

R. c. D.C.

Summary of the decision of the Court of Appeal of Quebec

Good news! Six years after the charges were filed against her, D.C. has been acquitted. In a judgment dated December 13, 2010, the Quebec Court of Appeal reversed the trial judgment convicting her of sexual assault and aggravated assault on the basis that she failed to inform her partner that she was HIV-positive prior to having a single instance of unprotected sex with him. Based on the medical evidence, the Court of Appeal concluded that the sexual encounter in question did not expose the complainant to a significant risk of HIV transmission, because D.C.'s viral load was undetectable. However, the Court refused to establish a general principle that an undetectable viral load would necessarily remove the duty to disclose.

1. Facts

D.C. was diagnosed HIV-positive in 1991. In 2000, she met the complainant, JLP, with whom she had an intimate relationship for four years. After their breakup in 2004, D.C. filed a complaint against J.L.P. for conjugal violence, and he was convicted of assault against her and her son.

Two months later, J.L.P. filed a complaint against D.C., alleging that the couple had several unprotected sexual relations at the very beginning of their intimate relationship, before she disclosed her HIV-positive status. D.C. claimed that the couple had only one sexual encounter before the disclosure and that a condom was used at that time.

D.C. had an undetectable viral load at the relevant time, and J.L.P. did not contract HIV.

2. The trial judgment

Under Canadian criminal law, a person living with HIV has the obligation to disclose her/his HIV-positive status before having sex that poses a significant risk of HIV transmission.

The trial judge found that the couple had sexual relations only once before D.C. disclosed her status, but that the sex was unprotected. He found that this sexual contact without a condom exposed J.L.P. to a significant risk of HIV transmission, and he convicted D.C. of sexual assault and aggravated assault. He did not take into account the fact that D.C. had an undetectable viral load, even though the medical experts testified that the risk of transmission was “very low”, “truly minimal” and “very, very low” as a result.

The trial judge sentenced D.C. to 12 months of imprisonment to be served in the community.

3. The judgment of the Quebec Court of Appeal

D.C. appealed the trial judgment. COCQ-SIDA and the Canadian HIV/AIDS Legal Network obtained intervener status before the Court of Appeal, where they argued that Canadian criminal law should not permit a person living with HIV to be convicted for non-disclosure if the sex was protected with a condom or if his/her viral load was undetectable at the relevant time.

3.1. Condom use

COCQ-SIDA and the Canadian HIV/AIDS Legal Network asked the Court of Appeal to clarify the law by confirming that protected sex does not carry a significant risk of transmission and therefore does not give rise to an obligation to disclose. But the Court held that it did not have to decide this question, notably because it confirmed the trial judge's finding that no condom had been used during the single sexual encounter that occurred between the partners before D.C. disclosed her HIV-positive status.

In short, this decision does not rule out the possibility that a condom can reduce the risk of transmission to a level below the "significant risk" threshold, but it does not lay down a clear rule to that effect. Consequently, in a future case involving protected sex, it will once again be up to the trial judge to assess whether or not there was a significant risk of transmission.

3.2. The undetectable viral load

Since the Court of Appeal found that there was unprotected sex before disclosure, the central issue was whether the sex exposed the complainant to a significant risk of transmission. Unlike the trial judge, the Court of Appeal took into account the fact that D.C.'s viral load was undetectable in assessing the risk of transmission. In fact, it considered this a decisive factor.

The Court reiterated the test in *Cuerrier*: non-disclosure of HIV (by omission or deceit) vitiates the partner's consent when the sexual encounter poses a "significant risk of serious bodily harm." The Court clearly rejected the Crown's argument that, in view of the seriousness of HIV, any risk of transmission is a "significant risk." Thus, it confirmed that a duty to disclose exists only in situations where the evidence shows that the sexual encounter actually poses a "significant risk" of transmission. The level of risk is to be assessed having regard to the facts and medical evidence of each particular case.

Here, the medical experts assessed the risk of transmission as 1 in 10,000 where the viral load is undetectable, and they characterized the risk as "very low", "truly minimal" and "very, very low." In light of this evidence, and the fact that there was only one instance of unprotected sex before D.C. disclosed her status, the Court of Appeal held that the complainant was not exposed to a "significant risk of serious bodily harm" and acquitted D.C.

We are pleased that the Quebec Court of Appeal has held that an undetectable viral load alone can be sufficient to exclude criminal liability. However, we regret that the Court has not enunciated a general rule that an undetectable viral load removes the duty to disclose.

Like the recent decisions of the British Columbia and Manitoba Courts of Appeal in *Wright* and *Mabior*, this decision is a step in the right direction. There is a strong trend in Canadian criminal law whereby viral load must be taken into account in assessing the risk of transmission from a legal point of view.

Trial judges in Quebec are bound by the Court of Appeal's decision. This means that they must take viral load into account in assessing whether there is a significant risk, and that if they conclude that the risk of transmission is similar to the risk in *D.C.*, they must acquit the accused. However, the analysis will continue to be done on a case-by-case basis.

This decision is not binding on courts outside Quebec, but is likely to constitute persuasive authority for trial and appellate courts in Canadian provinces and territories other than Quebec.

We cannot yet rule out the possibility that this decision will be appealed to the Supreme Court of Canada.

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