State v Marapo (2002) AHRLR 58 (BwCA 2002)

The State v Moatlhodi Marapo

Court of Appeal, criminal appeal no 15/2002, 19 July 2002

Judges: Tebbutt AJP, Korsah JA, Lord Sutherland JA, Grosskopf JA and Akiwumi JA

The constitutionality of a law that mandatorily denied bail to anyone accused of the offence of rape

Interpretation (generous and purposive construction of Constitution, 9-11, 13, 14)

HIV/AIDS (mandatory denial of bail in rape cases, 17-19)

Personal liberty (mandatory denial of bail in rape cases, 19, 21-23, 25)

Tebbutt AJP

[1.] The issue for decision by the Court in this matter is whether section 142(1)(i) of the Penal Code, as introduced by Act 5 of 1998, 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.

[2.] The respondent, Moatlhodi Marapo, was arrested on 27 September 2000 and charged with rape. In terms of section 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 in terms of section 18 of the Constitution of Botswana for an order declaring section 142(1)(i) ultra vires section 5(3)(b) of the Constitution and also as offending against section 10(2)(a) of the Constitution. The application came before Mosojane J, who, in a written judgment delivered on 21 November 2001, held that paragraph (i) of sub-section 1 of section 142 of the Penal Code is ultra vires the Constitution and struck it down. The Attorney-General has now invoked the provlsions of section 336(1) of the Criminal Procedure and Evidence Act (Cap 08:02), which enables him to have the correctness of that decision argued before this Court. Although he has, in doing so, posed four questions of law for consideration by this Court, in essence they boil down to the same thing, namely: Does section 142(1)(i) as amended by section 3 of Act 5 of 1998 offend against sections 5(3)(b) and 10(2)(a) of the Botswana Constitution?

[3.] Section 18 of the Constitution, under which the respondent brought his application before the High Court, provides as follows:

> (1) ...if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.
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> [4.] 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:
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> > Any person who is arrested or detained ... (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.

[5.] And subsection (2)(a) of section 10 of the Constitution, which is also alleged to be contravened by section 142 (1)(i), reads thus: Every person who is charged with a criminal offence (a) shall be presumed to be innocent until he is proved or has pleaded guilty.'

[6.] It would seem that there are two convenient starting points in the determination of the issue raised before this Court. The first is to emphasise that section 142(1)(i) unequivocally imposes a total prohibition on the granting of bail to persons charged with rape. There is no saving provision that such a person may be admitted to bail if he is not brought to trial within a reasonable time after he has been arrested and detained, as envisaged in section 5(3)(b) of the Constitution. Mrs Dambe, who appeared for the Attorney-General, submitted that section 142(1)(i) should be read together with section 5(3)(b) of the Constitution and that a person charged with rape could, despite the provisions of section 142(1)(i), if deemed fit, be admitted to bail if he was not brought to trial within a reasonable time. I do not agree. She submitted that a legislative enactment passed by Parliament could not override a term of the Constitution. Section 142(1)(i) is couched in clear and unambiguous language. Its provisions are peremptory. A person charged with rape, it says, shall not be entitled to be granted bail'. I emphasise the word shall' which, it is well-established, denotes that the statutory provision in question is peremptory. I also emphasise the words not be entitled'. These denote in the clearest possible terms that the denial of bail is total and absolute, inflexible and unmitigated. And, by so enacting, Parliament has, contrary to Mrs Dambe's submission, sought to override the provisions of section 5(3)b of the Constitution entitling persons to bail in the circumstances therein set out.

[7.] The second point of departure is a consideration of the constitutional rights which are, or may be, affected by the provisions of section 142(1)(i). This is necessary because of the further argument advanced by Mrs Dambe to which I shall presently turn.

[8.] The Constitution of Botswana in chapter 2 thereof provides for the protection of the rights and freedoms of the people of the country, which rights and freedoms have to be respected in all state actions. This is abundantly clear from (a) the heading of the chapter, namely Protection of Fundamental Rights and Freedom of the Individual'; (b) from the provisions of sections 3 to 16 inclusive of the Constitution; and (c) from the provisions of section 18 cited earlier herein, that if any person alleges that the provisions of section 3 to 16 have been, or are likely to be contravened in relation to him, he can apply to the High Court for redress. It is, I think, well that one be reminded of the memorable words of Lord Wilberforce in the House of Lords in Minister of Home Affairs

and Another v Fisher and Another 1980 AC 319 at 328-9 where the Lords dealt with the Constitution of Bermuda. It, too, contained a chapter (chapter 1) headed like chapter 2 of the Botswana Constitution, Protection of Fundamental Rights and Freedoms of the Individual'. Remarking that this chapter was influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms which, in turn, was influenced by the United Nations Declaration of Human Rights of 1948, the learned and noble Law Lord said this:

> These antecedents, and the form of chapter 1 itself, call for a generous interpretation, avoiding what has been called the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. Section 11 of the Constitution forms part of chapter 1. It is thus to have effect for the purpose of affording protection to the aforesaid rights and freedoms' subject only to such limitations contained in it being limitations designed to ensure that the enjoyment of the said rights and freedoms by an individual does not prejudice...the public interest.'

[9.] Lord Wilberforce went on to say the following:

> A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

[10.] One would wish to add to these words the important voice of Lord Diplock in Attorney-General of the Gambia v Jobe 1984 AC 689 at 700 who said:

> A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms, to which all persons in the state are to be entitled, is to be given a generous and purposive construction.

[11.] Citing these remarks, Aguda JA who delivered one of the majority judgments in the watershed case in this Court of Attorney-General v Dow 1992 BLR 119, said the following at 165H:

> Generous construction means in my own understanding that you must interpret the provisions of the Constitution in such a way as not to whittle down any of the rights and freedoms unless by very clear and unambiguous words such interpretation is compelling. The construction can only be purposive when it reflects the deeper inspiration of the basic concept which the Constitution must for ever ensure, in our case the fundamental rights and freedoms entrenched in section 3.

[12.] This then is an appropriate juncture at which to set out section 3 of the Constitution. It reads as follows:

> 3. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely - (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

[13.] That a Constitution and particularly one like that of Botswana should receive a purposive construction' has been emphasised in recent years by the House of Lords (see eg Attorney-General of the Gambia v Jobe supra; Attorney-General of Hong Kong v Lee Wong Kui 1993 AC 951 at 966 E) and has also been stressed in Botswana by this Court in Attorney-General v Dow supra. Such purposive interpretation has been said to embrace the following concept: Rights should be interpreted in accordance with the general purposes of having rights, namely the protection of individuals and minorities against an overbearing collectivity' (per Madame Justice Bertha Wilson of Canada in a paper in 1988 on Constitutional Protection of Human Rights' cited by Puckrin JA in Attorney-General v Dow at 194 H).

[14.] Adopting such a purposive construction to section 3 of the Constitution, it is manifest that its purpose is the protection of those rights and freedoms of the individual set out in the section including the right to personal liberty (my emphasis). The only limitations to the latter right are

> (i) that its enjoyment should not prejudice the rights and freedoms of others or the public interest and (ii) those limitations expressly contained in section 5 of the Constitution.

[15.] Section 5 sets out in subsections (a) to (k) those circumstances in which a person may be deprived of his or her personal liberty. Only subsection (e) is germane to the present inquiry. It permits such deprivation - (e) upon reasonable suspicion of his having committed or being about to commit, a criminal offence under the law in force in Botswana'.

[16.] It is in respect of that sub-section that section 5(3)(b) becomes operative granting, as it does, entitlement to be released either unconditionally or on conditions, which would include bail. That entitlement has now been removed by section 142(1)(i). Section 142(1)(i) accordingly offends against section 5 (3)(b) unless its enactment can be said to be in the public interest.

[17.] It is the contention of the Attorney-General that Parliament obviously considered the enactment of section 142(1)(i) to be in the public interest. In elaboration of this Mrs Dambe made the following submissions:

(a) She submitted that a Constitution - and this would apply to the Botswana one - is not a static document but is a living and organic instrument. It is not a lifeless museum piece' to use the words of Aguda JA in Attorney-General v Dow supra but must reflect the mores and norms of the time. With this submission I am in complete agreement. The provisions of a Constitution are not time worn adages or hollow shibboleths. They are vital, living principles that authorise and limit government powers in our nation' (per Chief Justice Earl Warren of the United States in Trop v Dulles 356 US 86 [1958] at 103). In addition, when construing the Botswana Constitution, the national ethos must be taken into account.

(b) Having regard to the mores and norms of the present time and weighing the national ethos, she submitted in considering section 142(1)(i) that the public interest formed the basis for its enactment that public interest was the concern about the escalation in the incidence of crimes of rape and, associated therewith, the HIV/AIDS epidemic that currently afflicts the nation. There had, she said, been a consistent increase, borne out by statistics, in the crime rate and, in particular, the number of rapes. Again with this submission I have no quarrel. The increase in rapes cannot be gainsaid and that the nation is beset by an epidemic of HIV/AIDS is notorious.

[18.] It was with this in mind, said Mrs Dambe, that Parliament passed the amendment to section 142 of the Penal Code to reflect societal concerns about the high crime rate and the incidence of HIV/AIDS. It was designed to promote public safety and public health and was thus in the public interest. The non-bailability of persons charged with rape was one of the measures in that design.

[19.] It is with this last-mentioned submission that I have considerable difficulty. 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 sections 142(1)(ii) (2)(3)(4)(5) by section 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.

[20.] Faced with the difficulties that I have just set out, Mrs Dambe 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.

[21.] 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 (see Attorney-General v Dow supra at 131 - 132, per Amissah P). As stated by Kentridge JA in Attorney General v Moagi 1982 (2) BLR at 184: 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.'

[22.] 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 (see the Dow case supra at 168 B-C) 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 necessitates a value judgment by the court (cf Ex parte Attorney-General, Namibia: In re Corporal Punishment 1991 (3) SA 76 (NmSC) at 96).

[23.] It is notorious, as mentioned by Mr Kgalemang for the respondent, 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 (see section 114 of the Criminal Procedure and Evidence Act). It is therefore incongruous, to say the least, that a person accused of rape may not be so admitted. Accusations of rape are easily made and male persons are vulnerable to unscrupulous, vindictive or malicious complainants who may make false or unsubstantiated allegations of rape. An innocent person may thus be detained for considerable periods and would not even be entitled to bail, as I have shown, where his trial is, for whatever reason, unreasonably delayed. And even a person who is not innocent of the allegation may be unnecessarily detained for unreasonable periods, especially if he is not tried in a reasonable time, where there is no prospect of his absconding or of not standing trial or of breaking any of the usual conditions of bail. The remarks of the late Chief Justice Mokama in Daniel Baikakedi v State - Miscra 4 of 1992 are particularly apposite to the situation. In dealing with an appeal against a refusal of bail by a magistrate where the investigations were taking an unreasonably long time he said this:

> The courts do not like to deprive a man of his freedom while awaiting trial as he may be proved innocent. Even where he is subsequently proved guilty, the courts try not to deprive him of his liberty until he has been convicted (see S v Budlender and Another 1973 (1) SA 264).

[24.] The learned Chief Justice went on to say the following:

> I cannot accept that once a charge appears to be a serious one then the sky is the limit'. After all the charge has not been proved and if we allow the seriousness of the charge to be a determining factor for how long the accused can be remanded in custody, then there is a real danger that those who are accused of serious crime, could almost be detained without trial for an indefinite period. In my view, that would be tantamount to introducing preventative detention in our legal system.

[25.] 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. This finding makes it unnecessary to consider whether it also offends against section 10(2)(a)of the Constitution. It follows that I agree with Mosojane J that section 142(1)(i) of the Penal Code is ultra vires the Constitution of Botswana and is to be struck down.

[26.] One aspect remains. It is the question of costs. Mr Kgalemang submitted that in striking down section 142(1)(i) the learned judge in the Court a quo should have ordered the state to pay the respondent's costs and he applied for an order that this Court now award him those costs in that Court. He did not ask for the costs of the proceedings in this Court as he was appointed by the registrar of the Court to act amicus curiae. The Court a quo did not advert in its judgment to the question of costs. Mrs Dambe contested the application. Mr Kgalemang submitted that the usual rule in relation to costs applied and that as the respondent was the successful party in the Court a quo he should have his costs in that Court. Mrs Dambe submitted that an order for costs against the Attorney-General would not be appropriate on three bases: (a) what was involved in the Court a quo was an application by the present respondent under section 18 of the Constitution for a declarator that a provision in a statute infringed his constitutional rights in which the Attorney-General was entitled to be heard without attracting any liability for costs; (b) that the application was a criminal matter in which costs against the Attorney-General were not usually awarded; (c) that the issue raised in the application was a constitutional issue of public interest and the Attorney-General's intervention in the matter was one for the benefit of the public as the Court's decision defined the citizen's rights on the issue raised. I shall deal with (b) first. It is true that costs are not generally awarded in criminal matters. However, the High Court has an inherent jurisdiction to do so but will only do so in exceptional cases to mark its disapproval of high handed conduct amounting to bad faith (see Re: Attorney-General Reference: State v Malan (1990) BLR 32 (CA). No such consideration arises here. This case however, while

having a criminal element to it as a background, was not a criminal matter in its strict sense. It was an application for a declaration of a citizen's rights. I turn, therefore, to Mrs Dambe's points (a) and (c). In respect of both of these it seems to me that the true position is the following. The respondent considered that a law passed by the government contravened his constitutional rights. He applied to the High Court for redress. The Attorney-General represents the government in such matters but it was in effect the government, in its capacity as the maker of the law in question, which was the party being challenged and which sought, via the Attorney-General, to defend its law. It lost. I can see no reason why therefore the individual respondent, as the successful party in his application, should be deprived of his costs. The matter is clearly one of public interest but the respondent's attack upon the law is as much for the public benefit as the government's defence of it, through its representative, the Attorney-General. The Attorney-General should therefore pay the costs of the respondent in the Court a quo. Because the legal representative of the respondent in the proceedings in the Court of Appeal did so amicus curiae it is not necessary for me to decide in this case which party, if any, should bear the costs in a reference by the Attorney-General in terms of section 336(1) of the Criminal Procedure and Evidence Act and I leave the question open.

[27.] The following order is therefore made:

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

(2) The Attorney-General is ordered to pay the costs of the respondent, then applicant in High Court - Miscellaneous Criminal Application F14 of 2001, in the High Court in Francistown.

(3) The costs of the legal representatives of the respondent in the reference in terms of section 336(1) of the Criminal Procedure and Evidence Act (Cap 08:02) brought by the Attorney-General in this Court are the responsibility of the Registrar of the Court, such representative having acted amicus curiae.