



SUPREME COURT OF CANADA

CITATION: R. v. D.C., 2012 SCC 48

DATE: 20121005

DOCKET: 34094

BETWEEN:

Her Majesty The Queen

Appellant

and

D.C.

Respondent

- and -

Attorney General of Alberta, Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario, Coalition des organismes communautaires québécois de lutte contre le sida, Positive Living Society of British Columbia, Canadian AIDS Society, Toronto People With AIDS Foundation, Black Coalition for AIDS Prevention, Canadian Aboriginal AIDS Network, Criminal Lawyers' Association of Ontario, British Columbia Civil Liberties Association, Association des avocats de la défense de Montréal and Institut national de santé publique du Québec
Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT: McLachlin C.J. (LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring)
(paras. 1 to 31)

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2012 SCC 48

File No.: 34094.

2012: February 8; 2012: October 5.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Evidence — Credibility — Sexual assault and aggravated assault — Non-disclosure of HIV status — Proof of realistic possibility of transmission of HIV — Whether trial judge could rely on doctor's note as confirmatory evidence of complainant's testimony that no condom had been used — Whether trial judge committed error on question of law — Criminal Code, R.S.C. 1985, c. C-46, ss. 265(3)(c), 268, 271, 686(1)(a)(ii).

D.C. was charged with sexual assault and aggravated assault. When she first engaged in vaginal intercourse with the complainant, she had not disclosed to him the fact that she was HIV-positive. At the time, her viral load was undetectable. The critical issue in the trial was whether a condom had been used. The only evidence on the point was that of the complainant and D.C. The complainant testified no condom was used; D.C. testified a condom was used. The trial judge found that neither witness was credible. However, on the basis of a note of D.C.'s doctor made seven years earlier and referring to a broken condom, the judge concluded that D.C. had lied to her doctor, and inferred that no condom had been worn. He convicted D.C. The Court of Appeal concluded that the trial judge's reasoning as to whether a condom was used was a reasonable inference, but set aside the convictions on the

ground that even without condom use, the requirement of a significant risk of serious bodily harm was not met, given the absence of detectable HIV copies in D.C.'s blood.

Held: The appeal should be dismissed.

As discussed in *R. v. Mabior*, 2012 SCC 47, in the case of HIV, a significant risk of serious bodily harm is found in the presence of a realistic possibility of transmission. On the facts of this case, condom use was required to preclude a realistic possibility of HIV transmission. Given the lack of credibility of the complainant, the trial judge needed evidence that a condom had not been used in order to convict. Here, he erred in law in relying on speculation as confirmatory evidence of the complainant's testimony that a condom had not been used. He could not rely on a series of speculative conclusions about a supposed lie and the motives for it, based on a note made seven years earlier that did not constitute independent evidence. It follows that the prosecution failed to prove D.C.'s guilt on the charges against her beyond a reasonable doubt.

Cases Cited

Applied: *R. v. Mabior*, 2012 SCC 47; **referred to:** *R. v. Cuerrier*, [1998] 2 S.C.R. 371.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 265(3)(c), 686(1)(a)(ii).

APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Léger and Gagnon JJ.A.), 2010 QCCA 2289, 270 C.C.C. (3d) 50, [2011] R.J.Q. 18, 81 C.R. (6th) 336, [2010] Q.J. No. 13599 (QL), 2010 CarswellQue 14778, SOQUIJ AZ-50700564, setting aside the convictions for sexual assault and aggravated assault entered by Bisson J.C.Q., 2008 QCCQ 629 (CanLII), [2008] J.Q. n° 994 (QL), 2008 CarswellQue 986, SOQUIJ AZ-50473926. Appeal dismissed.

Caroline Fontaine and Magalie Cimon, for the appellant.

Christian Desrosiers, for the respondent.

Christine Rideout, for the intervener the Attorney General of Alberta.

Jonathan Shime, Corie Langdon, Richard Elliott and Ryan Peck, for the interveners the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario, Coalition des organismes communautaires québécois de lutte contre le sida, the Positive Living Society of British Columbia, the Canadian AIDS Society, the Toronto People With AIDS Foundation, the Black Coalition for AIDS Prevention and the Canadian Aboriginal AIDS Network.

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Michael A. Feder and *Angela M. Juba*, for the intervener the British Columbia Civil Liberties Association.

François Dadour, for the intervener Association des avocats de la défense de Montréal.

Lucie Joncas and *François Côté*, for the intervener Institut national de santé publique du Québec.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] This appeal, like the companion appeal, *R. v. Mabior*, 2012 SCC 47, raises the question of when an HIV-positive person's failure to disclose the condition to a sexual partner amounts to fraud vitiating consent under s. 265(3)(c) of the

Criminal Code, R.S.C. 1985, c. C-46, with the result that the sexual act constitutes the offence of aggravated sexual assault. In *Mabior*, I hold that the realistic possibility of transmission of HIV should be disclosed and that the failure to do so amounts to fraud.

[2] In this case, D.C.'s viral load was undetectable, and the trial judge found no condom protection was used on one occasion before HIV status was disclosed (2008 QCCQ 629 (CanLII)). The Court of Appeal set aside the convictions on the ground that even without condom use, the requirement of a significant risk of serious bodily harm in the prior jurisprudence was not met, given the absence of any detectable HIV copies in D.C.'s blood (2010 QCCA 2289, 270 C.C.C. (3d) 50). This is contrary to the standard now proposed in *Mabior*. On the facts of this case, condom use was required to preclude a realistic possibility of HIV transmission.

[3] However, I would dismiss the appeal but set aside the conviction on the ground that the trial judge erred in law in relying on speculation as confirmatory evidence in order to convict. But for this error, the trial judge would have acquitted D.C. Accordingly, the conviction cannot stand: s. 686(1)(a)(ii) of the *Criminal Code*.

II. The Facts

[4] D.C. learned that she was HIV-positive in 1991, after the death of her partner. She was treated with antiretrovirals, resulting in the undetectability of her viral load. In July of 2000, she met the complainant at a soccer match in which their

sons were playing. In time, their relationship became intimate. Depending on whose account is believed, they had sex on one or more occasions before D.C. disclosed her HIV status to the complainant. And depending on who was believed, a condom was or was not used; the complainant said no condom was used; D.C. said a condom was used.

[5] Upon learning that D.C. had HIV, the complainant broke off the relationship, but renewed it of his own initiative a few weeks later. They moved in together and lived as a family for four years. During this time, they had protected and unprotected sexual relations. The complainant has never contracted HIV.

[6] In December 2004, D.C., who had been briefly hospitalized, decided to end the relationship. She asked the complainant to leave the house. He refused. A few days later, D.C., accompanied by her son, went to the family home to remove her belongings. The encounter was violent. The complainant assaulted D.C. and her son. He was charged and convicted of assault.

[7] On February 11, 2005, the complainant filed complaints with the police. The Crown laid charges of sexual assault and aggravated assault against D.C., on the ground that when the complainant and D.C. first had sex four years earlier, D.C. had not disclosed the fact that she was HIV-positive.

III. The Trial Judgment

[8] The trial judge, after a long and detailed assessment of the evidence, concluded that neither the complainant nor D.C. were credible witnesses.

[9] The trial judge found that there was one sexual encounter before disclosure, accepting D.C.'s evidence in preference to the complainant's on this point.

[10] The trial judge then addressed the requirement in *R. v. Cuerrier*, [1998] 2 S.C.R. 371, of a "significant risk of serious bodily harm" for there to be sexual assault from non-disclosure of HIV status. The evidence was that engaging in vaginal intercourse carried with it a basic infection risk of 0.1% — similar to the basic infection risk for Mr. Mabior — according to medical experts (para. 179). The trial judge correctly concluded that two facts were relevant to preclude a realistic possibility of transmission: (1) D.C.'s undetectable viral load; and (2) whether a condom was used.

[11] The critical issue in the trial was whether a condom had been used on the single occasion of pre-disclosure sex. The evidence on this conflicted. The complainant testified for the prosecution that no condom had been used. D.C., however, testified that a condom had been used.

[12] The only evidence called by the prosecution on the issue of whether a condom was used on the pre-disclosure sexual contact was that of the complainant. The trial judge concluded that he could not accept the evidence of the complainant generally. More particularly, he found that the complainant's evidence, on its own,

did not establish failure to use a condom on the relevant occasion. He found the credibility of the complainant to be undermined by the following:

- His behaviour during the long period that followed the initial sexual encounter, including sexual encounters during the four-year period of cohabitation with full knowledge of D.C.'s condition, waiting four years to make a complaint, and the aura of vengeance that surrounded the making of the complaints (paras. 152-54);
- The manner in which he gave his evidence (para. 152);
- The fact that he was mistaken as to the place of the pre-disclosure sexual encounter(s) (para. 155);
- Lack of precision as to the number of pre-disclosure sexual encounters (para. 155);
- Inconsistencies with the evidence of Dr. Klein, D.C.'s physician at the time; he stated that he discussed with Dr. Klein the unprotected relations he had had with D.C., but Dr. Klein had no memory or notes of such discussions, leading the trial judge to conclude they had not taken place (para. 156);

- The fact that he referred to having met Dr. Klein at all the medical appointments, but that Dr. Klein did not mention this in her evidence (para. 157);
- His denial that he told the police officer: (1) that his partner had HIV and had infected him; (2) that he did not use a condom because he did not like to do so; and (3) that he continued to have unprotected sexual relations with D.C. after she disclosed her condition. On these points, the trial judge said he had no reason to reject the testimony of the police officer (para. 158).

[13] The trial judge went on to hold that while the credibility of the complainant was tainted by these considerations, there was independent proof that permitted him to infer that a condom had not been used. This evidence, he said, confirmed the complainant's evidence that a condom had not been used on the single occasion of pre-disclosure sex (para. 159).

[14] According to the trial judge, the medical note written by Dr. Klein and the inferences he drew from it amounted to [TRANSLATION] "independent evidence" (para. 159) confirming the complainant's evidence of unprotected sex. Dr. Klein had no independent recollection of her conversation with D.C., only what was mentioned in her note: "Sex c new partner — condom broke — consl to disclo".

[15] From this, the trial judge drew a series of inferences. He took for granted that D.C. told Dr. Klein a condom was worn but had broken (para. 160). He inferred this was a lie by assuming she wanted to camouflage from her doctor the fact that she had unprotected sex (para. 168). From this inference of a lie, the trial judge drew a further inference that no condom had been used, confirming the complainant's evidence on that point (para. 171). On this basis, the trial judge concluded the prosecution had established beyond a reasonable doubt that D.C. was guilty of sexual assault and aggravated assault.

IV. The Court of Appeal

[16] One of D.C.'s main grounds of appeal was that the trial judge had erred in inferring that a condom was not used on the basis of Dr. Klein's evidence, because (a) the evidence was privileged; (b) D.C. had been improperly cross-examined on the note; and (c) the judge erred in characterizing the evidence as "independent evidence" that a condom had not been used, and the judge's inferences from it amounted to speculation.

[17] I agree with the Court of Appeal that the first two submissions in support of this ground of appeal are without merit. However, with respect, I cannot agree that the third should be dismissed.

[18] On the third argument, the Court of Appeal correctly concluded that Dr. Klein's note that D.C. had spoken of a broken condom was not independent

evidence, and that the trial judge had erred in treating it as such. The Court of Appeal stated:

Regarding the medical visit on August 31, 2000, Dr. Klein testified from her patient file. She had no memory of [D.C.'s] remarks. This is not, in my opinion, independent evidence. The notes put in the medical file do nothing more than convey, in abridged form, [D.C.'s] remarks of August 31, 2000, seven years before the trial and four years before the charges. [para. 52, *per* Chamberland J.A.]

[19] However, having concluded that Dr. Klein's evidence was not independent evidence, the Court of Appeal went on:

Regardless of the exact characterization of this evidence, however, the trial judge infers from the lie he attributes to [D.C.] that her first sexual encounter with the complainant was unprotected, thus confirming the complainant's version. [para. 53]

The question, the court said, was whether this was a reasonable inference or mere speculation. It concluded that the trial judge's reasoning was a reasonable inference to draw from "what he considered to be [D.C.'s] lie to her doctor".

From the moment the judge, who had the opportunity to hear and assess [D.C.'s] testimony regarding the visit to Dr. Klein, concluded that [D.C.] had lied regarding the use of a condom, he was perfectly free to infer that a condom had not been used. [para. 56]

This was a factual inference, the court concluded, not speculation.

[20] However, the Court of Appeal went on to state that when the judge tried to explain why D.C. had lied to her doctor — that she wanted to camouflage her omission by reassuring her doctor — he was speculating.

People lie for all manner of reasons. Why accept this explanation rather than another? I believe that, on this point, the judge was speculating. But the fact that this part of the trial judge's reasoning constitutes conjecture does not affect the validity of the inference of fact drawn from [D.C.'s] lie to her doctor concerning the use of a condom. [para. 60]

V. The Problem

[21] The trial judge found both the complainant and D.C. to lack credibility, but convicted D.C. on the basis that there was independent evidence confirming the complainant's evidence that no condom was worn on the incident of pre-disclosure sex. The central problem is that, as explained below, there was no evidence, independent or otherwise, capable of corroborating the complainant's contention that a condom was not used on the first sexual encounter.

[22] The evidence relied on by the trial judge as confirmation that no condom was worn was based on inferences from a note in the respondent D.C.'s doctor's records. For the following reasons, I conclude that the note and inferences are not evidence capable of confirming the complainant's otherwise unsatisfactory evidence. As a consequence, the verdict must be set aside.

[23] First, as discussed, the note did not confirm that a condom had not been worn on the critical occasion. Rather, it said one had been worn, but broke.

[24] Second, the note is of dubious evidentiary quality. It was made in the course of a client interview, seven years earlier. Dr. Klein had no independent recollection of its contents. The note is cryptic: “Sex c new partner — condom broke — consl to disclb”. The possibility of miscommunication or inaccurate transcription cannot be discounted. (The conversation was in French, but Dr. Klein’s first language was English.)

[25] Third, the trial judge’s inference from the note *that D.C. lied to her doctor* is speculative. He took as true that D.C. had told Dr. Klein that a condom was worn but had broken. D.C. testified that she expressed her fear that the condom might have broken to Dr. Klein. The trial judge rejected her explanation for “condom broke” in the note as inadequate. But that does not establish that D.C. also lied to Dr. Klein with respect to the use of a condom, on which both her testimony and the medical note are consistent. The trial judge’s conclusion that D.C. lied to Dr. Klein regarding the use of a condom lacks an evidentiary basis and, as such, is speculative.

[26] Fourth, the trial judge’s further inference that D.C. “lied” *to conceal from her doctor the fact she had had unprotected sex* was speculative. Having concluded that D.C. lied to her doctor, the trial judge asked, [TRANSLATION] “Why did she not tell her doctor the truth?” He then answered: “The only inference that can be drawn is that she wanted to hide from her doctor the carelessness she had shown in having

unprotected sexual relations with a new partner, the complainant” (paras. 167-68). As the Court of Appeal pointed out, people may lie for many reasons. To fix on one possibility among others is speculative.

[27] The Court of Appeal concluded that the speculative nature of the trial judge’s finding that D.C. lied to her doctor to hide the fact that she had had unprotected sex with the complainant did not matter. The court said, at para. 60: “But the fact that this part of the trial judge’s reasoning constitutes conjecture does not affect the validity of the inference of fact drawn from [D.C.’s] lie to her doctor concerning the use of a condom”. With respect, it did matter. There is a distinction between speculation and evidence.

[28] In brief, the trial judge needed evidence confirming that a condom had not been used in order to convict, given the lack of credibility of the complainant. He purported to find that evidence in a conclusion that D.C. lied to her doctor to hide the fact that a condom had not been used. But when his reasoning is deconstructed, what emerges is not evidence, but a series of speculative conclusions about a supposed lie and the motives for it based on a note made seven years earlier that did not constitute independent evidence. The tissue of speculation on which the trial judge relied was not independent evidence confirming the testimony of the complainant, which the trial judge would otherwise have rejected.

VI. Disposition

[29] To convict, it was necessary to establish beyond a reasonable doubt that D.C. failed to disclose her HIV status to the complainant, where there was a significant risk of serious bodily harm. As discussed in *Mabior*, a significant risk of serious bodily harm, in the case of HIV, is found in the presence of a realistic possibility of transmission and is negated by both low viral load and condom protection. Here low — indeed undetectable — viral load was established. The critical issue on the trial was therefore whether a condom was used on the single pre-disclosure act of sexual intercourse between the complainant and D.C.

[30] The only evidence on the point was that of the complainant and D.C. The complainant testified no condom was used; D.C. testified a condom was used. The trial judge found that neither witness was credible. If the matter had ended there, D.C. would have been acquitted, since the prosecution bears the burden of proving guilt beyond a reasonable doubt. However, as discussed above, the trial judge went on to find independent evidence confirming the complainant's testimony that no condom was used, in the note of D.C.'s doctor referring to a broken condom. He concluded from this note that D.C. had lied to her doctor, and went on to infer from the "lie" that no condom had been worn. The speculative edifice the trial judge built on a single hearsay note made seven years before the trial does not constitute evidence that no condom was used. It follows, on the trial judge's analysis, that the prosecution failed to prove D.C.'s guilt on the charges against her beyond a reasonable doubt. Accordingly, the verdict must be set aside.

[31] I would therefore dismiss the appeal.

Appeal dismissed.

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*Solicitor for the intervener the Attorney General of Alberta: Attorney
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Solicitors for the intervener Association des avocats de la défense de Montréal: Poupart, Dadour, Touma et Associés, Montréal.

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