Lejony v *The State*
2000 (2) BLR 145 (BwCA)

In accordance with section 147(2) of the Penal Code of Botswana, as amended by the Penal Code (Amendment) Act 5 of 1998 a person convicted of defilement is required to undergo HIV testing before sentencing. The appellant tested positive to HIV but there was no evidence confirming that he had HIV at the time he committed the offence. The Botswana Court of Appeal dismissed the appeal on the ground that the accused must be shown to have been HIV positive at the time of the offence and not merely at the time of the test after conviction.

Excerpts

…

Facts

Ontshabetse Lejony was tried and convicted of defilement of a female under 16 years of age contrary to section 147(1) of the Penal Code (Cap. 08:01), as amended by section 8 of the Penal Code (Amendment) Act, 1998 (Act No 5 of 1998). The conviction was recorded by the magistrate's court at Francistown on 2 August 1999. Under the amended section 147(2) any person convicted of such offence shall be required to undergo a HIV test. Where the test is positive, the convicted person is liable, under section 147(3)(a) of the amended Act to a minimum sentence of 15 years' imprisonment, with or without corporal punishment, if proved that he was unaware that he was HIV positive. Lejony tested positive. There was no evidence that he was aware at any time before the test that he was HIV positive. The magistrate, whose sentencing power did not extend to imposing a penalty of 15 years' imprisonment, committed Lejony to the High Court under section 296 of the Criminal Procedure and Evidence Act (Cap. 08:02) for sentence. The case thereupon came before Mosojane J. In a considered judgment in *State* v *Lejony* [2000] 1 B.L.R. 326, Mosojane J came to the conclusion that he was not entitled to impose the minimum penalty of 15 years' imprisonment. This conclusion was based in the first place, on the fact that the document certifying that Lejony was HIV positive, did not state whether Lejony had the HIV syndrome at the time he committed the offence; and secondly, on the reasoning which was embodied in two passages of his judgment. It reads as follow at p. 329F:

"It seems to me clear without any room for doubt at all that the legislature intended to punish those people who were HIV positive but were unaware of their status at the time when they committed the offence and not everybody who was found with the disease after conviction regardless of whether or not they carried the disease when they committed the offence. To punish them simply because they were found to be HIV positive after conviction would be absurd and the language of the subsection permits no such construction in my judgment."

That led to the observation he later made, at p. 330H, that:

"Finally, I wish to remark that the possibility exists in this case, as always it will, that the accused got his HIV status, if he has it, from his victim. The law does not say that he should be punished for that. He would however be punished if he was HIV positive though unaware of it when he committed the offence. This is what I understand the law to be saying. Therefore, in the view that I have taken, unless a court is satisfied that the convicted person was HIV positive though unaware of it at the time of committing the offence it has no right to punish him under subsection 3(a) of section 147 of the Penal Code."

Accordingly, the learned judge imposed the minimum sentence prescribed by section 147(1) of the Penal Code, as amended, for defilement of a female by a person who did not have the HIV syndrome, that is, 10 years' imprisonment.
The State disagrees with this interpretation of section 147(3)(a), and has appealed against it to this court…
Taking the appeal by the State first, the grounds filed were no less than seven. They were as follows:
"1. The High Court judge erred by placing or determining the HIV status of an accused person at the time of the commission of the offence, when the Act refers to the status of the accused after conviction.
2. The Honourable judge erred when he made an assumption that because the complainant had been sexually active, the possibility of accused person being infected with the HIV virus by complain ant could not be ruled out.
…

Finding
They all revolve round the single issue arising from the interpretation placed by Mosojane J on the amendment to section 147 of the Penal Code, in so far as he concluded that the accused must be shown to have had the HIV syndrome at the time of the offence, and not merely at the time of the test after conviction …
The arguments canvassed on this question were exactly the same as this court considered in *Makuto* v *The State*, reported at p. 130, ante, which judgment was given today. In that case, counsel for the appellant relied on the decision of Mosojane J in this case. We expressly approved of the reasoning of Mosojane J. In this case, I think we should apply the reasoning of this court in the Makuto case. I think on that account, the submission of the State that this court should adopt the broad interpretation which makes the person convicted for the offence liable of rape or defilement to the enhanced punishment of 15 years, whether he had the HIV syndrome at the time of the offence or not, must be rejected.

Remedy
The decision of Mosojane J in this case was right and I would as a result, dismiss the appeal of the State.
…