

*Aggravated sexual assault/attempted aggravated sexual assault/ non-disclosure/
condom use*

“[The jury] w[as] instructed that there was no legal duty on Mr. Nduwayo to disclose his HIV-positive status if he used condoms at all times.”²

Facts:

Mr. Nduwayo tested HIV-positive in 1996 and was counselled by his physician on the use of condoms to reduce the risks of HIV transmission and the importance of disclosing his HIV-positive status to current and future partners.

Subsequently, Nduwayo had sexual intercourse with six female complainants without disclosing his HIV-positive status. Each of the six complainants testified that they had unprotected sex at least one time with Nduwayo. Three of the complainants later tested HIV-positive.

On December 13, 2005, a jury convicted Nduwayo of five counts of aggravated sexual assault and one count of attempted aggravated sexual assault. Each count concerned a different complainant. Nduwayo was also convicted of sexual assault in a case involving a seventh complainant, but that conviction was not related to HIV non-disclosure.

Nduwayo was sentenced to 15 years’ imprisonment for these offences.

The B.C. Court of Appeal allowed Nduwayo’s appeal and a new trial was ordered.³

Applicable law:

Section 265 of the Criminal Code

(1) A person commits an assault when:

¹ *R. v. Nduwayo*, 2006 BCSC 1972 [*Nduwayo 2006*].

² *Ibid.* at para. 7.

³ *R. v. Nduwayo*, 2008 BCCA 255. The decision of the Court of appeal did not concern the interpretation of the notion of “significant risk”.

(a) Without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(...)

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of:

(c) fraud

Section 271 of the Criminal Code

(1) Every one who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

Section 273 of the Criminal Code

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

(2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable

(b) in any other case, to imprisonment for life.

Section 24 of the Criminal Code

(1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

Section 660 of the Criminal Code

Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.

Decision: Charge to the jury — Key points

On the issue of consent to vaginal sexual intercourse:

On the issue of consent or lack of consent to sexual intercourse, the jury was instructed that there is no legal duty to disclose HIV-positive status under criminal law when a condom is used.

- “(...) the consent to engage in sexual intercourse naturally includes the consent to the application of force inherent in that activity. However, that consent is vitiated by the existence of fraud, which is made out when the element of dishonesty, which includes non-disclosure of important facts, and the element of deprivation, which may be actual harm or risk of harm, co-exist. The jury was instructed that the Crown had to prove Mr. Nduwayo knowingly undertook the dishonesty and was aware that deprivation could result from such conduct.”⁴
- “The jury was instructed that it was not necessary to establish that a complainant was in fact infected by the HIV virus, as deprivation was satisfied by the significant risk to the life of a complainant by unprotected sexual intercourse.”⁵ (Emphasis added)
- “The jury was instructed that there was a legal duty on Mr. Nduwayo to disclose his HIV-positive status if he had unprotected sexual intercourse with any complainant. They were instructed that there was no legal duty on Mr. Nduwayo to disclose his HIV-positive status if he used condoms at all times.”⁶
- “There was no legal duty on Mr. Nduwayo to disclose his HIV-positive status if he used condoms at all times, as there was no evidence at trial of any significant risk of serious bodily harm that would constitute deprivation if he was using a condom”.⁷
- “The jury was also instructed that the Crown had to prove that Mr. Nduwayo had unprotected sexual intercourse with a complainant who would have refused to engage in unprotected sex with him if she had been advised he was HIV-positive. True consent must be consent to have unprotected intercourse with a partner, knowing he is HIV-positive.”⁸
- “(...) instructions on the issue of consent and fraud vitiating consent were taken from the decision of the Supreme Court of Canada in *R. v. Cuerrier*, (1998) 127 C.C.C. (3d) 1.”⁹

On the issue of unprotected sex with a person who was likely to be already HIV-positive at the time of the sexual intercourse

On the issue of unprotected sex with a complainant who was likely to be already HIV-positive at the time of the sexual intercourse, the jury was instructed that it would have to consider the charge of “attempted aggravated sexual assault”

- “The jury was also instructed that if it had a reasonable doubt whether any one

⁴ *Nduwayo* 2006, *supra* note 1 at para. 6-7.

⁵ *Ibid.* at para. 7.

⁶ *Ibid.*

⁷ *R. v. Nduwayo*, Charge to the jury, Transcript, pp. 625-626

⁸ *Nduwayo* 2006, *supra* note 1 at para. 7.

⁹ *Ibid.* at para. 7-8.

of the complainants in counts 2, 3 or 5, who subsequently tested positive for the HIV virus, was HIV-negative when she had unprotected sexual intercourse with Mr. Nduwayo, because they believed she had, or may have already been infected by someone else or by some other means prior to Mr. Nduwayo, or in the case of the complainant in count 5, by Mr. Nduwayo himself when his condom broke, then they could not conclude beyond a reasonable doubt that he had endangered that complainant's life as she had or may have already been infected by someone else or through some other means, or again, by Mr. Nduwayo himself in the case of the broken condom in count 5.¹⁰ In that case, the jury was instructed that it must go on to consider the included charge against Mr. Nduwayo of attempted aggravated sexual assault."¹¹

- Nduwayo was convicted of attempted aggravated sexual assault regarding one of the complainants because the jury was uncertain whether she had already been infected before having relations with Nduwayo or when the condom broke while they were having sex.

¹⁰ In count 5, the complainant testified that they started by having protected sex but on one occasion the condom broke. After that incident, they had sexual intercourse on one additional occasion and it was not protected.

¹¹ *Nduwayo* 2006, *supra* note 1 at para. 9.