

Case Name:

R. v. Nduwayo

**Between
Regina, and
Adrian Sylver Nduwayo**

[2010] B.C.J. No. 1787

2010 BCSC 1277

Docket: X066089-14

Registry: New Westminster

British Columbia Supreme Court
New Westminster, British Columbia

J.W. Williams J.

Heard: April 20-23, 26-30, May 3-5, 7, 10, 13, 14 and June
4, 2010.

Oral judgment: August 23, 2010.

(163 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Assaults -- Aggravated sexual assault -- Consent -- Accused convicted on five of seven charges of aggravated sexual assault -- Accused had unprotected sex with seven women over seven years following his HIV-positive diagnosis, without advising women of his status -- Some of these women contracted HIV -- Conduct placed his partners at risk of contracting potentially fatal disease -- Risk vitiated partners' consent to sexual activity with accused -- Accused acquitted on two counts where sexual encounters limited, condoms possibly used and complainants not infected with HIV as result of contact with accused -- Criminal Code, s. 273(1).

Criminal law -- Defences -- Consent -- Informed -- Accused convicted on five of seven charges of aggravated sexual assault -- Accused had unprotected sex with seven women over seven years following his HIV-positive diagnosis, without advising women of his status -- Some of these women contracted HIV -- Conduct placed his partners at risk of contracting potentially fatal disease -- Risk vitiated partners' consent to sexual activity with accused -- Accused acquitted on two counts where

sexual encounters limited, condoms possibly used and complainants not infected with HIV as result of contact with accused.

Trial of the accused Nduwayo on seven charges of aggravated sexual assault. The accused was informed in October 1996 that he was HIV positive. Doctors who diagnosed the accused made it clear to him that he should have protected sex and advised prospective partners of his HIV status. The seven complainants were women with which the accused had consensual sexual relationships between 1997 and 2003, from whom the accused concealed his HIV-positive status. Four of the complainants later tested HIV-positive. The complainants all had different stories about the nature of their relationship with the accused. Most suggested he was reluctant to wear a condom during sex and that he indicated a desire to get his partners pregnant. Many indicated the accused had problems wearing a condom when he did agree to because of fit. Some became pregnant despite the use of condoms. All indicated he at some time and in some way denied to them that he was HIV-positive. Partners with whom he had lived, who became aware of his HIV-positive status, gave evidence he stopped taking his medications to keep the virus at bay after an adverse reaction in 1999. Some of the complainants had been inconsistent in their accounts of condom use, the number of sexual encounters they had with the accused, and other issues. Some had become friends and admitted they talked to each other about the accused. Medical experts testified that HIV, left untreated, could turn to AIDS, a fatal disease. HIV was an incurable disease that could in many cases be effectively controlled with a combination of three medications, which could have significant side effects. The risk of transmitting HIV varied greatly depending on the infected person's viral load, the use of protection, and the type of sexual activity. Medical reports indicated the accused had a viral load in the low range from 1996 through 1998. There was no information of his viral load in the subsequent years. The accused called no evidence.

HELD: The accused was convicted on five counts of aggravated assault. Evidence from the different complainants about the reluctance of the accused to use condoms was permitted to be used as similar fact evidence in cases where the accused had made a positive assertion he did not want to use protection, as opposed to merely failing to use a condom. The dishonesty of the accused in dealing with his different sexual partners with respect to carrying on different, concurrent relationships could not form the basis of a finding he was by nature dishonest and had lied about his HIV status. The risk to the complainants of being infected with a potentially-life threatening virus was significant, such that, in most cases, their consent to have unprotected sex with the accused without knowledge of his HIV-positive status was vitiated. In two cases, where the complainants had sex with the accused once or twice only, were not infected, and where the evidence was inconsistent about whether or not protection was used, acquittals resulted.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 273(1)

Counsel:

Counsel for the Crown: J.A.M. Dickie.

Counsel for the Accused: S.R.A. Buck and J. Rutherford.

Oral Reasons for Judgment

1 J.W. WILLIAMS J. (orally):-- Mr. Nduwayo is before this Court facing seven counts of aggravated sexual assault. Each count alleges a different victim. As well, the time frames and jurisdictions vary from count to count. The specifics are as follows:

2 I pause to note that the names of the complainants in the indictment are initialized. I do not propose to use initials but will rather use the names here today. However, there is a publication ban in effect. It specifically bans the publication of the name of any of the individuals named as complainants and any other information that would tend to disclose the identity of those individuals. That continues in effect. Any publication of these Reasons for Judgment must protect the identity of those persons by deletion of their names and the use of initials.

3 Count 1 is the aggravated sexual assault of L.A. between July 1, 1997 and November 30, 1997, in Delta and Burnaby, British Columbia. Count 2 is the aggravated sexual assault of N.W. between March 1, 2001 and June 1, 2001 at Port Coquitlam, British Columbia. Count 3 is the aggravated sexual assault of C.N. between August 1, 2000 and March 31, 2001, at Port Coquitlam, British Columbia. Count 4 is the aggravated sexual assault of E.K. between September 1, 2001 and August 1, 2002 at Langley, British Columbia. Count 5 is the aggravated sexual assault of D.T. between January 1, 2002 and July 31, 2002 at Burnaby and Surrey, British Columbia. Count 6 is the aggravated sexual assault of D.D. between April 1, 2002 and December 31, 2002, at Surrey, British Columbia. Finally, count 7 is the aggravated sexual assault of T.F. between October 1, 2002 and December 31, 2003 at Surrey, British Columbia.

4 The trial extended over a number of days. Crown called a total of 13 witnesses including the seven complainants. As well, two other witnesses gave evidence with respect to related circumstances. Three witnesses dealt with medical matters relating to the case and the investigating police officer testified.

5 The defendant elected to call no evidence.

6 I will commence with a general overview of the case and then set out the evidence of the witnesses. Following that, there will be a discussion of the applicable law and an analysis of how the law applies to the proven facts.

Overview

7 The charges arise out of sexual relations between Mr. Nduwayo and the seven named complainants. In each instance, the sexual encounters were ostensibly consensual. However, the evidence establishes that Mr. Nduwayo was a carrier of the Human Immunodeficiency Virus (HIV). He became aware of that status on October 11, 1996, when he was fully apprised by a medical practitioner.

8 The Crown says that Mr. Nduwayo engaged in sexual relations with a number of women, in many instances unprotected sexual activity, and that he failed to advise any of them of his HIV-positive status. It is the contention of the Crown that such conduct constitutes aggravated sexual assault in that the consent of the sexual partner is vitiated by the fact that she was not properly apprised of relevant circumstances. As well, the Crown says that the sexual conduct exposed the

women to a risk of serious bodily harm. Thus, in the submission of the Crown, the elements of the offence of aggravated sexual assault are made out.

The Witnesses

9 I will set out the evidence of each of the complainants. That will be essentially chronological although there is some overlap. This sequence parallels the counts as they appear on the indictment.

L.A.

10 This witness was 36 years old at the time she testified. She met the defendant in June of 1997 at a bus stop in Vancouver. There was a conversation struck up and the two began to date. At some point, there were discussions about the commencement of the sexual relationship. The witness said that the defendant told her that he was not seeing anyone at the time.

11 The relationship became sexual in July of 1997. The witness testified that there were discussions between them with respect to birth control. She says the defendant said he wanted a child. She was not taking the birth control pill. There was also discussion of sexually-transmitted diseases. The complainant testified that she was regularly tested. She said she asked the defendant about his sexual health, but he deflected the question responding to the effect of, "What? You think I have HIV?" That was the extent of the discussion.

12 The witness said that the first two times they had intercourse, it was with the use of a condom. Following that, in the next two episodes of intercourse, there was no protection. The witness said the defendant was pressing her to get pregnant. For her part, she felt that the relationship was solid and had promise. She said they had intercourse a couple of times in August and a couple of times in September. There was no protection in those contacts.

13 L.A. left the Lower Mainland and travelled to Lethbridge in late September. She was gone for about two weeks and then returned. On October 10, 1997, she and the defendant got together and talked about their relationship. She says it was agreed that the defendant would back off the pressure he seemed to be exerting for her to have a child. She said there was a further episode of unprotected intercourse.

14 The defendant then left, explaining that he was going to go on vacation to Miami, Florida for some 10 or 14 days in pursuit of his professional soccer aspirations. The witness testified that she then heard nothing further from him, but discovered that she was pregnant. As a consequence, she attempted to reach him by phone but was not successful.

15 One day at the end of October, she drove to his apartment building and waited for his car to arrive. When that did not happen, she buzzed his intercom and the call was answered by a woman. L.A. went up to the suite and there was greeted by a woman, K.N. She was told that the defendant was in the shower. He emerged shortly and there was a tense confrontation between the two of them; that is, L.A. and the defendant. She said the defendant was clearly angry at her and refused to acknowledge the situation. She then left.

16 The day following, the defendant called her at her mother's home. He was angry and said that she was crazy. He said he could not believe that he had gone out with her, and that the relationship was over. He told her to stay away from him. Two or three days later, L.A. went to the defendant's apartment. Again, K.N. was present and answered the door. L.A. said that she downplayed the situation and then left.

17 In mid-November, L.A. was living with her mother. She said the defendant came to her residence. He was friendly; he came in, asked if she was pregnant and upon learning that she was, asked if she planned to have an abortion. She replied she did not know. The defendant suggested that they should try and make the relationship work, that things were not working out with his wife, and that he wanted to be with L.A. He said that he was happy that she was pregnant and that they could be a family together.

18 In January of 1998, L.A. left the Lower Mainland and travelled to Lethbridge to be with her sister. Matters did not work out well. There were complications with her pregnancy and she found herself on bed rest and drawing welfare. She was in extremely difficult financial circumstances and made phone contact with the defendant, one or two calls, asking him for financial assistance. He agreed to come and visit her.

19 In the first week of May, the defendant went to Lethbridge and L.A. picked him up at the bus station. He said that he was prepared to help out financially, although no amount was discussed. The two of them met again the next day. L.A. said that they talked and hugged and he agreed to help her out, indicating that he would meet her on the day following at McDonalds and give her \$500 to buy a crib and some other items. In fact they did meet the following day but there was no money made available. The defendant said he was not able to help and there followed a bit of an argument. Mr. Nduwayo then left. L.A. said she did not see him again in Alberta. After that, there was phone contact which she described as civil, but she was not providing much information to him. He wanted to know when she was returning and he wanted to see the baby.

20 There were discussions with respect to custody of the child. The defendant wanted her to return to British Columbia with the baby, and he offered that he and his wife would take care of the child. He said, as well, if she did not return to British Columbia, he would pursue custody.

21 There were problems in the late stages of the pregnancy. Although the child was due to be born on July 28, 1998, L.A.'s water broke and there followed an early delivery on June 12, 1998. A daughter was born. The delivery was difficult. L.A. lost a substantial amount of blood and the baby was not healthy. After her release from hospital, L.A. met with a legal case worker with respect to the issues of custody, access and maintenance. She said there was some paperwork completed and at some point there was a legal proceeding which resulted in an order of the court in Alberta granting sole custody to her. Evidently there was a support order made as well.

22 In October of 1998, L.A. returned to British Columbia and contacted the defendant, offering him access. Mr. Nduwayo began to visit. The first few times went relatively smoothly. He played with the child and seemed positive. He asked L.A. if she needed anything. Each time she said she did, and once mentioned that she required diapers and formula. The defendant's response was to the effect that Welfare was not paying enough.

23 A subsequent visit did not go well. The baby was having problems and L.A. said she became angry at the defendant for not helping out. She suggested his access might be limited if he did not find a way to contribute to her support. Following the visit, L.A. realized that she should not have taken that tack, and so she called the defendant. She ended up speaking on the telephone with K.N. That was in December of 1998.

24 In a telephone conversation between L.A. and K.N., K.N. said to L.A. that there was a serious matter she had to raise with her and asked her if she was sitting down. She then told her that the defendant was HIV-positive and had been for two years. K.N. urged L.A. to have herself and the child

tested. At first, L.A. said she simply refused to believe this information. However, K.N. came over to her home and there was further conversation. As a consequence, L.A. and the child were tested. The results indicated that neither of them was infected.

25 On December 26, 1998, the defendant and K.N. visited L.A. They brought gifts and spent some time with the child. In the course of that visit, L.A. confronted the defendant with respect to his HIV status. He refused to answer her questions. In fact, he has never admitted to L.A. that he is HIV-positive. Instead, he specifically denied that he was and suggested that K.N. was a liar and was crazy. L.A. reported the matter to the police, but it appears her complaint was not taken seriously.

26 The defendant continued to call L.A. on the telephone. She felt these contacts were harassing and improper and she stopped taking his calls. Eventually she left the area and moved to Ontario. She has had no further contact with the defendant or K.N. At some point, she was contacted by the RCMP in relation to the investigation. She stated that she would not have agreed to have sexual intercourse, protected or unprotected, with the defendant had she known of his HIV-positive status.

27 In the course of cross-examination, L.A. was referred to a statement that she had given to the police. In that statement, she stated that there had been "no sex or anything" between herself and the defendant when he visited her in Lethbridge in May of 1998. In fact, she conceded in cross-examination that during the defendant's visit to her in Lethbridge in May of 1998, there was one incident of intercourse between them. The witness agreed that she had been untruthful in her statement to the police. She also agreed that in her testimony at the preliminary inquiry when she described events that had occurred in Lethbridge, she made no mention of there being a sexual encounter. When pressed in cross-examination, she testified that she considered that she had not been specifically asked if there had been sex, and so she did not provide the information. She said, as well, that she considered that to be personal business and embarrassing. She agreed that she had been wrong in not disclosing that information in her evidence, and agreed that she may very well have misled the Court by so doing.

N.W.

28 N.W. was 29 years of age at the time that she testified. She explained having met the defendant in March of 2001 at a pub. She said telephone numbers were exchanged and there followed a pub date, and then attendance at a wedding. There was phone contact as well, and in late March of 2001, she went to the defendant's home. She said they watched soccer on television and then went to another room where there was some "making out" followed by a hurried act of intercourse which was interrupted by someone at the door.

29 She said that there was no discussion between herself and the defendant with respect to sexual disease or health. She said the defendant did not inform her that he was HIV-positive. She testified as well that the defendant did not wear or use a condom in the act of intercourse. Subsequent medical tests have confirmed that she is not infected.

30 In cross-examination, the witness confirmed that, in her police interview, she had advised the officer that she did not think a condom was used, thereby presumably implying a degree of uncertainty. That of course is not entirely consistent with the testimony she gave at trial. She was confronted with the discrepancy. In a response to a question by defence counsel, she agreed that she had lied to the police.

C.N.

31 C.N. testified that she met the defendant at the end of August, 2000. At the time, she was 19 years of age and working in a pet store. She understood that he was a soccer superstar and had, at one point, been associated with the Arsenal Football Club in the United Kingdom.

32 Their first date was a visit to a pub. Sometime after that, C.N. called the defendant's home. The call was answered by a woman, K.N. The witness subsequently queried the defendant concerning this. He told her that K.N. was his wife and that they had a ten-month-old child. He also told C.N. that they were separated and that K.N. was on the way out.

33 The relationship proceeded and sexual relations between them began in September of 2000. The witness said that there was no discussion with respect to sexual health or sexually-transmitted diseases. There was some discussion concerning condoms with the defendant saying that he did not like them and saying that he would not use them. The witness said that there was sexual intercourse between them on a number of occasions. She said the defendant never used a condom.

34 In October, C.N. became ill. She went for medical tests but nothing conclusive was found. She was advised that her white blood cell count was elevated.

35 Unprotected sexual intercourse continued between C.N. and Mr. Nduwayo. C.N. said that in late September, she stopped taking birth control pills and the relations continued. In November, she learned that she was pregnant. She advised the defendant and she said that initially he seemed extremely pleased with that development. However, his disposition changed and his response became hostile. He asked her to abort the pregnancy and, in December, he angrily pushed her down some stairs.

36 In January, C.N. told the defendant that she intended to have some blood work done. She said that he discouraged her from doing so. In fact, the blood work was done and in March of 2001, she learned that she was HIV-positive. She subsequently confronted the defendant with respect to this and testified she said to him, "There's something you forgot to tell me. The HIV." She described his response as being, "It's none of your business."

37 On August 5, 2001, her child was born. She was able to deliver the baby vaginally. She described being on anti-viral medications herself and that the child, too, required such medications following the birth. She subsequently had a second child. Again, she said that she was able to do so through careful monitoring of her viral load, and she has been able, for the most part, to avoid taking medications. Neither of the children is infected with the virus.

38 In cross-examination, C.N. was confronted with a statement she had given to the police. In that statement, she indicated that she stopped taking birth control pills in November whereas at trial, she said it was in late September. Presented with that discrepancy, she said to the effect, "I honestly believe it was September, but I honestly don't remember." In effect, she accepted that her statement might well be true.

39 She was also confronted with the fact that in June of 2002, she had conversations with E.K., another complainant, and among the subjects discussed was the defendant and his preferences and habits with respect to the use of condoms.

E.K.

40 This witness was 33 years of age at the time of trial. She testified that she immigrated to Canada from Kenya in December of 1996 to study nursing.

41 In May of 2001, she met the defendant at a wedding. He made a positive impression. At first she made clear that she was not interested in a relationship with him but he persisted. In September of 2001, she relented. They began to date. As relations became more physical, she said that she asked the defendant if he had any diseases. He said he did not. Specifically, she recalls him saying, "If I did, S.'s mom would have it. She just had a baby and was just tested."

42 As the relationship progressed, there was more of what the witness called "heavy petting". She says she suggested to the defendant that maybe he should use a condom. He said, "No," and he explained to her that they get stuck in the vagina, that they burst and that they are risky. He said that he was taking precautions to see that she did not get pregnant. He told her he would not ejaculate and described himself as "stopping at the door". She understood this to mean that although there was genital contact, he was being truthful when he said that he was not going in all the way. She concluded from her discussions with him that she did not have to worry about losing her virginity.

43 With respect to the frequency of sexual relations, she described there being a number of episodes. She said that there was at least some penetration and that she believes the defendant achieved orgasm. She said at some point she knew there had been full penetration. She testified that the total number of acts of intercourse was no more than 20.

44 E.K. testified that in the time frame September to October 2001, she began to feel unwell. She described the symptoms as being like flu or malaria with chills and fevers.

45 At one point the defendant moved into E.K.'s accommodation with her. It appears there were problems between them, one of which involved the purchase of an automobile. The relationship was somewhat off and on, and in April of 2002, it ended finally.

46 In May of 2002, the defendant called E.K. and asked her to meet him at a restaurant. She did. At that time, he proposed marriage to her, a proposal which she declined. The situation became unpleasant. She left and went on her way.

47 E.K. described that following the meeting at the restaurant, the defendant began to call her frequently. She was avoiding contact with him. In one of his telephone messages, he said to her, "By the way, you'd better get tested for HIV." E.K. says she did not take that message seriously.

48 There followed an incident where the defendant came to her home and the police were called. Again, the defendant communicated a message to her, this time through the police officer, to the effect that she should have herself tested for HIV. As well, he continued to call, and in one of those calls, indicated that he had just had a call from his ex, that she has HIV, and that she had to call her partners. He said as well in the message that he had been tested positive for HIV. Again, E.K. was sceptical of the messages that were being left and thought it was part of the defendant's efforts to attract her attention or somehow bother her.

49 In June of 2008, E.K. felt nauseous. She testified she took a pregnancy test and learned that she was pregnant. Subsequently, in July, she took a full battery of tests. Those disclosed that she was HIV-positive. With that information, and being pregnant, she attended upon a clinic and began to take a cocktail, anti-viral cocktail, of three drugs.

50 She testified that a short while later her water broke and she had a miscarriage. She subsequently gave vaginal delivery to the foetus which was 19 or 20 weeks developed. She described the foetus as a black child.

51 E.K. testified that there was never a condom used in her sexual relations with the defendant. She also testified with respect to the difficulties, namely the resistance and negative reaction that she experienced with respect to the medications. She said that she has subsequently given birth to two children. She has had ongoing struggles with respect to the HIV medication.

52 In cross-examination, two specific points were developed. The first of these is that this witness has subsequently met and become friends with another complainant, C.N. She agreed that they have offered one another mutual support and that in the course of their conversations, there was discussions of the fact that the defendant did not wish to use condoms in sexual relations. She said that there was no detail discussed.

53 Another matter that was canvassed with her in cross-examination was an incident where she described the defendant's penis having been injured or sustaining some sort of laceration which she concluded had occurred because of contact with her pubic hair, which she says is especially coarse and abrasive. In her testimony, this witness said that she is now confident in stating that there were acts of intercourse between herself and the defendant. Any uncertainty that she might have had earlier has been displaced by the fact that she is now more knowledgeable of such matters by virtue of life experience. It was suggested to E.K. that there had been no sexual contact with the defendant before the illness which she experienced in September/October of 2001. She disagreed.

D.T.

54 D.T. was 32 years of age at the time of trial. She testified that in late 2001 or early 2002, she was at a club with a friend and met the defendant. They danced and shared drinks and ultimately exchanged telephone numbers. She testified that they subsequently spoke on the phone and then met the following weekend. The defendant came to her home.

55 There was a sexual relationship between the two. She said that there was sexual intercourse on five separate occasions. She said there was no discussion of safe sex or protection prior to the encounters. This witness describes herself as being quite cautious in the approach she takes to sexual relations. On the first occasion, she explained that she produced a condom for him to wear. He resisted her request and said words to the effect, "It's okay, sweetie, we don't need it." D.T. said that she insisted and that the defendant ultimately complied albeit somewhat hesitantly.

56 On the second occasion, she said they were fooling around and things progressed quite quickly from there. She said the defendant started to have intercourse without a condom, but she stopped and insisted. By that point, she said that he had been inside her. Again, his response was to the effect that, "We don't need it." However, he did relent and put on a condom and they continued.

57 The third and fourth occasions were similar, that is, there was intercourse with her insisting upon the use of a condom. She also described a fifth occasion. She said that they had sexual intercourse without a condom.

58 She was challenged on that assertion. She agreed that, in the statement she provided to the police, she had not mentioned a fifth occasion, nor had she made mention of it when she testified at the first trial of this matter. She was also confronted with a statement made to the investigating officer, words to the effect, "I honestly don't think I ever had sex with him without a condom per se." At trial, she said that was not accurate and insisted that there had been a fifth occasion.

59 D.T. has subsequently been tested. The results indicate that she is not infected with the HIV virus. This witness testified that she would not have consented to having sex with the defendant even if there had been a condom worn had she known he carried the HIV virus.

D.D.

60 D.D. met the defendant at a club in the Vancouver area in the fall of 2001. Some time later in March of 2002, there was some contact between the two of them and they began to see one another. They had a sexual relationship which lasted between the 1st of May, 2002, and late July of that year. In that time, there were four occasions when they had intercourse.

61 The first encounter was in May of 2002 at the witness's apartment. She testified that there was no discussion between herself and the defendant as to sexual health or STDs. She insisted that a condom be used and she provided it. However, that was not entirely successful as she said it repeatedly came off the defendant.

62 The second time there was intercourse was again at her residence. She testified it was protected by the use of a condom. The third occasion was in late June or early July at the defendant's place. On that occasion, the defendant did use a condom but it broke.

63 Finally on the fourth occasion that she recalls in late July, there were, again, what she described as problems with the use of the condom and the act of intercourse concluded without protection.

64 D.D. described the onset of flu-like symptoms and a cough in the summer of 2002. However, the worst of that passed and she did not have a test conducted. Later, in May of 2004, following the publication of information concerning the defendant, she attended on her doctor and arranged to be tested. The result came back indicating that she was HIV-positive. Initially she was told that she had ten years to live, but that has since been revisited. She has a condition that she manages through lifestyle and medication. She considers it to be a lifetime condition.

65 In cross-examination, she was presented with a statement she had given to the police in which she appears to have indicated that she was unsure as to whether there had been unprotected sex on more than one occasion. In her testimony at trial, she maintained that there had been difficulties on the three occasions that I described.

T.F.

66 T.F. was 32 years of age at the time of trial. She described having originally met the defendant in 1998 at a soccer game. She did not see him again until 2000 when she encountered him in a nightclub, and then not again until July 2002, also at a nightclub.

67 A relationship developed and they had their first date in October of 2002. They went for dinner and drinks and then to the defendant's home. They began to see each other more regularly following that.

68 At the end of October 2002, they embarked upon a sexual relationship. T.F. said that on the first occasion, she asked Mr. Nduwayo if he was okay, was there anything wrong. She said he responded with a similar question of her. The witness said that she was confident that she had no sexual health problems and the defendant replied that he, too, took the matter seriously, that he would not want to have anything wrong with him because of his soccer career and his daughter.

69 They continued to have a relationship including sexual intercourse. The witness said that the sex took place a couple of times a week and that for the first couple of months, condoms were used when they had them. The relationship continued until June or July of 2003 when they broke up. She testified that while they were together, they continued to have intercourse regularly, probably a couple of times a week, and that condoms were used only for the first couple of months as I just described. She said they decided that there was no further need and so the intercourse occurred without protection.

70 They broke up for a period of time and then resumed their relationship in early October. Again, sexual relations were occurring two or three times per week and no condoms were used. Around this time, the defendant requested that T.F. stop using the birth control pill and she agreed to do so. While she did not recall his exact words, she said, "We continued to have sex. I guess I was trying to have a child."

71 Matters continued like that until December of 2003. One day the defendant asked T.F. to take him to the RCMP detachment in Coquitlam as he had to pick up some papers. She left him there and he did not come back. Later she was contacted by an RCMP member who visited her and told her of the charges of aggravated sexual assault and told her of the defendant's HIV status. She said she refused to believe that.

72 She subsequently went to visit the defendant who was at that time detained at the North Fraser Pretrial Centre. She saw him regularly and discussed matters with him. He denied the accusations and professed not to know what the authorities were talking about. He also said that he was currently being tested for the virus. Later, while still in custody, he told her that he had received the results and they indicated positive, that is, that he was infected. Around this time, T.F. also arranged to be tested. Her results were negative.

73 In early April 2004, the defendant was released from custody on bail. He arranged to move in with T.F. At that time, she observed that he was taking his medications and that he was quite sick. He was experiencing a rash and bumps on his skin, apparently a reaction to the medication. She said they had sex on one occasion after his release, and she used a female condom.

74 About a month after the defendant was released on bail, T.F. found some material in his effects which caused her to conclude that he had been diagnosed with HIV in 1997. She was upset and confronted him. He admitted that to be the case. He said he knew he had it, but that he did not want to ruin his life and he wanted kids and a normal life. T.F. remained unhappy. She evicted the defendant from her home and then withdrew as a surety. She testified that she would not have consented to have had sexual relations with Mr. Nduwayo had she known of his status.

S.S.

75 S.S. was involved in a relationship with Mr. Nduwayo in 1996 and later. There is no charge arising from the relationship between them and her evidence is tendered as part of the narrative and background.

76 The two began dating in April of 1996 and commenced a sexual relationship in May. S.S. testified of a discussion which took place between herself and the defendant at the outset, dealing with the matter of sexual health. Her evidence is that the matter of HIV was discussed. The defendant said he had been tested on a prior occasion and that he had not been contacted, so assumed that he was all right.

77 She also testified that in the course of their relationship, the defendant indicated quite clearly that he did not like to use condoms and did not support the use of birth control. In May of 1996, S.S. became ill. She experienced symptoms consistent with HIV infection. In August or September of that year, she became aware that the defendant was in a relationship with a woman named K.

78 On September 19, 1996, S.S. received the results of her HIV test indicating that she was infected. Her testimony is that she had only one sex partner in the previous five years, namely, the defendant. She described having discussed the matter with Mr. Nduwayo. She said that he was reluctant to accept the news but that he also seemed casual about it. The witness testified that she subsequently had contact off and on with the defendant over the ensuing two years. She understood that he was separated from his wife, K.N. She stated that her relationship with him ended in 1998.

79 After the diagnosis as described, the witness and Mr. Nduwayo continued to see each other and to engage in sexual relations. She testified that Mr. Nduwayo was staunchly resistant to the use of condoms and that a condom was used only occasionally. She also testified that the frequency of the sexual activity post-diagnosis when they were seeing one another was two to three times per week.

80 S.S. testified that her relationship with the defendant came to something of an angry conclusion. One specific matter was most distressing for her: that was the defendant indicating to her that he was intending to be involved in some sort of clinical program whereby he hoped that he would be able to have a child without infecting either his sex partner or the child. S.S. was angry and upset about that attitude.

81 In cross-examination, she testified that in her estimation, Mr. Nduwayo tended to trivialize the effect of the infection and that on other occasions, appeared to have difficulty accepting that he was infected.

82 There is evidence that in May of 1996, S.S. met and had a conversation at a restaurant with K.N.

K.N.

83 A second witness called who was involved with the defendant but whose circumstances did not give rise to a charge was K.N. She testified that she first met the defendant in February of 1996. They became involved in a sexual relationship within a month. She said they began to live together in June of that year. At first, she said, the intercourse was quite frequent. Before the sexual activity started, she said there was a discussion with respect to disease and sexual health. She said that Mr. Nduwayo did not like using a condom but she insisted on doing so.

84 In September of 1996, the two of them became engaged and the wedding was set for October 11, 1997. On October 11, 1996, there was a telephone call from a doctor looking for Mr. Nduwayo. This witness testified that she listened in on the call and heard the defendant saying, no, that he did not want her tested. K.N. testified that she subsequently did have herself tested and the result was negative. She has remained uninfected.

85 K.N. also testified as to attending at the British Columbia Centre for Disease Control with Mr. Nduwayo. She described there having been discussion there about the necessity of using condoms and then subsequently Mr. Nduwayo embarked upon a course of treatment. Initially he took three different anti-viral drugs. She testified that he experienced quite pronounced side effects including

stomach upset, mood changes, tiredness and irritability. The medication was an unpleasant experience for him.

86 In this vein, she testified that he took his medications quite faithfully until 1999. She said in that year he contracted a case of shingles, and that condition, in conjunction with the effects of the medication, was such that Mr. Nduwayo discontinued taking his medication. She testified that he did not resume the use of the medication subsequent to that, to the best of her knowledge and ability to observe.

87 The marriage continued through to September of 2000. During the time between Mr. Nduwayo learning of his HIV status and the conclusion of the relationship, she said there was sex between 15 and 20 times, and that in each instance a condom was used.

88 Notwithstanding that, she advises that she became pregnant in January of 1999. Daughter S. was born on October 6, 1999 and there is no question that Mr. Nduwayo was the father of that child. K.N. testified that she believes the conception was the result of either a broken condom or some other error in the process.

89 She described Mr. Nduwayo's response to the news that he was HIV-positive. She said initially it was one of denial and disbelief.

90 The witness also described her dealings with L.A. in November of 1997 and said that she was not clear on what was transpiring between Mr. Nduwayo and that woman. Later she learned that L.A. had a child. K.N. discussed that with her husband and testified that it was apparent that he accepted the child as his. K.N. also testified that in her discussions with the defendant, she sought his reassurance that L.A. was aware of his HIV status. The defendant was adamant in insisting that he had apprised L.A. In fact, K.N. learned that was not true.

91 In cross-examination, she was asked further about condom use. She testified that she insisted on it at the outset. There was some difficulty in this regard because the defendant had difficulty wearing a standard size condom and requires a larger model. She testified that she bought and kept a supply of those. She also testified that in the early stage of their relationship, they stopped using condoms in or around April.

92 K.N. gave evidence concerning her attendance at a number of clinics with the defendant. She was present when he was first apprised of his status and at which time he was told of the necessity of ensuring that sex partners, both past and prospective, were advised of his status, and also the necessity of using condoms for protection in sexual activity.

93 In addition to the witnesses whose evidence I have just reviewed, the Crown called three medical personnel. The first of these was L.K. She was a nursing administrator at the Centre for Disease Control in November of 1996. She described having received a telephone call from a member of the public, a woman who said that she wanted to report a person who was HIV-positive and wanted that person advised of his status. Although it was an unusual request, the name and particulars of the individual were taken and Ms. K. discussed it with a doctor at the centre. Eventually inquiries were made of the information available at the centre, and the party in question, the defendant, was notified and directed to report to the clinic where he subsequently met Dr. Patrick. Ms. K. also testified respecting general practices and procedures at the clinic and she authenticated certain records which had been received in evidence.

94 Dr. David Patrick is a medical doctor with a specialty in infectious disease epidemiology, including HIV and AIDS and means of transmission of HIV. He was qualified as an expert in respect of those matters. He provided a general explanation of the nature of the disease, the history and evolution of treatment protocols and related matters.

95 With respect to the defendant, he testified of a meeting that he had with the defendant and his then fiancée on October 11, 1996. He, that is the doctor, specifically made reference to the fact that there had been an earlier test that indicated an HIV infection but which had not been picked up. He told Mr. Nduwayo of the need for a retest. He also testified that he explained about the mechanics of transmission, in particular the necessity of condom use in sexual activities and the need for disclosure and what he described as the duty to disclose to past, present and prospective sex partners.

96 He said the blood was taken and submitted for testing. That confirmatory test turned out to be positive and the defendant was brought back on October 25th to meet again with Dr. Patrick. He referred Mr. Nduwayo to Dr. Conway for follow-up.

97 Dr. Brian Conway is also a medical doctor who testified at this trial. He is a specialist in the field of virology, particularly with respect to HIV, AIDS, the transmission, and the effects of HIV on the human body and the diagnosis and treatment of those conditions. As well, he was found to have an expertise with respect to the use of condoms and was qualified to give opinion evidence in all of those areas.

98 I propose now to just briefly summarize the effect of the evidence of Dr. Conway and Dr. Patrick. I will also deal with the evidence of Mr. Nduwayo's particular disease condition.

99 HIV is an incurable infection which impairs the immune system. If it is untreated, it can be expected to progress to the condition known as AIDS. Ultimately, it is fatal. It is estimated that untreated, it takes 10 to 12 years from the point of initial infection for the condition to conclude in death. HIV endangers the life of those infected by it. Medical science is actively and aggressively researching the condition and treating those who are infected.

100 Commencing in 1996, the practice was to treat infected persons with a cocktail of three drugs. This was found to be more effective than existing procedures. The purpose of medication is to control and suppress the virus. Experience has shown that medications have the effect of quite dramatically slowing the deterioration caused by the virus. The medication sometimes has unpleasant side effects.

101 An important metric in the understanding and treatment of HIV is the factor of viral load. It is the measurement of the concentration of the relevant virus in the blood. The value used for measurement is the number of copies per millilitre of blood. The readings can vary greatly. In some cases, the numerical value will substantially exceed 100,000 copies per millilitre.

102 The degree of viral load is broken into two broad categories: high and low. High is assigned a value of in excess of 100,000 copies per millilitre. Low is for readings of less than 100,000 copies. As well, where the value is below the threshold of the technology's ability to measure it, it is classified as undetectable. For the purpose of the present discussion, that should be taken as 400 copies per millilitre. Given that the virus cannot be eradicated or cured, that status, undetectable, is the best practical result.

103 The virus can be transmitted when the infected party's viral load is in the high category and also when it is in the low bracket. Indeed, it can also be transmitted when the viral load is in the un-

detectable range. As a general proposition, the risk or likelihood of transmission of the virus is greater when the viral load is of a higher value. That said, I do not understand there to be any direct reliable linear relationship.

104 The virus can be transmitted by an infected individual to another person by a variety of means. One such means is sexual intercourse; that is, penile/vaginal intercourse. The likelihood or risk of transmission varies according to the type of contact. For example, it is notably high when the transmission is by way of blood transfusion. Because it can be transmitted through a variety of sexual interactions, the risk rates vary as well. Generally speaking, the estimated rate for transmission in the case of sexual intercourse between a male and a female is 1 in 1000. When the viral load is very low, approaching the undetectable range, that number increases trending toward the range of 1 in 10,000.

105 A significant variable in the likelihood of infection is whether or not the intercourse was protected by the use of a condom. There are other variables as well, including whether or not there are open sores or lesions present, whether the female is menstruating at the time of the contact, and other considerations as well. As mentioned, these include the viral load of the infected partner at the time of the activity.

106 As for condom use, the generally accepted understanding is that it will be approximately 90 percent effective in preventing transmission of the virus. The less than perfect result is due to failures of varying sorts including improper application or defective condoms.

107 In brief summary, the principal variables in determining risk of infection, that is, the likelihood of the virus being passed to the non-infected partner, are the type of activity, the viral load of the infected partner, and whether or not protection is used.

108 There is before the Court some evidence of Mr. Nduwayo's viral load as determined by testing. That is available for a period of time between December 1996 and March 1998. The evidence discloses that Mr. Nduwayo participated in a study program being conducted by the medical personnel at St. Paul's Hospital. His initial enrolment was December 1996 and it appears he continued in that program until March of 1998 and then was discharged.

109 There are medical records in evidence which document tests and measurements conducted while he was enrolled in the study. There are, in all, 21 reports which indicate the measured viral load on a series of dates over that time span. The records disclose a significant range of viral load values. One test, December 20, 1996, indicates that his viral load was in the undetectable range; that is, less than 400 copies per millilitre. The other 20 reports disclose viral load values ranging between 1100 and 16,144 copies per millilitre.

110 In addition, the evidence before this Court indicates that Mr. Nduwayo stopped taking his medication in 1999 because of an adverse reaction experience. There is no evidence to suggest that he took his medication after that date other than when he returned to reside with T.F. following his release from custody. One witness who might give relevant evidence, E.K., with whom he lived for a period of time, testified that she did not observe him taking medications.

The Law

111 The conceptual legal framework for the analysis of charges of this type is somewhat complicated. The offence of aggravated sexual assault is found at s. 273 of the *Criminal Code*. Subsection (1) states as follows:

Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

112 Sexual assault is an assault, that is, a non-consensual application of force to another, direct or indirect, or an attempt or threat to do so, where there is a reasonable basis to believe the assailant has the present ability to effect his purpose and committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. The additional element which is necessary to constitute aggravated sexual assault is proof that the sexual assault had the effect of wounding, maiming, disfiguring or endangering the life of a complainant.

113 An important consideration in the law of assault is consent. Generally, for criminal liability to be proven, the Crown must establish that the complainant did not consent to the act and that the defendant knew that the complainant did not consent.

114 The conduct in each instance in the present matter was ostensibly consensual. The complainants agreed to engage in sexual relations with Mr. Nduwayo. However, the issue of consent is not as simple as yes or no. It is more complicated than that, and that aspect of the present case is quite critical. In this case, because Mr. Nduwayo carried the HIV virus at the time of the sexual contact and knew that he was so infected, and because he did not disclose that status to his prospective partner before the sexual activity, the validity of the consent must be examined carefully in the context of the doctrine of fraud. The law is clear that if the consent has been given in circumstances where there has been a deliberate deception as to the nature and quality of the act, and that has the effect of putting the complainant at risk of harm, then the consent is not operative.

115 The conceptual structure was explained by Justice Cory who delivered the majority decision in *R. v. Cuerrier*, [1998] 2 S.C.R. 371. I do not intend to embark on an extensive discussion and description of the judgment, nor do I propose to quote lengthy passages from it. It should be taken as read. Instead, I will set out a summary of the principles as they emerge from that decision.

116 The offence of aggravated sexual assault where an HIV-infected accused has sexual intercourse with the complainant requires proof of an assault. In turn, that requires proof of lack of consent. Consent, in this particular context, requires that the consent is to have sex with a person who is HIV positive. Consent may be vitiated by fraud.

117 Proof of fraud requires proof of two elements. The first requirement is proof of dishonesty. The dishonest act can be either deliberate deceit or non-disclosure of status. True consent cannot be given without disclosure of status. However, the extent of the duty to disclose will increase with the risks attendant upon the act of intercourse. The greater the risk of deprivation, the higher the duty of disclosure.

118 The second requirement is that the dishonesty result in deprivation which may consist of actual harm or simply a risk of harm. The harm or risk of harm cannot be trivial. The Crown must establish that the dishonest fact had the effect of exposing the person consenting to a significant risk of serious bodily harm.

119 The careful use of condoms might be found to reduce the risk of harm such that it can no longer be considered significant, and so that there might not be either deprivation or a risk of deprivation. In the absence of a significant risk of serious bodily harm, the duty to disclose will not arise. The phrase "significant risk of serious harm" must be applied to the proven facts of each case. The

phrase should be interpreted in light of the gravity of the consequences of a conviction for sexual assault so as to avoid trivialization of the offence.

Other Matters

120 There are certain fundamental propositions which have application to this case. Foremost among these is the presumption of innocence. An accused person is presumed to be innocent of the offence alleged. That presumption remains intact unless and until it is displaced by proof beyond a reasonable doubt of his guilt. The onus lies upon the Crown to prove the necessary elements of the offences charged. The standard to be met is that of proof beyond a reasonable doubt. Anything less is insufficient and a defendant is entitled to the benefit of any such doubt. Where that standard is not met, the defendant will be acquitted. Furthermore, there is no obligation on an accused person to adduce evidence that he is not guilty. The onus of proof is on the Crown throughout the trial process and does not shift to the defendant. As stated, the standard of proof is clear; that is, proof beyond a reasonable doubt.

121 In this case, the defendant elected not to call any evidence and did not testify. I remind myself that the onus remains on the Crown and that there is no diminishment of that obligation by reason of the defendant having elected not to call evidence.

122 In the present case, there are a number of similar charges joined on one indictment. In such circumstances, each count must be proven on the basis of evidence adduced in support of it. The Court is not permitted to use evidence in support of one count to prove any other count unless there has been a specific ruling that such a similar fact use of evidence should be allowed. There is no such ruling in this case with one exception, which I will explain in a moment. To be clear, I am not permitted to infer from the defendant's conduct in any given count that he is more likely to have committed other offences, and I so instruct myself.

123 There is, as noted, one exception. In this case, the Crown made an application to have similar fact evidence adduced from one count to another for a very specific purpose. That was with respect to the issue that the defendant demonstrated a resistance to a use of condoms. That is, that he stated and indicated that he did not wish to use condoms and that he demonstrated an aversion to their use.

124 Following submissions of counsel, I held that such evidence could be considered from one count to another, and also from the other evidence arising off count, but that it would only be in circumstances where there was a positive assertion by the defendant that he did not want to use condoms and that it was more than a mere passive non use. To be specific, where he demonstrated that propensity in respect of one particular complainant, I am permitted to use that evidence in respect of other counts where there is an issue as to whether or not he used condoms.

125 Finally, I wish to speak to the issue of character. The challenge presented by the charges at bar is that a very specific and precise frame of analysis must be employed, one that is carefully focused and possibly even able to be characterized as technical. Specifically, I am obliged, when considering the consent issue and the fraud aspect, to examine whether the conduct of the defendant creates a significant risk of serious bodily harm. For the prosecution to succeed, that must be proven. In some of the fact patterns in this case, some of the conduct of the defendant might well be described as quite offensive. The very fact that he serially engaged in relations with women without advising them of his status, having been told by the medical professionals that such a warning was necessary, could cause a reasonable-minded person to conclude that nothing more need be said. His conduct was outrageous and wrong.

126 In fact, that type of reasoning is impermissible and cannot be allowed to permeate the analysis. Whether Mr. Nduwayo acted in an abominable way or not, the charges must stand or fall on a proper and principled analysis of the elements of the offences charged and a dispassionate consideration of the evidence to determine whether the proof has been made out.

127 In a related vein, there is evidence that is quite compelling which might be found to support a finding that Mr. Nduwayo was dishonest in his dealings with some of the women with whom he had relationships, both with respect to sexual relations and in other ways. Notwithstanding the character of his dealings with these persons, that cannot and will not be allowed to determine the outcome of the prosecution. The specific elements that I spelled out earlier in this judgment must be proven if the defendant is to be found guilty.

128 I turn now to the counts and a consideration of whether proof has been made out as the law requires in order to find Mr. Nduwayo guilty. In the submission of the Crown, each of the offences alleged has been proven and conviction should follow.

129 The defence submission is that the critical issue is whether the Crown has proved fraud in relation to each of the charges. More specifically, the defendant says it is a critical issue whether the Crown has proved that there was a significant risk of serious bodily harm. The defence does not argue that there was disclosure by the defendant of his status to any of the complainants. Mr. Nduwayo implicitly concedes that there was no disclosure.

130 The analysis of the risk issue will be significantly informed by whether or not a condom was used. However, the defendant says that there are other factors as well that bear on the issue including his viral load, the type of sexual activity, whether there was ejaculation and the presence of lesions or sores. The defendant also takes the position that the time at which the issue of risk is to be assessed is at the time of the exposure. In my view, that is a correct position.

131 Based upon the structure of the case at bar, the facts and the evidence, I accept that the key feature in the analysis is the deprivation component of the consent issue. That is, for the Crown to succeed in proving the individual counts, it will be necessary that the Court find that the dishonesty of the defendant resulted in deprivation which may be either actual harm or risk of harm. The prosecution must establish that there was a significant risk of serious bodily harm arising from the defendant's dishonest failure to disclose his HIV-positive status.

132 It is my view that the assessment of the risk of serious bodily harm has two aspects. The first is the assessment of the degree of risk in terms of the likelihood of transmission.

133 The second is the seriousness of the harm that is threatened. Dealing with the latter point first, I am satisfied that the consequences of contracting the HIV virus are undoubtedly serious and represent a vital threat to the health and well-being of the infected individual. It is a condition that, untreated, is life-threatening. Even with treatment, there are no sure outcomes. At a minimum, it will require lifelong care and treatment, sometimes with serious adverse consequences. The infected person's sexual and reproductive integrity and freedom are forever changed. Its impact upon the health and quality of life of the infected person is profound.

134 As for the risk issue, it is true that there are many variables and it must be accepted that this is not simply an exercise in calculation. It is not a matter of inputting mathematical values for the different variable factors and deriving a neat numerical coefficient of risk. The viral load of the infected partner is not, as a practical matter, anything that will usually be clearly ascertainable and

known at the relevant time. The presence of sores, lesions and other such germane considerations are also matters that will not usually, in the typical scenario, be known and susceptible to factoring into the analysis.

135 The use of condoms too is a factor with uncertainty. Quite apart from the statistical number provided by Dr. Conway, there are real world vagaries. It is clear that, on a number of occasions, Mr. Nduwayo and his partners experienced very real problems with condom use apparently due, at least in part, to the fact that he has problems with the fit. In a number of instances, the condom came off or was otherwise ineffective in the circumstances.

136 The difficulty of the risk issue was demonstrated when one of the medical witnesses, Dr. Conway, was asked in cross-examination to effectively assign a value to the risk of conduct in certain conditions. He declined to do so and he reframed the matter in the form of a question. He asked, "Is that a risk you would like to take?"

137 The answer to the question of what is the degree of risk - is it significant - is a matter of fact and is for the trier of fact to determine. In my view, given the great seriousness of the possible harm and the core importance of the notion of bodily integrity, that persons should be entitled to know the risks and dangers to which they are exposed and make critical decisions in an informed way, the threshold should not be set at a high level. Certainly a minor or insignificant degree of risk will not suffice. But, by the same token, it will not be necessary to find that the chances of infection are high or likely in order to conclude that the deprivation is made out and that the consent is vitiated.

Count 1

138 On the evidence, I am satisfied that there was unprotected sexual intercourse between Mr. Nduwayo and L.A. on at least seven occasions. As a consequence of those acts of intercourse, L.A. became pregnant. She was not infected with the HIV virus.

139 In examining the evidence on this count, I am required to approach L.A.'s evidence with particular caution. That is because of the fact that she has withheld, on earlier occasions, the fact she had intercourse with the defendant when he visited her in Lethbridge. I have taken into account the fact that she was not appropriately honest and forthcoming on those occasions. I have also taken into account her explanation, and have had the opportunity to consider her presentation and demeanour in court. Taking all of that into account, I am confident that her testimony with respect to the sexual relations between herself and the defendant in the time period before she left for Lethbridge is truthful and reliable. Certainly the evidence of her pregnancy supports her testimony.

140 As well, I find the evidence of K.N., as it deals with matters involving L.A., to be supportive of the latter's testimony.

141 Put another way, her failure to disclose that information as she ought to have, and the implication of that, does not cause me to doubt the truthfulness and reliability of her evidence with respect to the critical issue in this count. Furthermore, I am satisfied that she would not have had unprotected intercourse with the defendant had she known of his condition.

142 It is my conclusion that these incidents of unprotected intercourse, taken cumulatively in all the circumstances, represent a significant risk of serious bodily harm so as to vitiate her consent.

143 I proceed on the proposition that there is nothing in the evidence to find that there was ever disclosure made by Mr. Nduwayo and I make that observation with respect to all counts.

144 In the circumstances, it is my conclusion that the offence of aggravated sexual assault, count 1, is made out. In so deciding this count, I have taken into account that the time period involved is concurrent with Mr. Nduwayo's participation in the St. Paul's Hospital study medication program and I have considered the viral load reports in evidence.

Count 2

145 The basis of this count is one brief and isolated incident of sexual intercourse between the defendant and N.W. There is some question as to whether or not a condom was used. The witness testified at trial that there was no condom used. At the same time, she accepts that she told the police officer in her statement that she was not sure.

146 In these circumstances, I am obliged to recognize that there is a doubt with respect to the matter of protection arising from the evidence and the defendant is entitled to the benefit of that doubt. Proceeding from that proposition, that is, one incident of protected intercourse, I am not satisfied beyond a reasonable doubt that the consent of N.W. was vitiated. Specifically, I am not certain that the risk of the conduct in these particular conditions rises to the level that it could fairly be characterized as significant.

147 I wish to make clear that this is not a finding that N.W. is an untruthful witness. In fact, she was an impressive witness. There is, however, the matter of the discrepancy as I have discussed, and the Court must proceed on the basis that there may have been protection. Count 2 is dismissed.

Count 3

148 The evidence satisfied me that there were a substantial number of episodes of unprotected sexual intercourse between the defendant and C.N. In assessing this count, I have considered the fact that there is evidence of conversation between this witness and E.K. The issue I have to consider is whether or not that factor impacts adversely upon the credibility of this witness such that I should have a doubt as to the truthfulness of her testimony. I must ask myself whether there is reason to find an element of some conspiracy or collaboration. If there is, that must be carefully taken into account in assessing the credibility of the witness.

149 Having done so in this case, I do not find reason to disbelieve her evidence with respect to the common use of condoms on the basis of those dealings or otherwise. I have no reservation in concluding that the sexual relations between the defendant and C.N. were not protected. I accept her evidence that when the topic of the use of condoms arose, the defendant indicated that he did not like the feel.

150 The evidence is, as noted, that this witness was infected with the virus.

151 I am satisfied that the infection she has incurred constitutes an endangerment of her life. As for the issue of consent, I am satisfied that the two elements of fraud necessary to vitiate her consent, dishonesty and deprivation, have both been proven. I conclude as well that, had she known of his condition, she would not have consented to the sexual relations as she did. Mr. Nduwayo is guilty on count 3.

Count 4

152 E.K.'s evidence is that there were many acts of sexual contact between them. On her testimony, I would conclude that her estimate of a minimum of 25 acts of unprotected intercourse is truthful and should be accepted. There is no question that she was a particularly naïve person at the

time she had her dealings with the defendant, and that certainly extended to her sexual knowledge, notwithstanding that she was in a nursing program. That said, I do not accept the suggestion that there was no intercourse in this case. Indeed, she was infected with the HIV virus and she became pregnant.

153 On the evidence, I conclude that the defendant was responsible for both of those outcomes. Furthermore, I am satisfied that this witness would not have had sexual relations with the defendant had she known he carried the HIV virus.

154 I have also taken into account the submission that her dealings with C.N. should be a factor in assessing the truthfulness and reliability of her evidence concerning the condom use. Again, as I indicated with respect to C.N., I conclude that her evidence is truthful and reliable and should be accepted. I do not find there to be a collaboration factor here such as would taint the truthfulness of her evidence.

155 The totality of the evidence leaves me no doubt with respect to the proof of this count; both of the elements of fraud have been established such that the complainant's apparent consent was of no effect. I find Mr. Nduwayo guilty of count 4.

Count 5

156 On the evidence, I am satisfied that there were five acts of sexual intercourse between the defendant and D.T. The evidence is that two of those were unprotected by condom use.

157 There is some discrepancy in the evidence, particularly in two respects. The first is the witness's evidence of the second unprotected incident which she described. There was a not-insignificant discrepancy between her earlier testimony and her evidence at trial. It was apparently a matter of a recovered memory. In the circumstances, I am compelled to conclude that only one act of unprotected intercourse has been proven to the necessary standard. D.T. was not infected as a consequence of her relations with the defendant. I note that in his dealings with her, there is evidence of a persistent resistance to condom use, but that is not determinative.

158 In the final result, given that there is proof of one act of unprotected intercourse and no evidence of actual harm or deprivation, I am not satisfied that count 5 has been proven and Mr. Nduwayo is acquitted with respect to that count.

Count 6

159 Count 6 is the matter of D.D. D.D. had sexual intercourse with the defendant four or five times. She was infected with the HIV virus as a consequence of that contact. Notwithstanding vigorous and pointed cross-examination, I accept her evidence that on the first occasion, there were difficulties with the use of the condom. The second incident was protected. In the third incident, the condom failed, and in the fourth incident it was not effectively used.

160 In my view, the deficient nature of the use of protection and the actual transmission of the infection to her satisfy the deprivation element of the consent analysis. I therefore find that her consent was vitiated. Accordingly, I find that count 6 has been proven and find Mr. Nduwayo guilty.

Count 7

161 The defendant's relationship with T.F. extended over a substantial period of time. I have no hesitation in concluding that there were frequent incidents of intercourse and that they were unprotected. I conclude that such incidents occurred at probably a minimum of 60 times. Through great

good fortune, she was not infected. I accept her evidence that she would not have engaged in those relations with him, as she did, had she known of his condition.

162 I conclude that her ostensible consent was vitiated by virtue of the frequency of the incidents of unprotected intercourse in all of the surrounding circumstances. There is no question that the defendant's actions constituted a significant risk of serious bodily harm to her. Accordingly, I find Mr. Nduwayo guilty in respect of count 7.

163 To conclude, Mr. Nduwayo is found not guilty in respect of counts 2 and 5. He is convicted with respect to counts 1, 3, 4, 6 and 7.

J.W. WILLIAMS J.

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