

Criminal law and cases of HIV transmission or exposure

Man convicted of first-degree murder sets disturbing precedent

On 4 April 2009, in the Ontario Superior Court of Justice, a jury convicted Johnson Aziga of two counts of first-degree murder, 10 counts of aggravated sexual assault and one count of attempted aggravated sexual assault in relation to sexual encounters he had with 11 women without disclosing his HIV-positive status.¹

Of the seven complainants who tested HIV-positive at some point following their encounters with Aziga, two subsequently died of cancer argued to be related to their HIV infection.

Aggravated sexual assault charges

Under Canada's Criminal Code, an aggravated assault or aggravated sexual assault is one that "endangers the life" of the complainant. Previously, the Supreme Court of Canada has established, in *R. v. Cuerrier* in 1998, that a person with HIV may be convicted of these offences if he or she, without disclosing his or her HIV-positive status, exposes another person to a "significant risk" of infection.²

Subsequent prosecutions for not disclosing HIV-positive status have largely involved charges for these offences, and hence the application of this "significant risk" test.

Therefore, of particular note in Aziga is that one of the counts of aggravated sexual assault advanced by the prosecution was based solely

on one instance of oral sex without a condom with one of the complainants (JC). Another of the counts of aggravated sexual assault, in relation to a different complainant (MD), was based on 3–4 instances of oral sex without a condom and approximately 12 instances of vaginal sex with a condom; there was no allegation by the Crown that Aziga had unprotected vaginal sex with this complainant.

All other counts, in relation to the nine other complainants, rested upon an allegation of unprotected vaginal sex on one or more occasions.

In his charge to the jury regarding the counts of aggravated sexual assault, trial judge Lofchik J. referred repeatedly to the Crown's duty to prove "unprotected penetrative sexual activity."³ (It seems likely that by this he meant to refer to vaginal sex, but this is not stated clearly anywhere.)

Nonetheless, as Aziga was convicted on 10 counts of aggravated sexual assault and one count of attempted aggravated sexual assault in relation to one complainant (BH), this means that he was convicted of at least one count for not disclosing his HIV status prior to unprotected oral sex alone, and of at least one count in relation to unprotected oral sex and vaginal sex while wearing a condom.⁴

Drawing upon an earlier Supreme Court of Canada decision, *R. v. Williams*,⁵ Justice Lofchik also outlined that, in order to obtain a conviction for aggravated sexual assault with respect to any complainant, the Crown had to prove beyond a reason-

able doubt that the complainant was HIV-negative at the time of having sex with Aziga. If there was some doubt as to this, and if it is possible that she might have already been HIV-positive by the time of having sex with Aziga, then only a conviction for *attempted* aggravated sexual assault would obtain. While the defence argued this was the case with respect to three of the women with whom Aziga had sex, the jury found that this was the case only in respect to one complainant (BH).

Murder charges

With respect to the two murder convictions relating to the complainants who died, the trial judge charged the jury that, just as with the charges of aggravated sexual assault, the Crown was required to prove beyond a reasonable doubt that:

- Aziga had "unprotected penetrative sexual activity" with each complainant;
- he was aware that he was HIV-positive at the time of having sex with each complainant;
- he was aware that he was required to inform all prospective sexual partners that he was HIV-positive;
- he failed to advise the complainants of his HIV status prior to having penetrative sexual activity with them; and
- the complainant would not have consented to unprotected sex had Aziga told her he was HIV-positive.⁶

However, to obtain a conviction for murder, the Crown also had to prove that:

- the complainant became infected with HIV as a result of sex with Aziga;
- Aziga caused the complainant's death by infecting her with HIV through sex;
- he meant to cause the complainant's death or meant to cause bodily harm that he knew was likely to cause her death, and was reckless as to whether death ensued; and
- the aggravated sexual assault, the HIV infection and the death of the complainant was part of "one continuous sequence of events forming a single transaction," thus elevating the conviction to one of first-degree murder.⁷

Sentencing

At this writing, sentencing was still pending, following a psychiatric assessment.⁸ The Crown had notified the court of its intention to seek an order designating Aziga as a "dangerous offender" under the Criminal Code (Section 753), which would mean the possibility of indefinite imprisonment.

Commentary

This precedent-setting case raises some significant questions and concerns.

In particular, because Aziga was convicted on at least one count of aggravated sexual assault based solely on oral sex without a condom, there is an implication that oral sex alone constitutes a "significant risk of serious bodily harm" which would suffice legally for a conviction. Yet, performing oral sex on a man not wearing a condom has generally been

considered to present only a "low risk" of HIV transmission at most;⁹ some assessments have estimated the per-act risk of transmission as being in the range of 0.01percent (1:10 000).¹⁰

Similarly, the conviction for aggravated sexual assault where there was but unprotected oral sex and protected vaginal sex is also of concern, given that the risk of transmission to a receptive partner in vaginal sex when a condom is used is in the range of 0.1percent (10:10 000).¹¹ Broadening the scope of criminalization in a way that does not reflect the scientific evidence undermines the objective of the law by subjecting people living with HIV to criminal culpability where there is, at best, a marginal risk of harm.

The case also resulted in the first murder convictions in Canada for non-disclosure of HIV prior to unprotected sex, with respect to two of Aziga's sexual partners who subsequently died. Justice Lofchik instructed the jury that it had to find, beyond a reasonable doubt, that Aziga intended either to kill the two complainants or to cause bodily harm he knew would likely cause their death and was reckless as to whether death ensued.

In his charge, Justice Lofchik instructed the jurors to decide "whether [Aziga] did in fact form this intent or whether his intent was merely to have sex with the complainants without regard to the consequences," which would be the basis for a finding of manslaughter (as opposed to murder).¹²

The prosecution argued that Aziga's failure to tell them "about his HIV status before, during and after he had unprotected sexual activity with them so that they could obtain medical treatment, is evidence of the intent to kill [SB] and [HC]."¹³ This

appears to have been the extent of the evidence regarding Aziga's intent.

In the end, because the jury convicted Aziga of murder in relation to each of the two women who died, this could be interpreted by police and prosecutors as a basis for more regularly pursuing charges for murder or attempted murder in the context of HIV non-disclosure in the future.

In the absence of an informed public debate, charges for non-disclosure of HIV prior to otherwise consensual sex have escalated in Canada from common nuisance and criminal negligence causing bodily harm to assault to aggravated sexual assault and, now, to murder. With little, if any, evidence that criminalizing HIV exposure has significant benefits for HIV prevention, the verdict in *Aziga* may further result in increasing — and increasingly serious — charges for HIV non-disclosure, including in cases where there is no "significant risk" of transmission.

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