NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Thompson*, 2018 NSCA 13

Date: 20180215
Docket: CAC 456036
Registry: Halifax

Between:

Claude Thompson

Appellant

v.

Her Majesty the Queen

Respondent

and

The Coalition of the HIV & AIDS Legal Clinic Ontario (HALCO), The Canadian HIV/AIDS Legal Network, and the Coalition des Organismes Communautaires Québécois Contre le SIDA (COCQ-SIDA)

Intervenors

Restriction on Publication: s. 486.4 Criminal Code

Judges:	Fichaud, Oland and Beveridge, JJ.A.
Appeal Heard:	October 12, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beveridge, J.A.; Fichaud and Oland, JJ.A. concurring
Counsel:	Lee Seshagiri, for the appellant Timothy O'Leary, for the respondent Luke Craggs and Khalid Janmohamed, for the intervenors

IN THE NOVA SCOTIA COURT OF APPEAL
I hereby certify that the foregoing document, identified by the Seal of the Court, is a true copy of the original document on file herein.
Dated the 15th day of February A.D., 2018
Deputy Registrar

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Reasons for judgment:

INTRODUCTION

[1] The sole issue in this case is whether psychological harm said to have been caused by non-disclosure of HIV status vitiates consent to sexual activity. The short answer is no, it does not.

[2] The appellant stood trial on two charges of aggravated sexual assault involving two separate complainants. The Crown alleged that the appellant failed to disclose his HIV-positive status to the complainants, and they would not have consented to sexual intercourse had they known. One complainant admitted that a condom was used, the other insisted one was not. Neither contracted HIV.

[3] The appellant testified. He swore he had told the complainants of his HIV status, and a condom was used during intercourse with each complainant. Details of the appellant's anti-retroviral treatments and the expert testimony will be referred to later.

[4] To establish vitiation of the complainants' consent, the Crown was required to prove beyond a reasonable doubt that the appellant did not disclose to the complainants his HIV-positive status, they would not have consented had they known, and the sexual activity either transmitted the virus or there had been a realistic possibility of HIV transmission.

[5] The trial judge, the Honourable Justice Suzanne Hood, in a thoughtful and careful decision, found that the Crown had not established a realistic possibility of HIV transmission. She therefore acquitted the appellant on the two counts of aggravated sexual assault. The Crown did not appeal the acquittals.

[6] However, the trial judge accepted Crown counsel's submission that the complainants had suffered psychological harm caused by the uncertainty in not knowing whether the virus had been transmitted. She found the appellant guilty of the lesser and included offences of sexual assault causing bodily harm. Her reasons are reported as 2016 NSSC 134.

[7] On August 25, 2016, the trial judge sentenced the appellant to thirty months' incarceration along with the mandatory ancillary orders for DNA and sexual offender registration.

[8] Within days of sentence, the appellant filed his own appeal from conviction. Counsel assumed carriage of his appeal. Intervenors support the appellant's complaint of legal error and fear the potential implications of the trial judge's ruling on people living with HIV.

[9] The appeal hearing was scheduled for October 12, 2017. However, on September 14, 2017, the Crown filed its factum. It conceded that the trial judge had erred, and the appropriate remedy was to quash the convictions and enter acquittals.

[10] The panel was satisfied that the Crown's concession was eminently correct and immediately convened a conference with the parties.

[11] We took the unusual step of issuing an order on September 19, 2017 quashing the convictions and entering acquittals on all charges, with reasons to follow.

[12] The parties wished to make submissions on the scope of our decision. So, the hearing proceeded on October 12, 2017. Our reasons are as follows.

What is required to vitiate consent

[13] Failure by a sexual partner to disclose that he or she has a sexually transmitted disease is morally reprehensible, but it is not usually a crime[1]. Most STDs can be cured with appropriate treatment or do not constitute a serious health threat. Given the potential endangerment of life, the law struggled with an adequate response to the risks posed by the Human Immunodeficiency Virus (HIV).

[14] If the sexual contact transmitted HIV, the accused faced charges of criminal negligence causing bodily harm and aggravated sexual assault. But convictions for aggravated assault were impossible to obtain because consent to the sexual activity was not vitiated by traditional legal theory (see, for example, *R. v. Ssenyonga*, [1993] O.J. No. 1030, (Gen Div.); 81 C.C.C. (3d) 257; *R. v. Cuerrier* (1996), 83 B.C.A.C. 295).

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[1] Communicating a venereal disease (syphilis, gonorrhea or soft chancre) was a summary conviction offence from 1919 (S.C. 1919, c. 46, s.8) until 1985 (R.S.C. 1985. C. 27 (1st Supp.), s.41

[15] The legal landscape changed when *Cuerrier* reached the Supreme Court of Canada (*R. v. Cuerrier*, [1998] 2 S.C.R. 371). In *R. v. Cuerrier*, the HIV-positive accused was acquitted of aggravated sexual assault where HIV transmission did not occur. The Supreme Court unanimously ordered a new trial. The Court divided on the requirements to vitiate consent.

[16] Cory J., for the majority, crafted a new test. Consent would be vitiated by the existence of deceit and deprivation. Non-disclosure of HIV-positive status would satisfy the deceit requirement; actual harm [by transmission of the virus] or exposing the complainant to a significant risk of serious bodily harm, deprivation (paras. 125-128).

[17] The test proved problematic. Fourteen years later, the Supreme Court re-visited the issue in *R. v. Mabior*, 2012 SCC 47. McLachlin C.J. wrote the unanimous reasons for judgment. She recognized that the *Cuerrier* test of "significant risk of serious bodily harm" posed dangers of uncertainty and overbreadth (paras. 15-19).

[18] After canvassing the purposes of the criminal law, the legal history of fraud vitiating consent, *Charter* values, and the experience of other common law jurisdictions, the Chief Justice concluded that the principle encapsulated in the *Cuerrier* test was valid.

[19] To ensure greater certainty and prevent overbreadth, "significant risk of serious bodily harm" requires disclosure of a positive HIV status only if there were a realistic possibility of HIV transmission. McLachlin C.J., wrote:

> [91] These considerations lead me to conclude that the *Cuerrier* requirement of "significant risk of serious bodily harm" should be read as requiring disclosure of HIV status if there is a realistic possibility of transmission of HIV. If there is no realistic possibility of transmission of HIV, failure to disclose that one has HIV will not constitute fraud vitiating consent to sexual relations under s. 265(3)(c).
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> ...
>
> [93] A review of the case law pertaining to fraud vitiating consent to sexual relations leads to the following general principle of law: the *Cuerrier* requirement of a "significant risk of serious bodily harm" entails a *realistic possibility of transmission of HIV*. This applies to all cases where fraud vitiating consent to sexual relations is alleged on the basis of the non-disclosure of HIV-positive status.
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> [Emphasis in original]

[20] On the evidence presented in *Mabior*, the Court was satisfied that the combined effect of condom use and low viral load reduced the risk to one of a speculative possibility rather than a realistic possibility. Chief Justice McLachlin summarized as follows:

> [104] To summarize, to obtain a conviction under ss. 265(3)(c) and 273, the Crown must show that the complainant's consent to sexual intercourse was vitiated by the accused's fraud as to his HIV status. Failure to disclose (*the dishonest act*) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm (*deprivation*). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV. On the evidence before us, a realistic possibility of transmission is negated by evidence that the accused's viral load was low at the time of intercourse and that condom protection was used. However, the general proposition that a low viral load combined with condom use negates a realistic possibility of transmission of HIV does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in the present case are at play.

[21] We can now turn to the trial judge's findings and reasons.

The trial judge's reasons

[22] The trial judge found as a fact that the appellant had not ejaculated in either of the two acts of sexual intercourse. In the first, the appellant used a condom, but did not during the second.

[23] The appellant had been on antiviral drug therapy. There was a lapse in his therapy and a recommencement. There was ambiguity about the date of the first act of intercourse in relation to the recommencement of antiviral drug therapy, creating uncertainty about the appellant's viral load for the first incident of intercourse.

[24] Three infectious disease experts testified. Dr. Ian Davis for the Crown, Dr. Stephen Shafran for the appellant, and Dr. John Smith in rebuttal for the Crown. There was unanimity in their evidence about the negligible risk of transmission where either the viral load is low or a condom is properly used. The risk of transmission would also be negligible from just pre-ejaculate.

[25] The trial judge drew the following conclusions from the combined testimonies of the experts:

> [132] Based upon the testimony of the three experts, I draw the following conclusions:
>
> 1. If viral load is less than 1500, the risk of transmission is "negligible" (Dr. Davis), one in 1000 (Dr. Shafran), "extremely unlikely" (Dr. Smith). I therefore conclude that there is not a realistic possibility of transmission if viral load is less than 1500.
>
> 2. Condom usage by a person with a viral load of less than 1500 has no effect on the risk of transmission, according to Dr. Shafran, and according to Dr. Davis makes it even more unlikely. Condom usage is almost 100 percent effective even with a viral load of approximately 15,000, according to Dr. Smith, and 100 percent effective according to Dr. Davis. I therefore conclude condom usage by a person with HIV precludes a realistic possibility of transmission of HIV.
>
> 3. It is unknown whether there can be HIV transmission from pre-ejaculate. I therefore conclude there is a reasonable doubt about the realistic possibility of transmission of HIV.
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> 4. Viral load decreases rapidly within 7 days. By day 7 there is a distinct possibility it would be less than 1500 and could be less than 1500 on day 5 or 6 (Dr. Shafran), and is probably less than 1500 on day 5 or 6 (Dr. Smith). I therefore conclude there is a reasonable doubt that Claude Thompson's viral load was greater than 1500 on day 5 or 6 of anti-retroviral treatment.

[26] The trial judge then applied these conclusions to the facts she had found. The judge concluded that the appellant had raised a reasonable doubt about a realistic possibility of HIV transmission with respect to both complainants:

> [133] I must apply these conclusions to the facts that I have found above. It does not matter on what date Claude Thompson had vaginal intercourse with H.R.H. It is undisputed he used a condom and I found as a fact he did not ejaculate. Even if his viral load was close to 15,000, as it was determined to be on December 13, the medical evidence which I accept establishes that condom usage is almost 100 percent effective to prevent transmission of HIV.
>
> [134] Claude Thompson has therefore raised a reasonable doubt about a realistic possibility of transmission of HIV to H.R.H. I therefore find him not guilty of aggravated sexual assault on H.R.H.
>
> [135] I have found that Claude Thompson did not use a condom when he had sexual intercourse with M.A.M. However, I have a reasonable doubt about whether he ejaculated. HIV transmission is from bodily fluids and it has not been proven that pre-ejaculate transmits HIV. It is also possible that the sexual intercourse with M.A.M. occurred after Claude Thompson had recommenced anti-retroviral therapy. Based upon either, Claude Thompson has raised a

> reasonable doubt about the realistic possibility of transmission of HIV to M.A.M. Accordingly, I find Claude Thompson not guilty of aggravated sexual assault on M.A.M.

[27] However, despite acquitting the appellant because a reasonable doubt existed that there was a realistic possibility of HIV transmission, the trial judge found the failure to disclose had caused psychological harm that amounted to bodily harm.

[28] The trial judge found that the psychological harm caused by the complainants' worry and uncertainty amounted to deprivation. Coupled with the deceit by non-disclosure, the complainants' consent was vitiated. Her reasons were as follows:

> [139] Bodily harm is defined in s. 2 of the *Criminal Code* and includes psychological harm. Both H.R.H. and M.A.M. testified about their reaction to the news that Claude Thompson was HIV-positive. H.R.H. said she was scared and shocked, and underwent testing to determine if HIV had been transmitted to her.
>
> [140] Between the time she knew that Claude Thompson was HIV-positive until the time she had the testing done and received the results, H.R.H. suffered psychological harm in that she did not know if she had contracted HIV.
>
> [141] I conclude this is not harm of a trifling nature because of the seriousness of HIV as a disease. Nor was the harm of a transient nature. The psychological worry of whether she had contracted HIV continued until she had the results of the testing. This satisfies the requirement of deprivation.
>
> [142] I conclude the consent of H.R.H. was vitiated by fraud. I therefore find Claude Thompson guilty of sexual assault causing bodily harm to H.R.H.
>
> [143] M.A.M. testified she had one year of testing for HIV. She said it was stressful and she had a fear of the unknown, that is whether she had contracted HIV. She too suffered psychological harm within the meaning of bodily harm. The psychological harm lasted for one year and I conclude therefore it was not trifling or transient. M.A.M.'s consent was vitiated by fraud.
>
> [144] Accordingly I find Claude Thompson guilty of sexual assault causing bodily harm to M.A.M.

[29] With respect, the trial judge was led astray by Crown counsel (not Mr. O'Leary), who advocated that the emotional turmoil suffered by the complainants could amount to bodily harm and thereby vitiate their consent to the sexual activity.

[30] The sole test to establish deprivation is actual transmission of HIV or "a realistic possibility of HIV transmission".

[31] Emotional stress or upset, even if they could legitimately amount to bodily harm within the meaning of the *Criminal Code*, are, in the eyes of the law, irrelevant. This is clear from the careful approach by the Supreme Court to avoid overbreadth and stigmatization of HIV-positive individuals.

[32] As the Court emphasized in *R. v. Cuerrier, supra*, and *R. v. Mabior*, *supra,* an HIV-positive person has no duty, enforceable by the criminal law, to disclose their HIV status unless there is a significant risk of serious bodily harm, satisfied by actual transmission or a realistic possibility of HIV transmission:

> [129] To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation. To repeat, in circumstances such as those presented in this case, there must be a significant risk of serious bodily harm before the section can be satisfied. **In the absence of those criteria, the duty to disclose will not arise.**
>
> per Cory J., in *R. v. Cuerrier* [my emphasis]

[33] Harm in the form of mental distress was rejected by the majority in *Cuerrier* as something that, in the absence of a significant risk of serious bodily harm, could vitiate consent.

[34] L'Heureux-Dubé J., in separate concurring reasons in *Cuerrier*, suggested any fraud that induced agreement vitiated consent. Cory J., for the majority explained why this approach was problematic:

> [131] Since writing I have had the opportunity of reading the reasons of L'Heureux-Dubé J. written with her customary clarity. It is her position (at para. 16) that any fraud that is "designed to induce the complainant to submit" to the act will vitiate consent and constitute an assault. In her view to do anything less would set a separate standard for fraud in cases of sexual assaults. With respect, this appears to add an additional *mens rea* requirement for fraud, but more importantly this position could give rise to unfortunate consequences. It would trivialize the criminal process by leading to a proliferation of petty prosecutions instituted without judicial guidelines or directions.
>
> [132] It must be remembered that what is being considered is a consensual sexual activity which would not constitute assault were it not for the effect of fraud. Obviously if the act of intercourse or other sexual activity was consensual it could

not be an assault. It is only because the consent was obtained by fraud that it is vitiated. Aggravated assault is a very serious offence. Indeed, a conviction for any sexual assault has grave consequences. The gravity of those offences makes it essential that the conduct merit the consequences of conviction.

[133] In the case at bar, the failure to disclose the presence of HIV put the victims at a significant risk of serious bodily harm. The assault provisions of the *Criminal Code* are applicable and appropriately framed to deter and punish this dangerous and deplorable behaviour. To say that any fraud which induces consent will vitiate consent would bring within the sexual assault provisions of the *Code* behaviour which lacks the reprehensible character of criminal acts. Let us consider some of the situations which would become criminal if this approach were followed.

[134] In these examples I will assume that it will more often be the man who lies but the resulting conviction and its consequences would be the same if it were the woman. Let us assume that the man lied about his age and consensual sexual act or acts then took place. **The complainant testifies and establishes that her consent would never have been given were it not for this lie and that detriment in the form of mental distress, had been suffered. Fraud would then be established as a result of the dishonesty and detriment and although there had been no serious risk of significant bodily harm a conviction would ensure.**

[135] The same result would necessarily follow if the man lied as to the position of responsibility held by him in a company; or the level of his salary; or the degree of his wealth; or that he would never look at or consider another sexual partner; or as to the extent of his affection for the other party; or as to his sexual prowess. The evidence of the complainant would establish that in each case the sexual act took place as a result of the lie and detriment was suffered. In each case consent would have been obtained by fraud and a conviction would necessarily follow. The lies were immoral and reprehensible but should they result in a conviction for a serious criminal offence? I trust not. It is no doubt because of this potential trivialization that the former provisions of the *Code* required the fraud to be related to the nature and quality of the act. This was too restrictive. Yet some limitations on the concept of fraud as it applies to s. 265(3)(c) are clearly necessary or the courts would be overwhelmed and convictions under the sections would defy common sense. **The existence of fraud should not vitiate consent unless there is a significant risk of serious harm. Fraud which leads to consent to a sexual act but which does not have that significant risk might ground a civil action. However, it should not provide the foundation for a conviction for sexual assault. The fraud required to vitiate consent for that offence must carry with it the risk of serious harm.** This is the standard which I think is appropriate and provides a reasonable balance between a position which

> would deny that the section could be applied in cases of fraud vitiating consent and that which would proliferate petty prosecutions by providing that any fraud which induces consent will vitiate that consent.
>
> [Emphasis added]

[35] Stress from being lied to, however despicable the deception may be, is simply not sufficient to vitiate consent for the purposes of the criminal law. This was emphasized by McLachlin C.J., in *R. v. Hutchinson*, 2014 SCC 19, where she observed:

> [72] This application of "fraud" under s. 265(3)(c) is consistent with *Charter* values of equality and autonomy, while recognizing that not every deception that induces consent should be criminalized. **To establish fraud, the dishonest act must result in a deprivation that is equally serious as the deprivation recognized in *Cuerrier* and in this case. For example, financial deprivations or mere sadness or stress from being lied to will not be sufficient.**
>
> [Emphasis added]

[36] Deception between short or long-term intimate partners can cause emotional stress, even harm. But, as outlined above, consent is not vitiated by deception about being HIV-positive in circumstances that negate a realistic possibility of HIV transmission.

[37] The appellant points to the thin evidentiary basis to support the judge's finding that the complainants' feelings of worry and stress constituted bodily harm within the meaning of the *Criminal Code*.

[38] One complainant testified about her reaction on hearing from the police about the appellant's HIV-positive status. She said she was "kind of shocked" and scared:

> Q. When Constable McPherson told you about Mr. Thompson's HIV status, what was your reaction?
>
> A. I was kind of shocked.
>
> Q. Okay. What did you...
>
> A. Scared.
>
> Q. Shocked and scared. All right....

[39] This complainant described going for a STD test, which included HIV. The test was negative. After that, she felt safe:

Q. Okay. After Constable McPherson told you of Mr. Thompson's HIV status, what did you have to do medically as a result of receiving that information?

A. I went and got STD tested.

Q. Okay. You have to speak up, we can't hear you.

A. I went and got STD tested.

Q. Okay. So for sexually transmitted diseases, is that correct?

A. Yes.

Q. All right. And did that include a test specifically for the HIV virus?

A. Yes.

Q. Okay. And was there one test or more than one test that you had to go through?

A. I just had one test.

Q. Okay. And was it positive or negative for HIV?

A. Negative.

Q. Was it recommended by your physician or a doctor that you do more than one test?

A. He had said that perhaps I should come back and get retested, but I didn't.

Q. Okay. Any reason why you didn't go back to be retested?

A. I just felt safe and because we used protection.

[40] The second complainant, on hearing the news, felt like she was going to pass out. She immediately made a medical appointment and had HIV blood tests at one month, three and six months. All were negative, but she said it was stressful as family members worked at the hospital where her blood requisitions went. She also said she had a fear of the unknown.

[41] Neither complainant sought or received any psychological or psychiatric counselling. There was no evidence either missed work or other activities. No expert evidence was tendered to demonstrate psychological harm.

[42] The Crown led no evidence in its case in chief about psychological harm having been caused to the complainants. The Crown cross-examined Dr. Shafran about the potential for harm where HIV was not transmitted, but the complainant had to go through testing. Dr. Shafran referred to it as a "small harm involving a transient period of anxiety in a person's life".

[43] At one point, Dr. Shafran described the advances in medical treatment and thinking about HIV:

> ...HIV has evolved to a situation where, you know, once in the 1980s regrettably it was an illness that was fatal in almost everybody to a condition today where it's a very easily managed chronic disease, in fact, a whole lot easier to manage than diabetes, just to pick another chronic medical disease, with a life expectancy that's very close to that of the general population.

[44] The Crown's expert, Dr. Smith, who had been the Crown expert in *R. v. Mabior* in 2008, testified that "HIV is no longer a lethal infection". Trial Crown counsel sought Dr. Smith's views about the potential harm to the person who is exposed to the virus but did not acquire it. He referred to the harm as "small". With respect to any psychological impact from the potential acquisition and medical testing, Dr. Smith did not "really see anything there" from complainants having to go through testing. Any psychological harm would stem from stigma and outdated information:

> Q. Sure. But I guess what I'm wondering, Dr. Smith, is do you see a harm done to an individual who's exposed, unwittingly exposed, to the HIV virus in terms of both the medical testing that then must take place to determine whether they've acquired the virus or not and the psychological impact of that situation on that individual? Do you see harm in that scenario?
>
> A. Well, I think that anyone who has unprotected sex with someone they don't know well or they have failed to ensure they're not likely to get an infection from, should be going to get STI testing. I mean, gonorrhea or chlamydia or syphilis or herpes might occur. So in terms of the testing issue, I don't really see anything there. In terms of the psychological harm, my belief is that a lot of that harm is around stigma and information that is outdated about the consequences of getting this disease.

[45] On this record, it is doubtful that a finding of bodily harm could withstand appellate scrutiny. But we need not decide this issue.

[46] Even if a complainant truly suffered psychological harm that could amount to bodily harm caused by active deception or non-disclosure of HIV, such harm does not amount to deprivation that vitiates consent. Numerous cases illustrate that even apparently serious emotional harm does not vitiate consent.

[47] Without realistic transmission of HIV, acquittals have been mandated for complainants who: "went through hell" "not eating or sleeping" (*R. v. W.H.*, 2015 ONSC 6121); were "devastated, cried daily, and thought she was going to die" (*R.*

v. Mekonnen, 2013 ONCA 414); became so extremely distraught that she threw up (*R. v. J.T.C.*, 2013 NSPC 105).

[48] Worry, stress, anger are natural emotions on learning of unwittingly being exposed to HIV. But absent a significant risk of serious bodily harm, satisfied by actual transmission or a realistic possibility of transmission, consent is not vitiated.

[49] Because the Crown cannot negate consent, a conviction for any lesser and included assault offence is simply not available. Hence, the appellant's convictions were quashed and acquittals were entered. With that order, the sentence and all ancillary orders fall.

Beveridge, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.