



# Litigation and defence in practice:

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# Zimbabwean Experience

- Instructions advise that presentation has to be in 15 minutes.
- This will be done as follows;
- The law in Zimbabwe (5 minutes)
- Issues arising in criminal defence (2 minutes)
- `Cases studies (8 Minutes)

# ZLHR HIV related litigation

- ZLHR has handled about five cases.
- As many as ten cases/prosecutions have happened in Zimbabwe
- S v Kaiboni Mlambo
- S v Sally Taengwa
- S v Samukelisiwe Mlilo – S v P Mpofu
- S v Nevison Mpofu
- S v Malandu-Ncube

# The Law

- In Zimbabwe, criminalisation of HIV transmission and exposure before 2004 was provided for under Section 15 of the now repealed Sexual Offences Act [Chapter 9:21]. Currently, the Criminal Law (Codification and Reform) Act [Chapter 9:23] provides for the criminalisation of HIV transmission in Section 79

# Section 79 of the code

- *(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.*

# Problem with this piece of legislation

- poorly drafted
- overbroad and counterproductive
- It is at cross purposes with Zimbabwe's public health policy
- is unjust, unconstitutional and facilitates gross violation of the rights of people living with and affected by HIV.
- Persons can be convicted without proof of actual infection of complainant – REALISE there is a real risk or possibility of infection – engages in sex – realising the real risk or possibility of infecting another person

# Defence prescribed at law

- The provision is very clear on what constitutes a defence
- *(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.*
- *( Act allows voluntary assumption of risk)*

# Issues arising – Criminal Defence- ZLHR experience

- Proof: sero status, infection, of elements in defence
- intention
- Inadmissible evidence
- Disproportionate sentencing
- Lack of understanding by accused persons of what they are being charged with
- Forced HIV testing
- Proper recording of guilty plea – courts not ascertaining if the accused has applied himself to the nature of the charge
- Effects of imprisonment
- Use of condoms
- The role of the media
- Women and criminalisation

# Issues arising from ZLHR Experience

- **Proof ...status of accused.-**
- - S v Malandu-Ncube -High Court judge Maphios Cheda ruled that Malandu could not be compelled to be tested for HIV, as a magistrate had earlier ordered. The case could not proceed.
- In S v Mpofu, S v Mlilo accused persons admitted that they were HIV positive, so there was no need for hiv test

# Admissibility – blood tests

- Section 264 of the Criminal Procedure and Evidence Act as amended in 2016, empowers the court in ascertaining the health of an accused person to make an order for the taking of a sample of saliva, blood or tissue.
- Evidence of the results will be admissible
- Shall not be inadmissible simply because it was taken against the will of the accused person

# S v Kaiboni Mlambo

- Accused was charged with contravening section 3 (a) and s 15(1) (b) of the Sexual Offences Act Chapter 9 :21 and it being alleged that he had sexual intercourse with a girl below the age of 16 years and that he deliberately or wilfully transmitted Human Immunodeficiency Syndrome Virus (HIV) to her.

# S v Kaiboni Mlambo

- Accused admitted that he had consensual sex with the complainant but denied that the sexual intercourse was unprotected. He also denied that he was HIV positive and that if he was he did not have knowledge of it, actual or otherwise, and accordingly did not wilfully transmit or intend to transmit HIV to the complainant. He also said he used a condom and so even if he was HIV positive he took steps to prevent transmission of HIV to the complainant.

# Points of difficulty

- Proof of Complainant's HIV status was not produced in court – provision does not require proof of infection
- Proof that the complainant did not have HIV before
- Or if she was, who infected who?

# S v Kaiboni Mlambo

- Complainant gave evidence
- Complainant's father who was a medical doctor to the accused also gave evidence
- Another medical doctor also gave evidence
- - To prove that he had actual knowledge of his status – compulsory testing – no pre&post counselling
- Firstly, in terms of SI 41/04 it is not lawful for a doctor to divulge information pertaining to his patient.
- Defence objected to admissibility of Dr's evidence but

# S v Kaiboni Mlambo

## Doctors giving evidence

- Against public policy in terms of section 295 of the Criminal Procedure and Evidence Act.
- Against public health policy, encouraging VCT but when doctors use that information for criminal prosecutions that wld impair the health policy and discourage VCT
- Duty of confidentiality exists also at common law. Various cases were cited as authority that the doctor has a duty of confidentiality and cannot divulge medical information about his client.
- In terms of SI 41/04 it is not lawful for a doctor to divulge information pertaining to his patient

# S v Kaiboni Mlambo - Defence

- Accused admitted sexual intercourse but said that he had reasonable cause to believe that the complainant was of or above the age of sixteen. He said on the occasions he had sex with complainant he used a condom. This was not disputed because there was no evidence to the contrary. The complainant had not been tested for HIV. He said he did not have actual knowledge that he was HIV positive and that he could not have known that he was likely to lead complainant to become infected with HIV. Further he denied that he was HIV positive at all material times. He said if he transmitted HIV to the complainant, which he denied he did not do so wilfully or with knowledge.

# S v Kaiboni Mlambo -Media

- Manica Post was insensitive and cultivates stigma of PLHIV,
- Convicted the accused even before the trial concluded
- It was brought to the attention of the Magistrate that the paper was in contempt but magistrate disagreed.
- Media provided inaccurate information on HIV and failed to educate the people
- Fueled stigma and discrimination

# S v Kaiboni Mlambo - Judgment

- After two doctors and complainant gave evidence accused was however found guilty of doing anything which had likelihood to lead another to be infected with HIV. He was sentenced to 15 years of which 5 years were suspended.

# S v Samukelisiwe Mlilo

- My presentation explains the questions around *dolus eventualis* and the future of litigation around decriminalization of deliberate HIV transmission. But will however highlight some points of interest from this case

# S v Samukelisiwe Mlilo - Points of interest

- Accused not fully aware of the nature of the charge she was facing and this was paraphrased for her
- Women and Criminalisation – ante natal care- HIV status –gender violence
- Who infected who, proof of infection
- Media aiding stigma and discrimination – accused had to take off days from work

# S v Samukelisiwe Mlilo

- The Constitutional Court of Zimbabwe dismissed the application,
- That challenge was based on the protection of the law and freedom from discrimination clauses of the former constitution. The court dismissed the protection of the law argument on the basis that the law is sufficiently precise to regulate individual conduct. It also found that there was no unfair discrimination since there is no listed constitutional ground which protects persons living with HIV/AIDS from discrimination.

# S v Samukelisiwe Mlilo - ruling

- According to the Court, Section 79 of the Criminal Law Code embraces both actual intent (*dolus directus*) and constructive intent (*dolus eventualis*). That is to say, it protects society against those who intend to infect others with prior knowledge of their serostatus and those who act recklessly with knowledge that they *could* be seropositive.

# Issues- Constructive Intent

- Court should have enquired into whether it is appropriate for this offence that constructive intention should be sufficient basis for conviction ?
- The question which arose during hearing from Justice Patel was whether there were any offences in respect of which constructive intent was not a constitutive part.
- Section 15 of the Code set out the requirements of constructive intent
- Two issues come up from Section 15 – “Awareness and recklessness” . This according to some scholars (G. Felton) dispels the vagueness issues

# Realising a real risk or possibility – 2 components- S15

## Awareness

-That conduct might give rise to the consequences

## Recklessness

Despite awareness, Accused proceeded with the act

- Where awareness is proved by prosecution, Recklessness is inferred from the fact that the consequence/result actually ensued arising from the conduct of the accused and the relevant circumstances existed when accused engaged in the conduct

# So ??

- This would have required a supplementary heads of argument to show (a) the existence of such offences and (b) why Section 79 should be regarded as a good case to be such an offence. Such offences (such as rape) do exist, and any such submission has to be carefully tailored in light of this judgment of the court. It can only be attempted, in my respectful view, in the following circumstances:

# Way forward

- Action procedure in the high court to allow for leading of evidence, particularly expert witness evidence;
- A client with such a powerful story as to expose the falsity of the court's view that the provision cannot be used to target innocent and indeed vulnerable groups;
- Reference to the *Mudzuru* (child marriages judgment) to implore the court to protect persons living with HIV as a vulnerable group in society deserving of special protection and to refer to regional and international instruments as were referenced in that same judgment