical relevance to the treatment of the survivor’.⁴¹⁹ As this testing cannot benefit the victims, it appears to be unnecessary, in respect of the South African legislation⁴²⁰ and in the case of Botswana,⁴²¹ because such testing cannot confirm exactly

⁴¹⁵ Note 38 above.

⁴¹⁶ Botswana: *Makuto v The State* 2000 (2) BLR 130 (CA) and Zimbabwe: *Pitty Mpofu (2) Samukelisiwe Mlilo v State* CCZ 5/2016 Const Application No CCZ 08/13].

⁴¹⁷ *S v Phiri* 2014 (1) SACR 211 (GNP) [South Africa], *Samukelisiwe Mlilo v State* CCZ 5/2016 Const Application No CCZ 08/13 [Zimbabwe].

⁴¹⁸ UNAIDS & OHCHR as quoted in PM Eba: ‘*HIV-specific legislation in sub-Saharan Africa: A comprehensive human rights analysis*’ (2015) 15 African Human Rights Law Journal 224-262 as accessed at <http://dx.doi.org/10.17159/1996-2096/2015/v15n2a1>.

⁴¹⁹ Note 107 above.

⁴²⁰ Note 355 above.

⁴²¹ Note 355 above.

when the perpetrator tested positive, it renders such law ineffective. With scientific difficulties in proving transmission of the virus, such laws seem to weigh unjustly against the perpetrators rights to privacy and liberty.

Eba advises that ‘by providing for compulsory HIV testing...HIV-specific laws contribute to perpetuating misinformation and prejudice about HIV and its modes of transmission’.⁴²² In effect, in both Botswana and South Africa’s case, such compulsory testing, ‘may be deemed to violate human rights because they are overly broad, unnecessary and do not hold any health benefit for survivors of sexual violence’.⁴²³

There is a need for more sentencing guidelines across all jurisdictions as minimum sentences alone are not enough to ensure consistency and fully informed sentences, in the cases of Botswana and South Africa. Further, some sentences are not aligned with international standards, like corporal punishment in Botswana.

In Botswana, the appeal courts have found themselves in situations where, in order to be just , they had to apply their mind to the set of facts before it in the light of unforeseen implications as it did in the *Lejony* matter, here it held that the legislature did not envisage certain outcomes at the time of their formulation of the HIV specific legislation.⁴²⁴ On the other side, in South Africa, notwithstanding that the common law applied, as opposed to HIV specific laws, it too does not quite fit the unique situation of transmission of the HIV virus when compared to the more traditional *senarios* of attempted murder and assault. In Zimbabwe too, the unfair effect of the HIV specific legislation and the impractical application makes for the decision to repeal such failed laws. This is indicative of the failure of the criminal law to handle what should in essence be managed by the health, education, academic and social development sectors of government.

⁴²² Note 15 above.

⁴²³ Note 15 above.

⁴²⁴ *State v Lejony* 2000 (1) BLR 326 (HC).

6.4. *Conclusion*

‘The UNAIDS guidance note on ending the overly-broad criminalization of HIV...exposure and transmission...principles are (i) to limit criminal liability to cases of intentional HIV transmission ...(ii) no criminal liability in cases of mere ...exposure or where transmission has not occurred; (iii) no criminal liability where a person has a low viral load or is on effective treatment; (v) no criminal liability where a person did not know his or her status and no criminal liability in case of disclosure of HIV status prior to a sexual act.’⁴²⁵

These norms have not been followed by all three countries. Botswana, South Africa and Zimbabwe should look at bringing their HIV laws to reflect the current legal and scientific position.

⁴²⁵ Note 15 above.

Chapter 7: Conclusion

The UNAIDS Guidelines recommend the management of the HIV/AIDS epidemic through the use of a human rights framework. Countries with specific laws that criminalize HIV exposure and transmission ‘epitomize the embrace of coercive approaches in HIV-specific laws in the region’.⁴²⁶ ‘Human rights approaches submit that coercive legal measures....serve the politics of blame and do nothing to advance understanding of the epidemic or to slow its spread’.⁴²⁷

This study has compared three Southern African countries to examine their use of the criminal law to respond to HIV. The comparison has been useful as it has shown the difficulties in both a statutory and a common law approach. Despite all three countries facing the same epidemic, their criminal law responses have been quite different and useful learnings were able to be drawn from the work.

This study has shown that all three countries have contrary to international human rights norms used the criminal law to respond to HIV. Although there has been some attempt to balance the rights of the community with the rights of people living with HIV, by and large the laws have done little in lessening the burden of the epidemic. These laws have also not kept abreast of global changes in the science surrounding HIV. Neither Botswana, South Africa nor Zimbabwe lawmakers have considered the incredible medical advances that render HIV positive people unable to transmit the virus with their body fluids if they are on treatment.⁴²⁸ Concerning, the prosecution of people who use barrier prevention methods still occurs.

This study concludes that HIV-specific laws are in need of revision in Botswana, South Africa and Zimbabwe. Most of these laws “...fall short of human rights standards and best available public health recommendations relating to HIV...[ultimately leading to] stigma and fear that keep people from seeking HIV services.”⁴²⁹

The criminalization of exposure and transmission of HIV is an outdated response based on fear and prejudice. It does nothing if not hamper HIV prevention and treatment measures.

⁴²⁶ PM Eba: ‘*HIV-specific legislation in sub-Saharan Africa: A comprehensive human rights analysis*’ (2015) 15 African Human Rights Law Journal 224-262 as accessed at <http://dx.doi.org/10.17159/1996-2096/2015/v15n2a1>.

⁴²⁷ E Cameron;E Swanson: ‘*Public Health and Human Rights- The AIDs Crisis in South Africa*’, 8 S. Afr. J. on Hum. Rts. 200 (1992) P232.

⁴²⁸ The Zimbabwean court considered modern medicine advances in the case of *Rebecca Ndaizivei Semba v State* HH 299-17 CRB RMW 95/14 [2017] ZWHHC 299 (12 November 2015).

⁴²⁹ Note 2 above p255.

Rather, HIV and AIDs will be overcome by education, research, medical progress, social progress and the management of HIV positive people within the human rights framework. After all, 'syphilis was defeated by penicillin, not by the Contagious Diseases Act'.⁴³⁰

⁴³⁰ Califa P, CounterPunch, The Necessity of Excess, (Oct. 19, 2002), at <http://www.counterpunch.org/califa1019.html> (last visited Oct. 4, 2003) as quoted in Stein A 'Should HIV be Jailed? HIV Criminal Exposure Statutes and Their Effects in the United States and South Africa' Washington University Global Studies Law Review Vol 3 Issue 1 p197

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Appendix

Botswana

The Penal Code (Amendment) Act 5 of 1998 was amended in 1998 :

142. Punishment for rape

(1) Any person who is charged with the offence of rape shall-

(i) not be entitled to be granted bail; and

(ii) subject to subsections (2) and (4), upon conviction be sentenced to a minimum term of 10 years' imprisonment or to a maximum term of life imprisonment.

(2) Where an act of rape is attended by violence resulting in injury to the victim, the person convicted of the act of rape shall be sentenced to a minimum term of 15 years' imprisonment or to a maximum term of life imprisonment with or without corporal punishment.

(3) Any person convicted of the offence of rape shall be required to undergo a Human Immunodeficiency Virus test before he or she is sentenced by the court.

(4) Any person who is convicted under subsection (1) or subsection (2) and whose test for

the Human Immunodeficiency Virus under subsection (3) is positive shall be sentenced

a) to a minimum term of 15 years' imprisonment or to a maximum term of life imprisonment with corporal punishment, where it is proved that such person was unaware of being Human Immunodeficiency Virus positive; or

(b) to a minimum term of 20 years' imprisonment or to a maximum term of life imprisonment with corporal punishment, where it is proved that on a balance of probabilities such person was aware of being Human Immunodeficiency Virus positive.

(5) Any person convicted and sentenced for the offence of rape shall not have the sentence imposed run concurrently with any other sentence whether the other sentence be for the offence of rape or any other offence.

147. Defilement of person under 16 years

(1) Any person who unlawfully and carnally knows any person under the age of 16 years is guilty of an offence and on conviction shall be sentenced to a minimum term of 10 years' imprisonment or to a maximum term of life imprisonment.

(2) Any person convicted under subsection (1) shall be required to undergo a Human Immunodeficiency Virus test before he or she is sentenced by the court.

(3) Any person who is convicted under subsection (1) and whose test for the Human Immunodeficiency Virus under subsection (2) is positive shall on conviction be sentenced to a-

(a) minimum term of 15 years' imprisonment and a maximum term of life imprisonment with or without corporal punishment, where it is proved that such person was unaware of being Human Immunodeficiency Virus positive; or

(b) minimum term of 20 years' imprisonment and a maximum term of life imprisonment with or without corporal punishment, where it is proved that on a balance of probabilities such person was aware of being Human Immunodeficiency Virus positive.

(4) Any person who attempts to have unlawful carnal knowledge of any person under the age of 16 years is guilty of an offence and is liable to imprisonment for a term not exceeding 14 years, with or without corporal punishment.

(5) It shall be a sufficient defence to any charge under this section if it appears to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the person was of or above the age of 16 years or was such charged person's spouse.

South Africa

Part 3: Application for compulsory HIV testing of alleged offender by investigating officer

Application by investigating officer for HIV testing of alleged offender

32. (1) An investigating officer may, subject to subsection (2), for purposes of investigating a sexual offence or offence apply in the prescribed form to a magistrate of the magisterial district in which the sexual offence or offence is alleged to have occurred, in chambers, for an order that—

(a) the alleged offender be tested for HIV; or 30

(b) the HIV test results in respect of the alleged offender, already obtained on application by a victim or any interested person on behalf of a victim as

contemplated in section 30(1)(a)(i), be made available to the investigating officer or, where applicable, to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings.

(2) An application contemplated in subsection (1) must—

(a) set out the grounds, on the strength of information taken on oath or by way of solemn declaration, in which it is alleged that a sexual offence or offence was committed by the alleged offender; and

(b) be made after a charge has been laid, and may be made before or after an arrest has been effected, or after conviction.

(3) If the magistrate is satisfied that there is *prima facie* evidence that—

(a) a sexual offence or offence has been committed by the offender; and

(b) HIV testing would appear to be necessary for purposes of investigating or prosecuting the offence,

the magistrate must, in the case of an application contemplated in subsection (1)(a), order that the alleged offender be tested for HIV in accordance with the State's prevailing norms and protocols, including, where necessary—

(i) the collection from the alleged offender of two prescribed body specimens; and

(ii) the performance on the body specimens of one or more HIV tests as are reasonably necessary to determine the presence or absence of HIV infection in the alleged offender,

and that the HIV test results be disclosed in the prescribed manner to the investigating officer or, where applicable, to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings and to the alleged offender, if the results have not already been made available to such offender as contemplated in section 30(1)(a)(i)-

(4) An order contemplated in subsection (3) must be made in the prescribed manner and handed to the investigating officer.

(5) The investigating officer must, as soon as is reasonably practicable, after an application has been granted in terms of subsection (3), inform the alleged offender by handing to him or her a notice containing the information as prescribed and, if necessary, by explaining the contents of the notice.

S51 of Act 105 of 1997

Minimum sentences for certain serious offences

51. (1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall—

(u) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person, in the case of— 35

(i) a first offender, to imprisonment for a period not less than 15 years:

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years; 40

(b) if it has convicted a person of an offence referred to in Part III of Schedule 2, sentence the person, in the case of—

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and 45

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

GOVERNMENT GAZETTE, 19 DECEMBER 1997

Act NO. 105, 1997 CRIMINAL JUSTICE ACT, 1997

(c) if it has convicted a person of an offence referred to in Part IV of Schedule 2, sentence the person, in the case of—

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum sentence that a regional court may impose in terms of this

subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

(4) Any sentence contemplated in this section shall be calculated from the date of sentence.

(5) The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(6) The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.

(7) If in the application of this section the age of a child is placed in issue, the onus shall be on the State to prove the age of the child beyond reasonable doubt.

(8) For the purposes of this section and Schedule 2, “law enforcement officer” includes—

(a) a member of the National Intelligence Agency or the South African Secret Service established under the Intelligence Services Act, 1994 (Act No. 38 of 1994); and

(b) a correctional official of the Department of Correctional Services or a person authorised under the Correctional Services Act, 1959 (Act No. 8 of 1959).

CRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23*]

Act 23/2004

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.

80 Sentence for certain crimes where accused is infected with HIV

(1) Where a person is convicted of—

(a) rape; or

(b) aggravated indecent assault; or

(c) sexual intercourse or performing an indecent act with a young person, involving any penetration of any part of his or her or another person's body that incurs a risk of transmission of HIV;

and it is proved that, at the time of the commission of the crime, the convicted person was infected with HIV, whether or not he or she was aware of his or her infection, he or she shall be sentenced to imprisonment for a period of not less than ten years.

(2) For the purposes of this section—

(a) the presence in a person's body of HIV antibodies or antigens, detected through an appropriate test, shall be *prima facie* proof that the person concerned is infected with HIV;

(b) if it is proved that a person was infected with HIV within thirty days after committing a crime referred to in those sections, it shall be presumed, unless the contrary is shown, that he or she was infected with HIV when he or she committed the crime.



13 August 2019

Ms Nesira Singh (209527200)
School of Law
Howard College Campus

Dear Ms Singh,

Protocol reference number: HSS/0543/019M

Project title: The use of the criminal law to respond to the exposure / infection with HIV: A comparison between the laws in South Africa, Botswana and Zimbabwe

Full Approval – No Risk / Exempt Application

In response to your application received 06 June 2019, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.


Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully


Professor Urmilla Bob
University Dean of Research

/ms

Cc Supervisor: Professor Ann Strobe
cc. Academic Leader Research: Dr Donrich Thaldar
cc. School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee
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