

**Attorney General's Reference: In re: The State v Marapo
2002 (2) BLR 26 (BwCA 2002)**

The case dealt with the issue of unconstitutionality of section 142(1)(i) of the Penal Code, which restricts bail to persons charged of rape. The Botswana Court of Appeal indicated that depriving a person of his or her liberty does not reduce incidence of HIV. The Court decided that the section referred to is unconstitutional.

Excerpts

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Facts

The issue for decision by the court in this matter is whether s 142(1)(i) of the Penal Code ... which provides that any person who is charged with the offence of rape shall not be entitled to be admitted to bail, is unconstitutional or not. The respondent, Moatlhodi Marapo, was arrested on 27 September 2000 and charged with rape. In terms of s 142(1)(i) of the Penal Code, he was not entitled to bail pending his trial. On 9 February 2001 he brought an application in the High Court in Francistown ... for an order declaring s 142(1)(i) *ultra vires* section 5(3)(b) of the Constitution ...

...

Applicable law

...

Section 142(1)(i) of the Penal Code, as amended, provides thus:

'(1) any person who is charged with the offence of rape shall -
(i) not be entitled to be granted bail.'

Section 5(3)(b) of the Constitution, which is alleged to be contravened by section 142(1)(i) reads as follows: 'Any person who is arrested or detained -

(a) ...

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana, and who is not released, shall be brought as soon as is reasonably practicable before a court; and if any person arrested or detained as mentioned in paragraph b of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against, him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.'

Application of law to facts

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It is beyond my comprehension how depriving a person of his liberty merely because he is alleged to have committed rape - not, it must be stressed, because he is found guilty of it - can in any way reduce the crime rate, including rape or serve to contain or restrict the incidence of HIV/AIDS. After all, not all persons who commit rape are infected with HIV/AIDS. It may be thought that knowing that no bail will be granted if a person is charged with rape will have a deterrent effect, persuading those who may be so minded to desist from pursuing their intentions. That, however, it would seem, was the ostensible purpose in the enactment of the section 142(1)(ii), (2), (3), (4) and (5) by s 3 of Act 5 of 1998 containing, as they do, harsh and severe mandatory punishments for rape, particularly for those persons who are HIV positive and especially if they are aware of it. I cannot conceive that

making the fact that a person who may be alleged to have committed rape not entitled to bail can operate in any manner as a deterrent.

Faced with the difficulties that I have just set out, Mrs Dambe [counsel for the Attorney General] submitted that, in any event, the enactment of section 142(1)(i) by the legislature was an expression of public concern about the crime situation in the country. If I am wrong in my views and that the public interest may in some way be served by section 142(1)(i) or if it may represent an expression of concern about the crime situation, sight must not be lost of the fundamental right enshrined in section 3 of the Constitution of personal liberty. It is one of the most basic of human rights in a democratic society and its deprivation or curtailment must occur only within the most narrow of confines ... As stated by Kentridge JA in *Attorney-General v. Moagi...*:

'Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.'

Such rights are jealously guarded and the development, extension and preservation of them are cornerstones of the intellectual processes of democracies throughout the world and are embodied in the laws and judicial pronouncements of such countries as the United States, the United Kingdom, the many members of the European Community and neighbours of Botswana, such as South Africa. This trend has been particularly marked in the sphere of those rights personal to the individual and especially the right to personal liberty. This court as far back as 1992 has recognised that Botswana is one of the countries in Africa where liberal democracy has taken root.... and international human rights norms should receive expression in the constitutional guarantees of this country. The court is accordingly required to balance the concept of the public interest against the right of personal freedom and to determine the precedence of the one in relation to the other by reference to the mores of the community and by using an assessment based on proportionality....

It is notorious.... that the trend nowadays - and it has been so for a considerable time - is that basic human rights are nurtured, promoted and protected in all liberal democracies. Having stated that, the denial of entitlement to bail of a person who is only alleged to have committed rape to satisfy the public interest that serious crime should be confined, does not, in my view, weigh up against the infringement of that person's right of personal freedom and his deprivation of it on the mere allegation of his having committed the offence. It must be remembered that, even where a person is charged with the grave offences of murder and treason, he may be admitted to bail. ... It is therefore incongruous, to say the least, that a person accused of rape may not be so admitted....

...

Finding

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Adopting a purposive construction to the Constitution therefore and applying a value judgment to the proportional assessment of the public interest, on the one hand, and the right of personal liberty, on the other, I find that section 142(1)(i) of the Penal Code offends against the provisions of section 5(3)(b) of the Botswana Constitution and that the denial of bail where a person is alleged to have committed the offence of rape is not in the public interest

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Remedy

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The following order is therefore made:

(1) Section 142(1)(i) of the Penal Code as introduced by 3 of Act 5 of 1998 is declared *ultra vires* the Constitution of Botswana and is struck down.

