Editorial note: Certain information has been redacted from this judgment in compliance with the law.

LESOTHO

IN THE HIGH COURT OF LESOTHO

(SITTING AS THE CONSTITUTIONAL COURT)

HELD AT MASERU **CONST/05/2020**

In the matter between:

M[redacted] K[redacted] **APPLICANT**

AND

DIRECTOR OF PUBLIC PROSECUTIONS **1ST RESPONDENT**
MINISTER OF LAW & CONSTITUTIONAL AFFAIRS **2ND RESPONDENT**
ATTORNEY GENERAL **3RD RESPONDENT**

Neutral Citation: M[redacted] K[redacted] v DPP & 2 Ors [2022] LSHC 238 Const (25 October 2022)

CORAM **: Hon. Justice E.F.M. Makara**
: Hon. Justice M. Mokhesi
: Hon. Justice P. Banyane

HEARD **: 25 May 2021**
DELIVERED **: 25 October 2022**

SUMMARY

The Applicant convicted of sexual offences by the Trial Court but committed the matter for sentencing by the High Court – The reason being in her interpretation of the Sexual Offences Act, the circumstances surrounding the incidence, warranted the imposition of the death penalty as minimum punishment which the court did not have the jurisdiction to pass – The counsel for the parties concerned and the High Court decided that justice over the matter would be comprehensively achieved if it is featured before the Constitutional Court – Resultantly, the constitutionality of the Sections 30 and 32 (a) (vii) of the Act were challenged against the *right to equality before the law, equal protection under the law, freedom from discrimination, right to life, right to respect for private and family life and freedom from inhuman treatment.* The challenges were premised upon the regimen of the punishments prescribed in the Act.

Held:

1. Section 32 (a) (vii), is unconstitutional as it violates the right to equality before the law and the equal protection of the law;
2. Section 32 (a) (vii) that prescribes death sentence in some stated circumstances, is constitutional because the Constitution of Lesotho allows courts to impose capital punishment under the deserving situations;
3. Section 32 (a) (vii), is unconstitutional to the extent that in discriminating against the right of people living with HIV to be considered for sentencing in equal terms with others, it instead, subjects them to a degrading system of punishments which amounts to *inhuman treatment;*
4. Section 30 which compels the person charged of sexual offence to have his/ her blood substance tested for HIV for the results thereof to be considered by the court for sentencing purposes, is not unconstitutional since it is intended to save the life of the victim, those with whom one might intimately be in involved with and for sentencing purposes;

ANNOTATIONS

CITED CASES

1. **Rex v M[redacted] K[redacted]** CRI/S/0001/19
2. **Rex v Potlaki and Others** [2006] LSHC 78
3. **Selenkane Fatane & Others v The Crown** [2004] LSHC 114
4. **S v Dodo** 2001 (5) BCLR 423 (CC)
5. **Thabo Fuma v The Commander, Lesotho Defence Force and Others** CONST/8/2011) [2013] LSHC 68
6. **Attorney General v Mopa** C.of A(CIV) 3/2002
7. **Retsilisitsoe Khetsi v The Director of Public Prosecution and Others** CRI/0079/2014
8. **Lebohang Ramohalali v The Commissioner of Lesotho Correctional Service and Others**[2017] LSHC 34/2017
9. **Harksen v Lane** CCT9/97) [1997] ZACC 12
10. **S v Makwanyane** 1995(3) SA 391
11. **S v Tcoeib** 1996 (7) BCLR 996 (Namibia)
12. **Prinsloo v Van de Linde** 1997 (6) BCLR 759 (CC)

STATUTES & SUBSIDIARY LEGISLATION

1. Constitution of Lesotho, 1993
2. The Constitution of the Republic of South Africa 1995
3. Sexual Offences Act No. 29 of 2003
4. Stock Theft Act No. 4 of 2000

BOOKS

1. Sudan Tribune Nhial Titt Nhial April 9, 2006
2. B. Kumar: 'Impact of Sexually Transmitted Diseases on the Economies of the Developing Worlds' WHO Report Vol 6 of 1999
3. The Bill of Rights Handbook 2nd Ed. 1999 Juta & Co. Ltd 1999
4. International Covenant on Civil and Political Rights UNTS 999, 171
5. African Charter on Human and People's Rights CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

JUDGMENT

MAKARA J

Introduction

[1] The Applicant institutionalized this constitutional case seeking for the intervention of this Court by declaring:

1. Section 32 (a) (vii) of the Sexual Offences Act[1] - (which would for brevity sake be referred to as the Act) inconsistent with sections 18 and 19 respectively of the Constitution of Lesotho, 1993 and therefore invalid;

2. Section 32 (a) (vii) of the Act inconsistent with Section 5 Of the Constitution of Lesotho[2], and, therefore, invalid;

3. Section 32 (a) (vii) of the Act inconsistent with Section 8 of the Constitution of Lesotho, and therefore invalid;

4. Section 30 of the Act inconsistent with Section 8 of the Constitution and, therefore, invalid;

5. Section 30 of the Act inconsistent with section 11 of the Constitution and, therefore, invalid;

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[1]No. 29 of 2003
[2] The 1993 Constitution

6. Section 30 of the Act inconsistent with Section 12 (7) of the Constitution of Lesotho and, therefore, invalid; and, consequently, that;

7. The proceedings in **Rex v M[redacted] K[redacted]**[3] in which the Applicant was convicted and sentenced, be declared a nullity and that the Applicant be remitted back to the trial court for sentencing;

8. The respondents pay costs of this application in the event of opposition hereof;

9. Further and/or alternative relief.

[1] Duty dictates that it be recorded from this initial stage that to the best of my records remained the last but one of the assignments I delayed to execute on account of the officially reported misfortune occasioned by the ransom virus which graphically distorted the draft judgments in my over 5 years old laptop. These were written during the vacation and had to repeat the work in the order of the high-profile nature of each case and need for urgency. The problem was aggravated for consecutive months, that the Information Technology Unit took to resolve the predicament. In the meanwhile, the Unit could not provide the replacement of the machine. If things had been normal, the task would have been long executed. A testimony of that is that I wrote several constitutional judgments before the one at hand.

[2] The genesis of these constitutional proceedings has, foundationally as already resonated in the Notice of Motion, been

[3] CRI/S/0001/19

predicated by the protestation by the Applicant that the trial court had unconstitutionally conducted the proceedings. The accusation originates from the background criminal case in which he featured before that court against the charge that he had contravened sections 30 and 32(a) (vii) of the Act. The centrality of his case is that he was consequently convicted and sentenced on the basis of the two sections which he charged that they are both unconstitutional in both form and substance.

[3] It must, at the onset, be realized that in principle, the trial court commanded the jurisdiction over the proceedings in particular to consider the verdict and impose the sentence accordingly. This notwithstanding, it declined to determine the sentence. This was inspired by its comprehension of the provisions under Section 32(a) (vii) in the Act since it prescribes a minimal punishment of death for a convict under the circumstances of the Applicant. Resultantly, the trial court committed the matter to the High Court for sentencing where it assumed the citation of **Rex v K [redacted] CRI/S/0001/19.**

[4] On the day scheduled for the hearing of what appeared to be a simple case on sentencing, the High Court then sitting in its ordinary jurisdiction, determined that the matter warranted more profound constitutional research than the one presented before it. In the same vein, it directed that the constitutional importance of the case, necessitated the broadening of the legal representation to include the relevant spheres of the nation which would have a direct and

substantial interest in the matter. The counsel then involved, fully subscribed to the idea. This culminated in the roping in of the senior counsel who featured as *amicus curae* holding briefs from the relevant national formations notably the Lesotho Network of People Living with HIV and AIDS (LENEPWA). In the process, they simultaneously articulated their individual legal perspectives over the subject-matter.

[5] It became rather easy at the very initial encounter between the counsel for the parties to agree with the Court that the common cause developments which occasioned the litigation, authored the challenge for them to address to the constitutionality of the applicable provisions under Section 32(a)(vii). Here, it should be highlighted that the trial magistrate referred the matter the case to the High Court because it had evidentially emerged to her that the Applicant was HIV positive when he committed the offence charged. This constituted basis for her to determine that the section dictated that the revelation *per se,* warranted the man to be sentenced to death as the minimal punishment. The contemplation being that the commission of the offence by the Applicant who at the material moment was aware of his health status, is indicative of the actual or legal intention to kill the victim by infecting her with the deadly virus.

[6] In the posture of the stated narrative, the counsel who featured before the High Court prior to the interrogation of the constitutional

controversies, acknowledged that the addresses on that subject-matter would be dispositive of the case. The same understanding was adopted by the counsel who subsequently for the stated reasons presented their views at the invitation of the Court and on behalf of the qualifying organizations. This could, without condoning the undue delays by the Respondents to file their answering affidavit out of time, attest to this fact. It is for the same reason that the Court further invited the counsel to provide supplementary Heads of Arguments.

[7] This introductory part is concluded by recording in summarized terms that the Respondents duly filed their intention to oppose the application and then out of time filed their answering affidavit. In that instrument, they basically addressed the constitutional issues that formed the substratum of the application. This is in rhythm with the common understanding between the parties that the determination of justice in the matter, predominantly rested on the constitutional considerations upon which the Applicant anchored his case.

[8] In essence, the Respondents denied that the learned magistrate in the trial court, violated the identified constitutional provisions by referring the proceedings to the High Court for sentencing. This was inspired by her construction of the law that her court lacked the legal competency for the imposition of the capital punishment prescribed

under Section 32(a)(vii) read in conjunction with Section 31. In their analysis, the Magistrate had well-acted in accordance with the substantive and the procedural dimensions of the legislation. This was concluded with a narrative that Section 32 (a) (vii) that the discriminatory punishment provided for therein, was designed to pursue a legitimate public purpose that is permissible under the democratic dispensation and, therefore, would pass the constitutional test.

The Legal Landscape for the Application

[9] Against the backdrop of the stated factual scenario and the competing narratives for both parties, it becomes logically imperative to present the legal matrix upon which the Applicant has founded his case and the consequent response by the Respondents. The manner in which the Applicant has configured his case and the fact that it is constitutionally founded and driven, dictates that the material constitutional provisions be sequentially projected. These would be catalogued in relevant constitutional provisions. Thereafter, these would be complemented with the other legislative network for the logicality and comprehensiveness of the judgment. It is against these provisions that the Applicants tests the constitutional of the impinged sections in the Act.

[10] It would, towards traversing the constitutional provisions which the Applicant protests that they have been transgressed, be worthwhile to initially simply state them in passing. They apply to

the *right to life, freedom from inhuman treatment, right to fair trial, right to respect for private life, and right to equality before the law and the equal protection of the law.* These incidentally transcend into the related common law principles in particular those pertaining to the cannons on legislative interpretation which would be addressed in due course.

The Applicable Constitutional Provisions

Section 5 of the Constitution stands:

> 1. Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life.
>
> 2. Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such extent as is necessary in the circumstances of the case—
>
> a. for the defence of any person from violence or for the defence of property;
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> c. for the purpose of suppressing a riot, insurrection or mutiny; or
>
> d. in order to prevent the commission by that person of a criminal offence,
>
> or if he dies as the result of a lawful act of war or in execution of the sentence of death imposed by a court in respect of a criminal offence under the law of Lesotho of which he has been convicted.[4]

Section 8 of the *Constitution of Lesotho* states:

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[4]Constitution of Lesotho 1993

1. No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Lesotho immediately before the coming into operation of this Constitution.

Section 11 of the Constitution of Lesotho provides as follows:

(1) Every person shall be entitled to respect for his private and family life and his home.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision;

(a) In the interests of defense, public safety, public order, public morality or public health; or

(b) For the purpose of protecting the rights and freedoms of other persons.

[11] The constitutionality of the section in its categorization of the described offenders and the prescription of a death sentence upon their conviction for the specified sexual offence, has, indispensably introduced the controversy on its constitutional harmony with Section 19 of the Constitution which provides:

Every person shall be entitled to equality before the law and to the equal protection of the law

The Applicable Provisions in the Act

Section 30 provides as follows:

A person who is convicted of an offence of a sexual nature shall, subject to the provisions of section 31, be liable

(a) in a case of first conviction:

(i) where the offence committed is exposure or display of genital organs by one person to another, the court may impose any appropriate sentence,
(ii) where the offence is committed under other coercive circumstances not referred to under section 2, to imprisonment for a period of not less than eight years,
(iii) where the offence is committed under section 3 and the circumstances are as described in the definition of coercive circumstances in paragraph (a), (b), (d), (e), (f) or (i) of section 2, to imprisonment for a period of not less than ten years,
(iv) where the convicted person is infected with human immunodeficiency virus or other life threatening disease but at the time of the commission of the offence had no knowledge or reasonable suspicion of the infection, to imprisonment for a period of not less than ten years,
(v) where the offence is committed under section 9, to minimum imprisonment of fifteen years,
(vi) where the offence is committed under Parts III, IV and V by a person who is 18 years or above, to imprisonment for a period of not less than 10 years,
(vii) where a person is infected with the human immunodeficiency virus and at the time of the commission of the offence the person had knowledge or reasonable suspicion of the infection, to the death penalty,
(viii) where-
(aa) the complainant has suffered grievous bodily or mental harm as a result of the offence;
(bb) the complainant
(A) is under the age of 12 years, or
(B) is by reason of disability exceptionally vulnerable;
(cc) the convicted person has a sexually transmissible disease and at the time of the commission of the offence was aware of the sexually transmissible disease;
(dd) the convicted person is one of a group of two or more persons participating as an actual perpetrator or accessory in the commission of the offence; or
(ee) the convicted person uses a firearm or any other weapon or harmful instrument for the purpose of or in connection with the commission of the offence, to imprisonment for a period of not less than fifteen years;

The enforcement of penalties over the offences tabulated under Section 30 are, for the precise purpose of this case, prescribed under Section 31 thus:

(1) Save for the Central and Local courts, the sentences under Section 32 shall be apply and be enforced by all court unless extenuating circumstances or the proper consideration of the individual circumstances of the accused or lawful intimate relations between the perpetrator and the victim dictate otherwise.

(2) Where the appropriate penalty is beyond the ceiling of penal powers of the trial court, it shall after conviction, send the case to the High Court for sentence.

[12] Section 30 of the Act instrumentalizes the realization of the basis towards the sentencing of the imposition of the capital punishment under Section 31(vii) through its provision that:

(1) A person charged with a sexual action involving a sexual organ or anus, shall have his blood substance taken by a medical practitioner within a week of the preferment of the charge
(2) The blood substance referred to in subsection (1) shall be tested for Human Immunodeficiency shall be disclosed by the medical practitioner to the accused and the complainant only.

[13] Section 30(4) of the Act complements the scenario that guided the thinking and the procedural determination of the trial court. It directs that:

> Where a conviction is secured, the results of the test done pursuant to subsection (3) shall be tendered in evidence for the purposes of sentence.

[14] It is contextually appreciable that the Learned Magistrate had through the mechanism of all the operational provisions in Section 30, evidentially discovered that the Applicant was at the material moment living with HIV and that in the prevailing circumstances, he was aware of his health status. This explains her interpretation of Section 31(1) (vii) that the accused who is convicted under those circumstances, should by operation of its provisions, be referred to

the High Court for the imposition of the death penalty as it is mandatorily envisioned therein. It is precisely in that comprehension that she has recorded that she addressed the case to the High Court for it to simply pass the sentence of death upon the Applicant due to the jurisdictional limitation of her court to do so. It is for the same reason that the matter was introduced to this Court as Criminal Sentencing File[5].

The Inbuilt Provisions Which Could Give Jurisdiction to the Trial Court

[15] This should preliminarily be analyzed from the proper construction of the very provisions which are subjected under the constitutional scrutiny. It appears from the onset that it escaped the wisdom of the Trial Court that it ought to have interpreted Section 32 (a) (iii) through reading it with in conjunction with Section 31 (1). Had it been so, she would have realized the procedural protocols that her court was obliged to follow after convicting the Applicant. The initial one is that her court should after the convicting the Applicant, have determined if there were extenuating circumstances or the proper consideration of the individual circumstances of the accused or lawful intimate relations between the perpetrator and the victim dictate otherwise. It would only be, thereafter, that she would be qualified to have imposed upon the accused any of punishments within the sentencing parameters of the Trial Court or assign the task to the High Court if she determined that the man deserves the sentence beyond the jurisdiction of her court.

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[5] CRI/S/ 001/00/19

[16] Tellingly, Section 31 (1) did not sanction the Trial Court to have automatically referred the case to the High Court for sentencing merely because the accused was convicted. Instead, it entrusts the Trial Court with the judicial discretionary powers to decide on the personal circumstances surrounding the accused at the relevant moment before directing the proceedings to the High Court for sentencing.

[17] Besides, if the jurisdictional based decision by the Trial Court is correct, it ought to have realized from the commencement of the proceedings that it was from the onset legally disqualified from presiding over them since the Act prescribed the minimum sentence beyond its powers. This is so against the trite principle of law that *jurisdictional incompetency of the court to pass a prescribed sentence, is self-explanatory of its jurisdictional incompetency to preside over the proceedings that may culminate in that sentence* - **Rex v Potlaki and Others**[6]**.**

[18] On the interpretational level alone, the Trial Court ought to have interpreted Section 32(a)(vii) of the Act in the light of Section 31 which is its complementary and qualificative provision. This would have enabled the court a quo to have discovered that the latter leaves it with the discretionary powers to determine what would, besides death be the appropriate sentence in the circumstances of the case.

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[6] [2006] LSHC 78

This is because the constitutional position is that the legislature is not empowered to deprive the Judiciary with its inherent judicial powers including sentencing. The approach would be reinforced by the decision in **Selenkane Fatane & Others v The Crown**[7] where the direction detailed by Ackermann J in **S v Dodo**[8] was cited with approval the statement that:

> The legislature is not empowered to compel any court to pass a sentence which is inconsistent with the constitution[9].

[19] It should have transpired to the Trial Magistrate that at the time she became seized with the matter, the Constitutional Court had long directed in **Selenkane Fatane & Others v The Crown (supra)** that it was unconstitutional for the Legislature to have usurped the inherent discretionarily powers to determine sentences on the merits of each case. This was premised upon the fact that the Legislature had in response to the public outcry over the skyrocketing incidences of stock theft, amended the Stock Theft Act[10] by providing for the imposition of the minimum sentences. The Court perceived the measure to be primarily unconstitutional in that it undermined the *separation of powers* by prescribing the mandatory minimum sentences for the Judiciary.

[20] Moreover, the unconstitutionality of the amendment was in the Selenkane Fatane & Others case (supra), attributable to the discovery

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[7] [2004] LSHC 114
[8] 2001 (5) BCLR 423 (CC)
[9] Para 77
[10] No. 4 of 2000

by the Court that the sentences were in any event, undoubtedly crossly disproportionate with the prescribed offences. To illustrate the point, reference was made to the provision that the accused who pleads guilty of the theft of the stock recovered by its owner would be sentenced to 25 years' imprisonment or in the alternative, to pay a fine of M25.000. To worsen the scenario, even the accused convicted of receiving stolen stock of conveying stock products after sunset would be subjected to some such unbalanced punishments. The climax of the disproportionality in the prescribed regimen of sentences, was that they were heavier than those to be imposed upon convicts for murder.

[21] So, the jurisprudence pontificated over in the case under consideration, should have guided the Trial Court towards the discovery that she should not have simply referred the matter for sentencing by this Court. Instead, it should have recognized that Section 13 *per se,* obliged it to have initially been contemplative on whether the circumstances that dominated the commission of the offence, could warrant the imposition of any one of the sentences within its jurisdiction. If otherwise, it would only be then that it would invoke Section 31 and accordingly refer the matter for sentencing by the High Court. The thesis is in simple terms that the Trial Court prematurely sought for the exercise of the sentencing powers of this Court. This notwithstanding, it should be remembered that originally the case was referred to the High Court in its ordinary sitting over matters scheduled to it for sentencing. The present

sitting resulted from the constitutional considerations identified by the Court in collaboration with the counsel concerned. The rationale thereof was to ascertain the constitutionality of the basis for the reference of the case to the High Court for the stated purpose.

Determination of the Constitutionality of Section 32 (a) (vii) in the Act

[22] The question is addressed first in seriatim with the declaratory interventions sought for in this application commencing with the protestation that the section is inconsistent with sections 18 and 19 of the constitution. The former provides for *freedom from discrimination* and the latter is on *the right to equality before the law and to equal protection of the law.* Section 18 is configured thus:

> (1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.
> (2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
> (3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[23] And Section 19 which simply complements Section 18 reads:

> Every person shall be entitled to equality before the law and to the equal protection of the law.

[24] This phenomenon originates from the religious teachings and the ever evolving conceptions on the equality of the mankind from the classical era and across the successive phases of civilizations. The key relevant teaching from the Holy Bible is found in the teaching that you shall love your neighbor as yourself by virtue of being human made in the image of God. This constitutes the basis for the acknowledgement that consequently each human being is endowed with freedom, equality and dignity. Accordingly, Apostle Paul preached to the Galatians that these rights are not earned but divinely ordained[11].

[25] The rights consequently transcended their formative phase into the international legal instruments, the national laws in particular the constitutions as it is the case in the sections under consideration and progressively developed through common law. It should, at this early stage, be appreciated that the *right to equality and to the equal treatment of all people under the law* directly facilitates for the materialization of the rest of the human rights and fundamental liberties catalogued under Chapter 2 of the Constitution. This includes the *right to life and human dignity* which represent the foundational basis of the rest of the listed rights.

[26] In the postured legal scenario, the initial assignment to be resolved hinges on the question of the constitutionality of Section

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[11] De Fraders 'Sabastian Philosophical Postulations on the Equality of Man' Institute D' Droit L' Homme France 1992

32(a)(vii) of the Act when tested against Section 18 which is the equality clause in the Constitution considered in conjunction with Section 19 which provides for the equal treatment and protection of all people under the law. This Court in **Thabo Fuma v The Commander, Lesotho Defence Force and Others**[12], **Attorney General v Mopa**[13], **Retsilisitsoe Khetsi v The Director of Public Prosecution and Others**[14] and **Lebohang Ramohalali v The Commissioner of Lesotho Correctional Service and Others**[15] addressed the materially similar impasse through the adoption of the methodology followed in the South African case of **Harksen v Lane**[16]. The characteristically forensic approach therein is presented in a logistical questioning formulation thus:

1. Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rationale connection to a legitimate government purpose? If it does not then there is no violation of section 8 (1)[17] now section 9 (1) in the Constitution of the Republic of South Africa 1996.- (These are the corresponding equivalents of Sections 18 in the Constitution of Lesotho) Even if it does bear a rational connection, it might nevertheless amount to discrimination.
2. Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
   (i) Firstly, does the differentiation amount to 'discrimination'. If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively,

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[12](CONST/8/2011) [2013] LSHC 68 (10 October 2013)
[13] C.of A(CIV) 3/2002
[14]CRI/0079/2014
[15] [2017] LSHC 34/2017
[16](CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997).
[17] In the then Interim Constitution of the Republic of South Africa

the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of Section8(2) [now Section9 (3) and (4).

3. If, the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

[27] In applying the tabulated methodology relied upon in the **Thabo Fuma Case (supra),** it emerges that in the case at hand, Section 32 (a) (vii) introduces the differentiation between the people who commit sexual offences and goes further to sub-differentiate the same offenders into those who at the material moment lived with HIV in contrast to those who did not. It would in due course be analyzed if the identified differentiation bears any rational connection with the government purpose. It would in the process be ascertained if even if it does, it might nevertheless, amount to a mere discrimination or to unfair discrimination.

[28] The differentiation under consideration is not based upon any one of the specified grounds for discrimination under Section 18 (3) of the Constitution and, consequently, the unfairness cannot, on that account, be presumed. Instead, the discrimination *in casu* is identified to be founded upon an analogously one such ground. This is expressed by reference to the other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privilege. The comparative basis for the explained adverse *discriminative treatment* against the people convicted of the offences while living with HIV, incidentally renders them to be deprived of their complementary *right to the equal treatment and protection of all under the law.*

[29] At this stage, the analysis should speak to whether the impugned provision does not relate to persons of some description who are subjected to disabilities or restrictions to which persons of another such descriptions are not made subject or are accorded privilege. This is pertinently so due to the fact that it prescribes a host of heavy sentences including death to be imposed upon the same people in contrast to the others who are convicted of the same offences. To demonstrate the paradox, the provision does not include people who are convicted of the same offence at the time they knew that they were infected with other sexually transmittable viral infections that are relatively and potentially life threatening analogous to HIV. Here reference could be made to syphilis, human

papilloma (HPV) and hepatitis mainly due to their secondary sequelae[18].

[30] To this end, it is analytically established that Section 32 (a) (vii) categorizes the people convicted for the commission of sexual offences while being HIV positive from those who commit the same crime at the time while being HIV negative. The discrimination is, however, found not to be made upon any one of the specified ground of differentiation under Section 18 (3) of the Constitution and, therefore, not presumably regarded to amount to *unfair discrimination.* However, the determination is that the discrimination is rendered *unfair* because it impacts adversely upon the said constitutional rights of the categorized convicts over sexual offences in contrast to others who are basically similarly circumstanced save that they were HIV negative at the material moment.

[31] It has to be realized that ordinarily speaking, *unfair discrimination* sounds *prima facie* inconsonant with the equality related provisions in the Constitution[19]. This notwithstanding, the same discrimination may represent a dispensation from what appears to be the principle rule and, on account of that, translate into being constitutional. In direct and simple terms, there are relevant incidences where a pertinently unfair discriminative

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[18] B. Kumar: 'Impact of Sexually Transmitted Diseases on the Economies of the Developing Worlds' WHO Report Vol 6 of 1999 p. 121

[19] Sections 18 and 19 respectively

legislative provision could be interpreted to constitute a constitutionally allowable discrimination. This would be determined upon a consideration of the legitimacy of the Government goal that the discrimination seeks to achieve. The interpretation must foundationally be inspired by the recognition of human *right to life* intertwined with the *right to human dignity, equality* and *freedom.* This jurisprudential discourse has well been articulated in *inter alia* in **S v Makwanyane[20], S v Tcoeib[21] Prinsloo v Van de Linde[22].**

[32] The resultant assignment is to determine if the identified unfair discriminative treatment against the people living with HIV could be constitutionally justifiable. In the context of this case, the answer stands relative to the material considerations prevalent at the time the legislation was enacted. This is to be contrasted with the realities of today. It should against the backdrop of the recent historical revelations be acknowledged that as the HIV- AIDS pandemic emerged in June 1981, it posed a lethal threat to those infected by the virus. At that time and almost throughout the eighties and early nineties, the infection with the virus, in principle marked the progress towards death since there were no medical interventions for humbling its lethal danger let alone to provide any meaningful therapy. Thus, Parliament inspired by that reality, found it deserving at the time to, prescribe the sentences as a measure towards deterrence and

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[20] 1995(3) SA 391
[21] 1996 (7) BCLR 996 (Namibia)
[22] 1997 (6) BCLR 759 (CC)

protection of the victims against the offenders who commit the sexual offences under the stated circumstances. This was against the predominant perception that the commission of the offences effectively amounted to the sentencing of the victim to death. As a testimony of that UNAID and WHO published as follows:

> HIV/ AIDS is a weapon of mankind destruction. It killed more than 25 million people worldwide according to UNAID and WHO reports since December 1981 when it was first recognized. It is the worst recorded pandemic in the history of pandemics against mankind[23].

[33] Blessedly, for the mankind during the nineties there is emerged a positive medical revolution against the then prevailing perception that HIV was naturally a killing enigma without any medical intervention to reverse that. The game-changing testimony was articulately acknowledged at the 11th International AIDS Conference held in Vancouver Canada on the 7th - 12 July 1996 under the theme, *"one World One Hope"*. The epoch of the announcement there was that there is a breakthrough achievement that "High active antiretroviral treatment (HAATR) – a combination of three ARVs reported to reduce AIDS by 60% and 80%." In the same connection, it was further announced that:

> Taking antiretroviral treatment daily as directed to achieve and maintain durably undetectable status stops HIV infection from progressing, helping people living with HIV stay healthy and live together while offering the benefit of preventing sexual transmission[24].

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[23] Sudan Tribune Nhial Titt Nhial April9, 2006

[24] Ibid p. 123

[34] An even more striking revelation is that there is effectively no risk of sexual transmission of HIV when the partner living with HIV has achieved an undetectable viral load and then maintains that for at least 6 months and that contracting Human Immune Deficiency Virus or HIV, is no longer seen as a death sentence in developed countries which have resources to treat it[25]. To complement the picture, Lesotho is reported to have reduced HIV infections by 55% among adults and increased viral load suppression among adults living with HIV who were successfully treated with by 18%[26]. This has in particular been attained after the commencement of the *test and treat* policy strategy[27].

[35] In the circumstances, it is recognizable that nowadays, the erstwhile empirical evidence that HIV infection *per se* immediately and *irreversibly* destined the affected person to death has been exploded through the advancement of the medical science effective interventions. Instead, the virus could be assuming the same health challenge relatively analogous to the infections of syphilis, human papilloma (HPV) and hepatitis and other such health challenges that were historically considered to immediately mark the beginning of their victims last moments on earth.

[36] The thesis from the foregoing narrative and analyses is simply that the regimen of what could be interpreted as the draconian

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[25] Ibid p. 124

[26] LENEPWHA Issue on the HIV Stigma Index in Lesotho 2020 p18

[27] Ibid 29

sentences under consideration owed its jurisprudential basis from the fact that it was a practical response to the alarming worldwide statistics of deaths from the HIV infections. Understandably, the enactment was made under the panicking mode of thinking with the underlying urgency to safe human lives. This occasions a reflection on the relevancy of the prescription of a matrix of rather extra-ordinarily harsh sentences over the accused persons convicted for the commission of the sexual offences. In this respect, there must be special recognition that besides the long terms of imprisonment, there could be imposition of life imprisonment or the pronouncement of death upon such the affected persons.

[37] It should suffice to determine that the medical stated medical advancements, have rendered the rationale applicable at the time of the sanctions were prescribed for the crimes to fall apart. This is reinforced by the operation of the common law doctrine *cessante ratione legis, cessa ipsa lex doctrine.*

Determination of the Question on the Disproportionality of the Sentences

[38] The Court has addressed its mind to the interpretation that the Applicant assigned to the provisions under Section 30 of the Act which he submits that they are unconstitutional. He ascribes this to his analysis that they effectively make it an offence for a person to be afflicted with a decease instead of concentrating on the therapeutic mechanisms and that the punishment thereof would be logically inhuman and disproportional.

[39] In a relatively and comparatively similar scenario, the United States Supreme Court interrogated the constitutionality of a statute that was passed by the State of California in the 1960's that made it a criminal offence for a person *"to be addicted to the use of narcotics"*. Justice Stewart for the majority in the Supreme Court of the **United States in Robinson v. California**[28] that:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offence for a person to be mentally ill, or a leper, or to be afflicted by a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine confinement or sequestration. However, in light of the contemporary human knowledge, a law that made a criminal offence of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment[29].

[40] It could *Ex facie* the matrix of the array of sentences provided for Section 30, be concluded that it constitutes of cruel and unusual punishments. The perception could be instigated by the unfair discriminatory effect of the section and its unconstitutionality. However, such a construction would be comprehended otherwise upon reading it in conjunction with Section 31. As it has already been analyzed, the latter subjects the sentences under judicial discretion and, consequently, renders them not be applied as the minimum sentences but rather in the maximum sense. This includes the prescribed death penalty as well. Nevertheless, this is expressed

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[28]370 U.S 660; 82 S. Ct 1417; 8 L. Ed. 2d 758; 1962 U.S LEXIS 850

[29] P.850

with caution since there could be incidences where the same sentences could be found to be cruel and disproportionate. Resultantly, such punishments could further be held to violate the constitutional *right to human dignity.* The constitutionality of the sentence upon each person who is convicted of the created sexual offence, will be considered upon the proportionality of the sentence.

[41] *In casu,* it is deserving to be reiterated that the Trial Court had misconstrued Section 32 (a) (vii) to provide for the minimum sentence of death and that it was on account of the sentencing jurisdictional incompetency of her court to impose that punishment, that she committed the case for sentencing by the High Court. The Section 31 prerogatives entrusted upon the courts renders the sentences under section 30, to be constitutional. The converse would apply where the disproportionality of the sentence in a particular case, is successfully demonstrated to be unconstitutional. This could be based upon the charge that effectively the punishment violates *the right to human dignity/treatment.* To fortify the view, in **S v Tceib** [30] where the court stated that:

> There is a possibility that life imprisonment could, in a particular case, be held to be unconstitutional if the sentence was so crossly disproportional to the severity of the crime committed that it constituted *cruel, inhuman or degrading punishment or impermissibly invaded the dignity of the accused*[31].

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[30] 1996(7) BCLR (NmS)

[31] Read from De Wall & Others: The Bill of Rights Handbook 2nd Ed. 1999 Juta & Co. Ltd 1999

[42] All would depend upon the context relating to the determination of each of the contemplated series of punishments and how it was applied. It is not a matter for generalization or academic theorization. Appreciably, this would be decided in recognition of the key values in a democratic constitution. These are *human dignity and its complementary right to humane treatment, freedom and equality.*

The Constitutionality of Section 30 in the Act with Section 5 of the Constitution

[43] In consideration of the approach to be adopted under this sub-topic, it would, perhaps, be wise to proceed from a rather rhetoric but a truthful statement that a constitutional provision cannot be interpreted to be unconstitutional. Instead, courts must interpret the provisions of the constitution in such a way the they are all in harmony with each other. The statement is an indirect way of acknowledging the supremacy of the Constitution as it is provided so, under Section 2 – *The constitutional supremacy clause.* In the same logic, it should further be acknowledged that the controversy that the Applicant has introduced concerning the constitutionality of Section 30 of the Act when interfaced with Section 8 of the Constitution.

[44] The question is specifically relating to the fact that the impugned provision which sanctions the imposition of death upon the accused convicted for the commission of a sexual offence while being HIV positive or having done so under the circumstances in which such a person was in a position to know of that status. The answer to the controversy is clearly provided for in Section 5 (1) of the

Constitution where it pronounces a foundational principle that Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life. The statement is self-qualified in that from the onset, it makes it clear that deprivation of life could be allowed in situations where it is not done arbitrarily.

[45] Subsequently, the Constitution under the same section circumscribes the circumstances in which there could be a dispensation from the principle provision that Every human being has an inherent right to life. In simple words, this applies to instances where the deprivation of the affected person would not be regarded as having been *arbitrarily* done. The pertinent proviso for reference in this case is found in Section 5 (1) (d) where, *inter alia,* it is legally sanctioned that a death penalty could be imposed by the court in respect of a criminal offence under the law of Lesotho of which he has been convicted and be executed. Parliament acting on the strength of the enactment, has created the offence under consideration and complemented that with the array of sentences including death in particular. It would, therefore, be nonsensical to contest the constitutionality of the *death sentence* in Lesotho.

[46] A distinction must be drawn between the jurisdictions where the constitutionality of the *death sentence* could be a subject matter for legal polemics before the superior courts. This would apply in jurisdictions where the constitutions simply create the inherence of a right of every human to life without in any manner whatsoever,

limiting that right. To illustrate the point, in that space there would be dispensation for the courts to contemplate passing of the death sentence where the accused is convicted of some specified offences and under the qualifying circumstances.

[47] The Lesotho constitutional position which limits the extent to which the *right to life* could be limited including by the courts should be contrasted with what obtains in jurisdictions where the same constitutional right is expressed in absolute terms. In **S v Makwanyane,**[32] the South African Constitutional Court interpretatively elucidated the difference between the content and the effect of the constitution where the right is limited in contrast to where it provided for otherwise. It specifically reacted to 11 of the constitution of South Africa[33] states that, *"everyone has the right to life".* Sachs J after determining that the plain wording used in the acknowledgement of the right, renders the death penalty unconstitutional, reasoned:

> These unqualified and unadorned words are binding on the State (sections 4 and 7) and, on the face of it, outlaw capital punishment. Section 33 does allow for limitations on fundamental rights; yet, in my view, executing someone is not limiting that person's life, but extinguishing it.[34]"

The International Law Perspective on the Right and its Limitations

[48] Interestingly, though understandably on account of the sovereignty of states and the divergences of the challenges confronting each of them, the position of International law is that in

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[32]S v Makwanyane and Another (CCT3/94) [1995] ZACC 3.
[33] The Constitution of the Republic of South Africa 1995
[34]Id [350].

principle, it recognizes the existence of the right in absolute terms. Nevertheless, it accommodates the situations where the right is provided for in qualified terms such as in our case. In the latter instance, it over- emphasizes on the imperativeness of the ascertainment of adherence to the lawful procedures for the fairness of the trial and on the proportionality of the death sentence to the offence committed. The testimony in the narrative would be presented in a synopsis form in the subsequent paragraphs.

[49] The right to life is phrased similarly in the International Covenant on Civil and Political Rights [35] and the African Charter on Human and People's Rights,[36] both of which recognise that individuals cannot be *arbitrarily* deprived of their life.

[50] *The United Nations General Comment No. 36 on the Right to Life,* for instance, considers that the "use of lethal force in self-defence" is not an act that is *arbitrary* in nature. The word *arbitrary* is not merely synonymous with illegal, but rather encompasses notions of *"inappropriateness, injustice, lack of predictability and due process of law ... as well as elements of reasonableness, necessity, and proportionality".*[37] The African Commission's General Comment on the

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[35]International Covenant on Civil and Political Rights (entered into force 23 March 1976) UNTS 999, 171.

[36]African Charter on Human and People's Rights (entered into force 21 October 1985) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), article 4.

[37]General Comment No. 36 on the Right to Life CCPR/C/GC/36, [12].

right to life echoes, almost identically, these sentiments.[38] It also asserts that: "any deprivation of life resulting from a violation of the procedural or substantive safeguards in the African Charter, including on the basis of discriminatory grounds or practices, is arbitrary and as a result unlawful".[39]

[51] Further, the UN General Comment asserts that the duty to protect by law the right to life entails that any substantive ground for deprivation of life must be prescribed by law, and defined with sufficient precision *to avoid overly broad or arbitrary interpretation or application.* Since deprivation of life by the authorities of the State is a matter of the utmost gravity, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities and the States parties must ensure full compliance with all of the relevant legal provisions."[40]

[52] Incidentally, His Holiness Pope Francis is recorded to have called capital punishment, an attack on the inviolability and dignity of the person that is inadmissible in all cases. Resultantly, the Catholic Catechism has been amended to provide the Catholic faithful with the teaching against the death sentence. The guiding spirituality is

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[38]General Comment No. 3 On The African Charter On Human and Peoples' Rights: The Right To Life *(Article 4)*, adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015

[39] Id [12].

[40]Id [19].

that the termination of human life shall ever remain the prerogative of God the Almighty since He is the sole Giver of life[41].

The Constitutionality of Section 30 in the Act with Section 8 of the Constitution

[53] Logic dictates that the answer to this question should be premised upon the thesis arrived at that Section 30 has categorized the people convicted of sexual offences while living with HIV and discriminated them from the rest of those convicted with the same offence but who at the material moment did not have that health condition. The important dimension is that the section prescribes serious sentences including the death penalty upon the former. It should be reiterated that the discrimination was found to be based upon a comparatively effectively similar ground as those specified under Section 18 (3) of the Constitution. This qualifies it to constitute a form of the classification. The analysis led to a finding that besides the unfairness in the discrimination, it was not connected to any legitimate government goal sought to be achieved. This was primarily attributed to the fact that the factors that constituted the basis for the sentences had been relegated to history by the medical advancements.

[54] The mere fact that the foundational philosophy underpinning the sentences has collapsed, is suggestive that their continued operationalization upon the identified category of the convicted persons, would amount to a degrading treatment that is forbidden

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[41] Fratelli Tutti 4th October 2020

under Section 8 of the Constitution. It should from the onset be appreciated that the *discrimination* against another human kind, may in some incidences insult *human dignity* and undermine the standing of the affected person. This talks to the inter-linkage between *discrimination* and *the human dignity* which together with *the right to life* complement each other and represent the core human rights that anchor the rest of the human rights.

[55] In seeking to apply the concept of *human dignity* within the context of the inquiry at hand, it emerges that the discrimination of people who are living with HIV for the sole purpose of subjecting them to the relatively harsher sentencing scheme designed specifically for them, would be spiritually torturous upon the affected persons. It indirectly implies that they are being punished for their health status. This is so because the others who committed the same offence are not equally treated. So, any continued operationalization of the scheme, would sustain the torturing of the same people and subject them under a degrading punishment. Paradoxically, it would be otherwise with the other people convicted for the commission of the same offence simply because they were found HIV negative.

[56] To aggravate the unconstitutionality *unfairness in the discriminatory treatment of the people living with HIV,* there is no provision for the application of the similar array of sentences upon those convicted of the same offences with aggravating factors. These could arise from gang rape, causing the victim to sustain grievous

bodily harm and/or psychological trauma with the propensity of threatening the sustenance of healthy life.

[57] It would jurisprudentially pass the constitutional requirements of Section 32 if people convicted of committing sexual offences while living with HIV, were subjected under the same punishment schedule with the rest of the mankind who are convicted for the same crime. This is because as it has already been pointed out, there is no legitimate government purpose for the constitutionally based justification of the *discriminative sentencing regimen.* The constitutional clauses on the equality and the equal treatment of all under the law, would be satisfied along the famous rule of law philosophy by Aristotle (384 BC- 322 BC) that:

> *Equality in mortals means that this: those thigs alike, should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness*[42].

The Constitutionality of Section 30 with Section 11 of the Constitution

[58] The answer to the controversy on the subject-matter is discoverable from the text of the relevant section in the Constitution which endowed upon every human being the *right to respect ones private and family life and home.* What is of significance for the purpose of the case at hand, is that the enjoyment of right is subsequently circumscribed to balance it with the competing rights of other persons and that of the public.

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[42] De Waal and Others op cit p188

[59] It is precisely in pursuit of the protection and the advancement of the rights of the victim and that of the public that the Applicant was made to appear before the Trial Court against the charge of having committed the sexual offence crime. Consequently, he was convicted and then subjected to the Section 30 sentencing matrix which the *court aquo* misinterpreted the inscription of the *death penalty* therein, to denote minimum sentence and, thereby, warranting the matter to be send to the High Court for sentencing.

[60] In all fairness, the provision requiring the accused person convicted for a sexual offence to undergo HIV testing and that if the results are positive, this should be disclosed to the victim, is constitutional since in that case, the invasion of the right to privacy, would be done to:

- Ascertain the condition of the complainant after the unfortunate incidence;
- Allow the medical interventions and counselling;
- Explore prospects for some possible compensation of the victim and if need be;
- Establish basis for the victim to institute a civil claim against the convict.

[61] It should be appreciated that it makes constitutional sense for the person found guilty of having committed sexual offence under the circumstances in which the victim might have been infected with the HIV virus, to remove the vail of his *right to privacy* in all its

dimensions. This is because of the practical reason that the constitutional rights of the victim particularly to life and human dignity should equally be protected. Here, the distinction should be drawn between this and the question of the constitutionality of the sentencing schedule that forms part of the inquiry. In precise terms, the invasion of the right of the Applicant in this sphere, is constitutionally justified since it is founded upon the legitimate intention of Parliament aimed at the protection of the victim of the offence, the family and the public.

The Constitutionality of Section 30 in the Act with Section 12(7) of the Constitution

[62] The controversy here emanates from the position that Section 32 (a) (vii) that empowers the Court after convicting a person for the commission of a sexual offence to order that person to undergo HIV testing for the purpose of establishing the HIV status of the concerned person. After that process, the provision obliges the Dr. to disclose its results to the accused and the victim before transmitting it to the Trial Court for its assistance in the determination of the appropriate punishment from the Section 31 sentencing matrix which includes the death penalty.

[63] The constitutionality of Section 32 (a) (vii) is tested against the Section 12 (7) right of a person who is tried for a criminal offence, not be compelled to give evidence at the trial. This challenge springs from the fact that, this notwithstanding, the impugned section empowers the courts to order the person

convicted of the sexual offence to undergo HIV testing in order to assist in the determination of the proper sentence. After the Court has addressed its mind to the controverted section and considered several polemical exchanges on the same subject, it decided that the question should, in the main, be resolved through the appreciation of the mind of the legislature in the section. This should always be approached through the harmonization of the applicable constitutional provisions. In that task, there should be a recognition that the Legislature introduced Section 32 (a) (vii) to protect the right of the victims of sexual offences to *life and human dignity.* It is trite that these are the supreme rights upon which the rest of the regimen of rights are founded.

[64] Thus, the right of the accused person not to be compelled to give evidence at the criminal trial, would have to be interfaced with the *right to life* and *human dignity* in the context of the offence against which the person is convicted. It should be realized that the section contemplated that the order will be made post-conviction of the accused specifically for the assistance of the courts to determine the appropriate punishment by firstly ascertaining the HIV status of the person concerned. What would be of significance from the results is that they may provide basis for the mitigation or aggravation of the sentence. The revelations should be perceived to produce either one of outcomes. Whatever learned interpretations could be assigned to the subject-matter,

the conclusion is that Section 12 (7) should in the main, be read in such a way that it is aligned to the *right to human life* and *human dignity.*

[65] It should suffice to determine that the medically stated advancements, have relatively as analyzed, rendered the rationale applicable at the time of the sanctions were prescribed for the crimes to also relatively fall apart by operation of the common law doctrine *cessante ratione legis, cessa ipsa lex doctrine.*

[66] Thus, Section 32 (a) (vii), is found to be constitutional to the extent that it instrumentalizes the protection of the right of the victims of sexual offences *right to life* and *human dignity.* Incidentally, this would benefit others who could in future interact intimately with the victim. It would further conscientize the victim to timeously receive treatment and to dread carefully when dealing with other people.

[67] Towards the conclusion of this judgment the Court finds it imperative to register its gratefulness to Professor Linda-Gail Bekker *inter alia* the Desmond Tutu HIV Centre of the University of Cape Town. Her Expert Affidavit provided scientific revelations that guided the development of our jurisprudence. In the same breath, the Court acknowledges the valuable contribution made by Southern African Litigation Centre and Kenya Legal and Ethical Issues Network in their financial and technical

sponsorship of the Counsel who featured *amicus curiae* in this litigation. Their industriousness will stand the test of all times in our legal literature. Credit should equally be given to Kings Counsel and the rest of the Counsel who made learned submissions in the matter.

[68] In the premises, it is in a nutshell declared that

1. The Section 32 (a) (vii) matrix of sentences prescribed exclusively for the people convicted of committing sexual offences at the time they are HIV positive or under the circumstances in which such persons are regarded to have been aware of their status is found to be:

   Unconstitutional to the extent of its inconsistency with the Section 18 constitutional *right of freedom from discrimination* under any law or its effect, save for the purpose of sub-sections (4) and (5). In the same breath, the section is found unconstitutional for its inconsistency with the Section 19 constitutional *right to equality before the law and equal protection of the law.* Moreover, Thus, prayer 1 is granted as prayed for;

2. The Section 32 (a) (vii) of the Act which includes imposition of death penalty, is not found to be inconsistent with the Section 5 constitutional *right to life* since this is to be considered with reference to Section 31 which renders death

to be amongst the discretionarily determinable sentences. In any event, the Constitution itself allows court to impose the death penalty under the prescribed circumstances. Prayer 2 is, therefore, disallowed;

3. Section 32 (a) (vii) of the Act is found to be inconsistent with the Section 8 constitutional *right to of freedom from inhuman treatment* and, therefore, invalid to the extent that it subjects *only* the persons convicted of the offences that they committed while living with HIV. This is elucidated by its exclusion of the others who likewise committed the same offences but happened to be HIV negative at the material moment. Thus, prayer 3 is accordingly allowed;

4. Section 30 of the Act is consistent with section 11 of the Constitution and, therefore, invalid as its sanctioned in the dispensation provided under sub-section (2) that *the right to respect for private and family life,* could *inter alia* be interfered with. This applies where that is done in the interest of public safety and for the purpose of protecting the rights and freedoms of other persons. These have been found to be the situations in the matter. Thus, prayer 4 is, resultantly disallowed;

5. Section 30 of the Act is not found to be inconsistent with Section 12 (7) of the Constitution since the impugned evidence secured from the compulsory HIV testing, well balances the *right*

to life of the convicted accused and the interests of justice. consequently, prayer 5 and 6 is disallowed;

[69] It should be recalled that the Court had earlier determined that the Trial Court pre-maturely committed the matter for sentencing by this Court before turning its attention to Section 31 which gives it the discretionary powers in considering the appropriate sentence. Consequently, it is as prayed for, ordered that the matter be remitted to the Trial Court for it to determine the sentence with reference to the discretionary powers entrusted upon it under Section 31. In that task, there would have to be the consideration of the time already spent by the convicted accused in custody and the status of the victim for the assessment of the threat to her life. Proceedings of the trial court are however not declared as a nullity as it has been prayed for as well. The DPP is ordered to intervene towards the expedition of the process and the copy of this judgement should, accordingly, be served upon her office. Costs are awarded to Applicants on ordinary scale.

B.F.M. MAKARA
JUDGE

I concur

M. MOKHESI
JUDGE

I concur

P BANYANE
JUDGE

For Applicant : Adv. L.A. Molati assisted by M.E. Mokhathali inst. by M.W. Mukhawana Attorneys

For Respondent : Adv. M. Teele K.C. assisted by Adv. Tau instructed by the Attorney General & Director of Public Prosecutions

Adv. K.K. Mohau K.C. assisted by K.W.Letuka (Amicus curiae)