

England: Court rules that informed consent to the risk of HIV transmission is valid defence

R v. Dica [2004] EWCA Crim 1103, Court of Appeal (England and Wales)

Parties

The appellant (accused) Mohamed Dica was a man living with HIV. He had been convicted of two counts of causing grievous bodily harm under section 20 of the *Offences against the Person Act 1871* and subsequently appealed the conviction.

Outcome

The appeal was allowed and the Court ordered a new trial.

Background and material facts

The accused was diagnosed with HIV in December 1995 and began treatment. Following his diagnosis, he had unprotected sexual intercourse with two women, allegedly without disclosing his HIV-positive status. The accused testified that both women were aware of his HIV infection and were nonetheless willing to have sexual intercourse with him. The complainants later tested positive for HIV.

Legal arguments and issues addressed

The Crown prosecutors alleged that when the accused had consensual sexual intercourse with the complainants, knowing he was HIV-positive, he was reckless as to whether they might become infected. They positioned this argument under section 20 of the *Offences against the Person Act 1871* (reckless infliction of grievous bodily harm).¹ According to the Court, “[r]ecklessness as such, was not an issue. If protective measures had been taken by the appellant that would have provided material relevant to the jury’s decision whether, in all the circumstances, recklessness was proved.”

One of the main issues in this case was whether the complainants’ consent to have sex with the accused, knowing of his condition, should have been left to the jury. The trial judge had decided that, whether or not the complainants knew of the appellant’s condition, their consent, if any, was irrelevant and provided no defence. Accepting the Crown’s argument, the trial judge held that complainants were deprived “of the legal capacity to consent to such serious harm.”²

¹ Another issue on appeal was whether section 20 of the *Offences against the Person Act 1871* (reckless infliction of grievous bodily harm) could be applied in cases of HIV transmission. The Court of Appeal ruled that *R. v. Clarence* (1989), “suggest[ing] that consensual sexual intercourse of itself was to be regarded as consent to the risk of consequent disease ... [is] no longer authoritative.” As a result, prosecutions of people living with HIV accused of recklessly transmitting HIV during consensual sexual intercourse without having disclosed their HIV status would no longer be limited by what the Court described as “outdated restrictions” and could be pursued under section 20.

² Based on the decision in the case of *R. v. Brown & ors* [1994] 1 AC 212 (House of Lords).

The Court of Appeal, however, ruled that consent to the risk of transmission through consensual sex is a valid defence to a charge of reckless transmission. Consent to the risk of infection, however, would not provide a defence in cases of deliberate infection or spreading of HIV with intent to cause grievous bodily harm (cases that would be prosecuted under section 18 of the *Offences against the Person Act 1871*).

Based on the existing jurisprudence, the Court found that for public policy reasons, violent conduct involving the deliberate and intentional infliction of bodily harm is and remains unlawful, notwithstanding that its purpose is the sexual gratification of one or both participants. Referring to the case, the Court went on to find that

it does not follow from them, and they do not suggest, that consensual acts of sexual intercourse are unlawful merely because there may be a known risk to the health of one or other participant. These participants are not intent on spreading or becoming infected with disease through sexual intercourse. They are not indulging in serious violence for the purposes of sexual gratification. They are simply prepared, knowingly, to run the risk — not the certainty — of infection, as well as all the other risks inherent in and possible consequences of sexual intercourse, such as, and despite the most careful precautions, an unintended pregnancy.

Although it would be unlikely that consent can be established unless the complainant was informed about the risk of a sexually transmitted infection, the Court indicated that the ultimate question is not knowledge but consent and that, in every case where this issue arises, the question of whether the complainant did or did not consent to the risk of a sexually transmitted infection is one of fact and case specific.

Commentary

From a human rights perspective, the ruling that consent to the risk of a sexually transmitted infection is a valid defence to HIV transmission charges in the context of consensual sex (unless there is a deliberate intention to spreading disease) sets an important precedent that is both respectful of individuals' private lives and autonomy, as well as the sexual and reproductive rights of people living with HIV.

What remains uncertain from the Court of Appeal decision is how consent could be established if the HIV-positive partner has not disclosed their status. Some may argue that consenting to unprotected sex may equate to consenting to the risk of a sexually transmitted infection. However, this argument was rejected by the Court of Appeal in the case *R v. Konzani* (2005), where a distinction was drawn between “running the risk of transmission” and “willingly” or “consciously” consenting to the risk of transmission of a particular infection, thus establishing that consent must be informed.³

³ On this issue, the prosecutorial guidance developed in England and Wales states that informed consent to take the risk of being infected by engaging in sexual activity with a person who is infectious of the

With regard to the application of section 20 of the *Offences against the Person Act 1871*, it is interesting to note that no charges for intentional transmission (section 18 of the *Offences against the Person Act 1861*) have proceeded to trial. As of the time of this writing, all HIV exposure cases in the United Kingdom have proceeded under section 20, which criminalises the reckless infliction of grievous bodily harm.

complainant is knowledge of the defendant's specific infected status. However, this does not necessarily require that the person living with HIV has disclosed their HIV status to the complainant; the complainant could have been informed by a third party or aware from other circumstances. Crown Prosecution Service for England and Wales (CPS), *Policy on prosecuting cases involving the Intentional or Reckless Sexual Transmission of Infection*, (originally published 2008; updated 15 July 2011). Available via www.cps.gov.uk.

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