JUDGMENT: 18 January 2005
Criminal Section no. 02659/03 IV/SB
Supreme Court of the Netherlands

Ruling
on the appeal in cassation against a ruling by the Arnhem Court of Appeal of 30 June 2003, number 21/001435-03, in the criminal proceedings against: AA [accused], born in [place of birth] on [date of birth] 1951, residing in [place of residence].

1. The contested judgment

After remission of the appeal by a Supreme Court ruling of 25 March 2003 – whereby a verdict of the Court of Leeuwarden of 1 March 2001 was set aside – the Court of Appeal set the punishment in respect of counts 1 (principal charge) and 2 (alternative charge) at two years and six months, and furthermore, acquitting the accused of count 3 (principal charge) of the indictment set forth in the introductory summons, sentenced the accused to two years and three months' imprisonment in respect of count 3 (alternative charge), "attempted gross maltreatment", with decisions regarding the claim of the injured party as set forth in the ruling.

2. Proceedings in cassation

The appeal was brought by the accused. On his behalf J. Boksem, a lawyer practising in Leeuwarden, filed a document proposing a ground for cassation. This document is attached to this ruling and forms part of it.

The Advocate General Vellinga concluded that the appeal should be dismissed.

3. Assessment of the ground for cassation

3.1 In the ground for cassation it is argued that the intent found proven cannot be deduced from the evidence put forward. The first complaint of the ground concerns the"substantial possibility" that is required for conditional intent. The second complaint concerns the "acceptance" of that possibility.

3.2.1 Regarding count 3 of the indictment, the Court of Appeal found it proved that:
"he, during the period from 1 January 1990 up to and including 2 November 2000 in Leeuwarden, in the municipality of Leeuwarden, for the purpose of committing the criminal offence intended by the accused to **wilfully inflict serious bodily harm** [to the victim], wilfully, while the accused knew that he was infected with the HIV virus, **put his penis into the mouth of the aforementioned [victim**], at any rate had his penis taken into the mouth of the aforementioned [victim] and **had the aforementioned suck his penis and had the aforementioned [victim] put or push his penis in his, the accused person's, anus** while the commission of that intended criminal offence has not been completed".

3.2.2. Where relevant to the assessment of the ground for cassation, this judicial finding of fact is based on the following evidence:
1. a police report, to the extent that it is a statement of the [victim]:
"When I was about **fifteen or sixteen years of age,** I was with [the concerned party 1] in a house with Venetian blinds. In that house, [the concerned party 1] helped me taking off my

clothes. The man that lived there had also taken off his clothes. I sat beside that man and started to blow him. That man liked to be fucked. That man then sat on his knees on the couch with his ass towards me. I stood behind him and put my hard penis in his ass. **When my penis was inside his ass, I made fucking moves. I did not use a condom during this ass fucking.**"

2. a police report, to the extent that it is a statement given by the accused:
"I know [the concerned party] via a sex line in which I took part.
In September or October 1999, I was called by [concerned party 1]. He wanted to see me and he said he would bring a boy with him. Three quarters to an hour later, [concerned party 1] came to my house at [a-street] in Leeuwarden. I had closed my Venetian blinds. **[The victim] and I sucked each other off**. In May 1999, I knew I was infected with HIV. You ask me how I got infected. At one time, I had unsafe sex with a woman on Ameland, who later on appeared to have Aids. **I fully realise that if I let someone blow me without wearing a condom, I may infect another person with this disease. I also know that I can infect someone through pre-ejaculate fluid. I have not told anyone about this disease.**
After [concerned party 1] left with [the victim], I never saw [the victim] again."

3. a police report, drawn up by the investigating officer M. Geertsma-Spoelstra, to the extent that it is an account by the reporting officer:
"The accused refused to give any further answer to the question why he did not wear a condom with the boys mentioned by him [concerned party 3] and [the victim]."

4. a police report, to the extent that it is a statement by [concerned party 1]:
"I was with [the victim] from [place of residence] at the [the accused person's] place in Leeuwarden. I was with [the victim] in [the accused person's] house. The sexual acts performed in the house of [the accused] consisted of [accused] and [the victim] sucking each other off. **[The victim] fucked the [accused]**".

5. the following part of the statement by the expert professor S.A. Danner at the hearing in the appellate proceedings of 16 June 2003:
"**There is certainly a possibility of [the victim] having been infected by the HIV virus as a result of the acts referred to.** In the case of genital-anal contacts, the chance of being infected is greater than in the case of genital-vaginal intercourse. The anus is not constructed for sexual intercourse, meaning that genital-anal intercourse causes micro-traumas (small lesions) which bleed. Blood contains a large quantity of HIV particles. This increases the possibility of infection in the case of genital-anal contacts. The chance of infection is 1 in 200 or 1 in 300 for each sexual act. Persons aged 15 to 6 have a normal immune system.
The chance of infection is one and a half to two times greater in the event that the person infected with HIV anally penetrates another person than vice-versa. In other words, the chance of infection is 1 in 500 in the latter case.
In the medical world a 1-in-200 or 1-in-300 chance of infection is considered large. Oral sex entails a certain risk of infection. The chance of infection is substantially less than with genital-anal intercourse, unless there are lesions in the mouth. The chance of being infected through oral sex is 10 to 20 times less. The chance of infection through oral sexual contact is certainly not nil."

6. the following part of the accused person's statement at the hearing of the Leeuwarden Court of Appeal held on 26 July 2001:

“In 1999 I heard that I was infected with the HIV virus. I now take so-called HIV inhibitors. I was infected through a one-off sexual contact. Since I have known about my HIV infection I have always used a condom during sexual intercourse (which the Court of Appeal understands in conjunction with the following sentence, i.e. generally). Since I was infected I have certainly had protected sexual intercourse as well.”

3.2.3 The Court of Appeal furthermore considered the following:
“The Court of Appeal considers that infection with the HIV virus in itself constitutes grievous bodily harm as it allows no prospect of a full cure while lifelong medication is required, with various side effects.

Based on the statement of the witness [concerned party 1] and the statement of the person making the report [the victim], the **Court of Appeal considers it proved that between the latter and the accused oral sex took place as well as anal sexual intercourse, whereby only the person who made the report was the inserting (active) partner.** Based on the statements of the person who made the report and the accused, the Court of Appeal considers it proved that the sexual acts described above took place during a one-off encounter in the accused person’s house in the autumn of 1999. **The Court of Appeal also considers it sufficiently established that during the aforementioned sexual acts neither the accused nor the person making the report used a condom.** Regarding the question whether a (conditional) intent existed to inflict grievous bodily harm, the Court of Appeal considers the following:

The case law of the Supreme Court regarding this element demonstrates that an intent exists if the accused knowingly and wilfully aims at inflicting, in this case, grievous bodily harm. The question now remains whether a conditional intent existed.

The court of appeal takes the view that the accused knowingly and wilfully exposed himself to the substantial possibility that [the victim] would suffer grievous bodily harm and an irreversible HIV infection through the acts found proved. The accused consciously accepted the substantial possibility of this and was prepared to put up with it, whereby **the Court of Appeal comments that the substantial possibility is determined purely and solely in statistical terms.** The fact is that the accused was himself infected through a one-off contact and knew from about May 1999 with absolute certainty that he was infected with HIV. Nevertheless, he said nothing at all about this to the person who made the report, who was at the time relatively young.
From the accused person’s statement, however, it has also been established that he has had protected sexual intercourse since his infection; no extenuating circumstances have been shown to exist in the case in question as a result of which the accused did not discuss the use of condoms beforehand. This is all the more cogent in view of the fact that the accused was in a situation vis-à-vis the person making the report which, given the age difference and the surroundings, could, even without any mention of his infection but with a mere statement about the desirability of the use of condoms and their actual use, have resulted in the protection of the person making the report. Totally indifferent in this regard, the accused allowed the person making the report to satisfy his sexual desires, knowing that he should have demonstrated an increased level of alertness with regard to the great risks that according to general empirical rules are entailed in such forms of sexual contact.”

3.2.4. The Court of Appeal has established that the accused knew he was infected with the HIV virus and that he could infect another person through unprotected sexual contact.

3.3 It must be stated first and foremost that conditional intent with a certain result – such as grievous bodily harm in this case – exists if the accused has knowingly and wilfully exposed himself to the substantial possibility that such a result would occur. The answer to the question whether the act creates the substantial possibility of a certain result is dependant on the circumstances of the case, whereby meaning attaches to the nature of the act and the circumstances under which it is performed.

3.4 The first complaint of the ground for cassation poses the question whether it can be deduced from the evidence put forward that the acts found proved – having sexual contact with the victim in the manner described in the judicial finding of fact – created a substantial possibility of grievous bodily harm being inflicted on the victim. The Court of Appeal answered the question in the affirmative.

3.5 The Court of Appeal's opinion on this, however, is insufficiently substantiated. Although it is possible to deduce from the evidence put forward that the accused created the risk through the acts found proved that the victim would be infected with the HIV virus, the existence of a substantial possibility of such infection cannot follow either from the evidence or from the Court of Appeal's other considerations regarding the evidence.

3.6 That fact that a person infected with the HIV virus who has unprotected sexual contact poses a danger does not in itself mean that the sexual acts in question create the kind of possibility of infection with the HIV virus – and thus causing grievous bodily harm – that can be considered substantial in answering the question whether a conditional intent existed according to general empirical rules.

It could be a different matter under unusual circumstances involving increased risk; however, the Court of Appeal has determined nothing in this regard, either in the evidence or in its other considerations regarding the evidence. The proposed ground for cassation is thus correct insofar as it is dealt with above.

3.7 In this regard the Supreme Court makes the following comment: the question whether, and if so to what extent, the granting of protection under criminal law is indicated – such as through the creation of an abstract endangerment offence – in connection with the danger that arises from a person who is infected with the HIV virus and has unprotected sexual contacts, is a task for the legislator to evaluate. In answering this question all relevant factors must be weighed up, including the general interests of public health.

4. Official assessment of the contested judgment

4.1 In its ruling referred to under 1 above, the Supreme Court has set aside the judgment of the Leeuwarden Court of Appeal, to the extent that it was subject to the Court's assessment, setting it aside exclusively, however, with regard to the decisions handed down in connection with count 3 and the sentence passed, and remitted the case to the Arnhem Court of Appeal in order for it to adjudicate and resolve the existing appeal.

4.2 The Arnhem Court of Appeal has resolved the case in the manner indicated under 1 above.

4.3 The court to which the Supreme Court remitted the case after setting aside a judgment is bound to the decision handed down by the Supreme Court (cf. HR 27 February 1996, NJ 1996, 478). This means that in accordance with the Supreme Court's aforementioned decision the Court of Appeal was required to conduct a renewed investigation into count 3 of the indictment and furthermore should have passed sentence for counts 1 (principal charge) and 2 (principal charge) and perhaps – based on the result of the investigation meant above – count 3.

5. Conclusion

The considerations above mean that the contested judgment cannot be upheld, the ground for cassation requires no further discussion, and that it must be decided as follows.

6. Decision of the Supreme Court: the contested judgment is set aside

The Supreme Court remits the case to the 's-Hertogenbosch Court of Appeal in order that the existing case on appeal be re-adjudicated and resolved, with due regard to the operative part of the ruling of the Supreme Court of 25 March 2003.

This ruling was delivered by Vice President F.H. Koster, acting as President, and Justices G.J.M. Corstens, A.J.A. van Dorst, W.A.M. van Schendel and J. de Hullu, in the presence of the Supreme Court Registrar, S.P. Bakker, and pronounced on 18 January 2005.