

Summary
Court of Cassation, Criminal Division
Decision of July 2, 1998, quashing a decision of an indictment chamber

Facts

X, a man, knows that he is HIV-positive. He has been receiving treatment for several years. He is in a relationship with Y, a woman. They have protected sex. At X's request, Y gets tested for HIV and the result is negative. X himself refuses to get tested, certifying that he is not HIV-positive. The couple then has unprotected sex. A subsequent test reveals that Y has contracted HIV. She files a criminal complaint.

Procedural history

In a decision dated December 17, 1997, the indictment chamber (*chambre d'accusation*) of the Aix-en-Provence Court of Appeal decided that X should be prosecuted for the offence of poisoning, and referred the matter to the Alpes-Maritimes Assize Court, a court where felony cases are tried.

The decision referring the matter to the Assize Court for trial was appealed to the Court of Cassation, France's highest appellate court, on the basis that some constituent elements of the offence of poisoning were lacking.

Arguments of the accused regarding the requisite elements of the offence

- 1) The *actus reus* or "material element" of the offence
 - requires the administration of a deadly substance. But the fact that the disease is "incurable" does not necessarily mean that it is deadly.
 - also requires that the deadly nature of the substance administered be certain, and not dependent on random factors. The substance administered was semen, not the AIDS virus. Transmission of the virus was a possibility, not a certainty. While X's conduct can be regarded as risky or even perverse, that conduct alone is not sufficient for it to be inferred that the semen is deadly in nature, or that the contamination process is automatic. In any event, it is not sufficient to prove that X knew of the deadly nature of the semen, or the inevitability of contamination.
- 2) The *mens rea* or "moral element" of the offence
 - requires the intent to administer a deadly substance. In indicting the accused, the indictment chamber was content to find that this intent was present

because X knew that Y was HIV-negative, concealed his HIV-positive status from Y, and obtained unprotected sex from her.

- also requires homicidal intent. In the indictment chamber's view, the fact that X encouraged Y no longer to protect herself during sex, when he knew that Y was not a carrier, was sufficient to establish X's homicidal intent.

Decision of the Court of Cassation

The Court quashed the decision of the indictment chamber on the following grounds:

- 1) Procedural grounds: An indictment chamber can only indict someone for a felony to be tried in the Assize Court if all the constituent elements of the alleged offence are present. If certain grounds are insufficient or contradictory, these elements are not present.
- 2) Substantive grounds: Mere knowledge of the mortal power of the administered substance is insufficient to constitute homicidal intent. Thus, the elements of the offence have not been made out.