

An HIV mother breastfeeding a baby: Did she commit a criminal offence?

Case note on *S v Semba* HH-299-17¹

In this case the High Court examines the ambit of the offence of deliberate transmission of HIV in contravention contained in section 79 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and raises serious concerns about certain aspects of this offence. In particular, the court questions whether this offence was intended to cover a situation where an HIV positive woman transmits HIV by breastfeeding the child.

The heading for this offence is “Deliberate transmission of HIV” is misleading. It is committed not only where the accused actually infects the complainant, but committed if the accused exposes the complainant to the risk of infection without actually infecting him or her. The latter species of the offence is committed where the accused knows that he or she is infected or realises that there is a real risk that he or she may be infected and he or she does anything that he or she knows will infect the other person or realizes there is a real risk or possibility of infecting the other person.

Section 79 has attracted criticism in the past and an unsuccessful attempt has been made to challenge it on constitutional grounds. See *S v Mpofo & Anor* CC-5-16 and case note on this case by G. Feltoe entitled. “Constitutionality of the offence of deliberately transmitting HIV: Case note on the case of *S v Mpofo & Anor* CC-5-16” available on Zimlil website. In this article on the *Mpofo* case the author argues that there are strong reasons to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it. This matter will again be canvassed at the end of the current case note.

Transmission by breast-feeding

In the *Semba* case a 26-year-old woman who had been convicted under section 79 and had been sentenced to 10 years’ imprisonment. She appealed against both her conviction and sentence. The brief facts were these. The appellant who was HIV positive had breastfed another woman’s baby. The appellant was in a room with the other woman. Both women had babies of about the same age. The other woman left the room leaving her own baby in the room occupied by the appellant and the appellant’s baby. Upon her return, the other woman found the appellant breastfeeding the other woman’s baby. She was disgusted and snatched away her baby. The appellant maintained that when the other woman’s baby started to cry she mistook her for her own daughter and immediately instinctively put her on her breast to breast-feed her. The matter was later reported to the police and during police investigations, the appellant was tested for HIV and found to be positive. The tests on the other woman and her baby showed that they were negative for HIV. At her trial the appellant admitted that she knew she was HIV positive when she breast-fed the other woman’s child.

¹ I am grateful to Professor Julie Stewart for all her helpful comments and observations when I was writing this paper. Any errors in this paper are, of course, my own.

The appeal succeeded on two grounds. Firstly, the court found that the offence in question was impliedly confined to sexual transmission of the virus. Secondly, in any event, for this offence the State was required to prove that the appellant was aware that breast-feeding would result in transmission of HIV, which it had completely failed to do.

Risks of HIV transmission from breast-feeding

The appeal court referred to the medical evidence elicited in the trial court concerning the extent of the risk of HIV transmission through breast-feeding. This disclosed that:

- only 15% of breast-feeding babies contract HIV from their mothers;
- the longer the child breast-feeds the higher the chances of the baby contracting HIV whereas in the present case there was only a short single act of breast-feeding;
- there is no way of knowing the quantity of breast milk required in order for there to exist a real risk or possibility of transmission to the baby;
- factors such as viral load, the adherence to an anti-retroviral regimen, and others factors are now known to be relevant to issues of transmission.

That medical evidence is largely corroborated by a recent paper by the World Health Organisation in which this statement appears:

“The transmission of HIV from a HIV-positive mother to her child during pregnancy, labour, delivery or breastfeeding is called mother-to-child transmission. In the absence of any intervention, transmission rates range from 15% to 45%. This rate can be reduced to below 5% with effective interventions during the periods of pregnancy, labour, delivery and breastfeeding. These interventions primarily involve antiretroviral treatment for the mother and a short course of antiretroviral drugs for the baby. They also include measures to prevent HIV acquisition in the pregnant woman and appropriate breastfeeding practices.”²

In the *Semba* case it is not apparent from the judgment whether the appellant was on anti-retroviral medication at the time she breast-fed the baby.

Situations of breast-feeding could lead to HIV infection or risk of infection

It is most unusual for a woman to be breast-feeding another person’s baby. Here the woman claimed that she had mistaken the child for her own child. The court does not seem to have made a clear finding on whether it believed that the appellant actually made this mistake. If it had disbelieved her, and found she knew she was breast-feeding another person’s child, the basis of the charge would have been the exposure to HIV of another person’s child. But if she did make the mistake, it could be argued that the mistake was irrelevant as she knew that she was exposing a child (her own) to HIV infection.

Another situation of breast-feeding someone else’s child could be where a person, who is minding someone else’s baby and is breastfeeding her own baby, decides also to breast-feed the baby

² WHO Mother-to-child transmission of HIV <http://www.who.int/hiv/topics/mtct/about/en/>

she is looking after. One further situation could be where the mother can't generate breast milk and a wet nurse is brought into to breast-feed the child.

Another scenario is where an HIV infected mother breast-feeds her own child. As will be seen later, if during pregnancy, labour and breast-feeding the mother is on antiretroviral treatment the risk of HIV transmission to the child is drastically reduced.

The question that arises is whether any of these situations fall within the ambit of section 79. As will be seen below the Appeal Court decided that they do not as the section was intended to cover sexual transmission only. The issue then would be whether it would be socially appropriate to create a separate offence to criminalise the transmission of HIV by breast-feeding.

Offence only encompasses sexual transmission

The court said that the offence in section 79 "appears to have been directed at sexual transmission of the virus." The court inferred this from the wording of the offence. One feature of the offence that pointed in this direction is that the fact that the parties are not married to each other is not relevant to the commission of the offence. Another such feature was that it is a defence that the other party consented to the act knowing that the accused was HIV positive and appreciating the nature of HIV and the possibility of becoming infected with it. (Clearly a baby cannot consent to undergo the risk of HIV infection!) The court therefore concluded that the legislature contemplated only HIV transmission by sexual partners. Other means of transmission such as transmission by using an infected syringe to transmit HIV can be dealt with by means of assault-related offences in the Criminal Law Code. As regards transmission by breastfeeding the court said this:

"Taking into account the gender-sensitive guidelines set out in the Southern Africa Development Community Model Law on HIV/AIDS, it was never intended to criminalise HIV transmission through breast-feeding. Had this been the intention of the legislature, certain obvious exceptions would, in my view, have been expressly spelt out. One cannot fail to see that the legislature could not have intended to criminalise a mother who had no information regarding the possibility of breast-feeding as a form of mother-to-child-transmission. Besides, the World Health Organization ...is on record as promoting breast-feeding generally, and therefore in my view, with the advent of this pandemic there would have been need for this piece of legislation to expressly spell out the circumstances in which criminal liability would attach to a breast-feeding mother."

Later the judge concludes: "To import non-sexual contact into s 79 in my view, appears to me to further confuse an already vague piece of legislation."

Proof of knowledge that breast-feeding would result in HIV transmission

Even if transmission by breast-feeding was to be found to fall within the ambit of section 79, the appeal court pointed out that it was not enough for the State to prove that the appellant knew she

was HIV positive; it was also required to prove that the appellant was aware that breast-feeding would result in transmission of HIV. The court said this:

“It would appear that the prosecution assumed, as did the Court, that the appellant was aware that breast-feeding would expose the baby to HIV. There was no basis for this assumption on the record. There is no indication as to the level of appellant’s education on health matters let alone, whether or how sufficiently schooled in this area of medicine, the appellant was. In my view, it was necessary for the State to tender that proof of her knowledge before such a finding was made.”

Clearly the likelihood of transmission would need to be based on medical and scientific evidence that an individual is unlikely to have.

There is also the problem that impoverished mothers may choose breast-feeding instead of using watered down formula or other unsatisfactory feeding practices.

A question that arises is what would have happened in the *Semba* case if the appellant had breast-fed the baby not only knowing she was HIV infected but also knowing that her action was likely to infect the baby, and the baby was actually infected? The answer from the *Semba* case would be that as it does not involve sexual transmission it falls outside the scope of section 79, especially as there could no question of the defence of consent to undergo the risk of transmission applying. If it is to be criminalized it would have to be done as a separate form of this crime which is fashioned to take account of medical knowledge relating to this form of transmission.

If that specific offence is to be created to cover breast-feeding transmission of HIV or exposure to HIV infection, one factor which would need to be taken into account is the extent of the risk of infection by breastfeeding. The appeal court in the *Semba* case referred to the medical evidence elicited in the trial court concerning the extent of the risk of HIV transmission through breast-feeding. This disclosed that:

- only 15% of breast-feeding babies contract HIV from their mothers;
- the longer the child breast-feeds the higher the chances of the baby contracting HIV whereas in the present case there was only a short single act of breast-feeding;
- there is no way of knowing the quantity of breast milk required in order for there to exist a real risk or possibility of transmission to the baby;
- factors such as viral load, the adherence to an anti-retroviral regimen, and others factors are now known to be relevant to issues of transmission.

The medical evidence referred to in the *Semba* case is largely corroborated by a recent paper by the World Health Organisation:

“The transmission of HIV from a HIV-positive mother to her child during pregnancy, labour, delivery or breastfeeding is called mother-to-child transmission. In the absence of any intervention, transmission rates range from 15% to 45%. This rate can be reduced to below 5% with effective interventions during the periods of pregnancy, labour, delivery and breastfeeding. These interventions primarily involve antiretroviral treatment for the mother and

a short course of antiretroviral drugs for the baby. They also include measures to prevent HIV acquisition in the pregnant woman and appropriate breastfeeding practices.”³

However, there are overriding issues of social policy that need to be addressed in deciding whether the law should criminalise transmission of or exposure to HIV via breast-feeding. Should this offence be limited to situations where it can be proven that the woman deliberately transmitted HIV to another person’s child? Would it ever be socially appropriate to charge this offence in respect of a mother who infects her own child? Certainly it would not be possible to prove deliberate transmission where during pregnancy, childbirth and breastfeeding the mother was receiving anti-retroviral treatment which was being used for the very purpose of reducing the risk of HIV infection of her baby.

Need to re-visit section 79

The court was highly critical of the present formulation of this offence generally, suggesting that the law is vaguely couched, is difficult to apply and fails to take account of medical research that establishes that there are additional defences should be recognized. The judge says this:

“For example, previously the available knowledge did not show that with proper adherence to anti-retroviral regimen, the viral load can be reduced to such levels as to be undetectable. In that event the current scientific knowledge confirms that there the risk of transmission, even through vaginal sexual intercourse, would be so greatly reduced as not to pose a health risk. The only defence available at present is that the complainant consented to the act with full knowledge of the accused’s status and the nature of HIV. Yet there is scientific evidence pointing to several defences in light of new knowledge and recent break-through in research. ...”

The judge also commented that proper guidelines should be developed for prosecution for this offence. The judge quotes, apparently with approval, the guidelines devised by the Crown Prosecution Service in England and Wales. Under these, he says, a person is only likely to be successfully prosecuted if he or she:

- knew he or she was HIV positive at the time of the alleged transmission;
- understood how HIV is transmitted;
- had unprotected sex with someone negative who subsequently tests positive; and
- did not disclose their HIV diagnosis before sex; and
- can be proven to be the only likely source of transmission.⁴

³ WHO Mother-to-child transmission of HIV <http://www.who.int/hiv/topics/mtct/about/en/>

⁴ “HIV Transmission, the Law and the Work of the Clinical Team, January 2013.” at www.bhiva.org/documents/Guidelines/Transmission/Recklessness-HIV-transmission-final January 2013 visited 18 October 2015).

This restricted criminalisation approach is also strongly advocated by UNAIDS which has stated in its policy brief on Criminalization of HIV Transmission:

There are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights. Because of these concerns, UNAIDS urges governments to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it.⁵

Conclusion

There are cogent reasons for not extending the offence on transmission of HIV to transmission by breast-feeding. What should be done is to encourage pregnant women to obtain screening and medication and support in order to try to prevent mother to baby HIV transmission during and after childbirth.