

Case Name:
R. v. Jones

Between
Her Majesty the Queen, and
Darren Jason Jones

[2002] N.B.J. No. 375

2002 NBQB 340

No. F/CR/22/01

New Brunswick Court of Queen's Bench
Trial Division - Judicial District of Fredericton

Garnett J.

Heard: October 29, 2002.
Oral judgment: October 29, 2002.

(35 paras.)

Criminal law -- Offences against person and reputation -- Aggravated assault -- Defence, consent.

Trial of the accused Jones for aggravated assault against two individuals named M and T. M and Jones had a sexual relationship. M claimed that Jones sexually assaulted him. T and Jones met in a bar and had unprotected sex. T claimed he did not consent to the assault because Jones did not tell him that he had Hepatitis C. Jones provided evidence that Hepatitis C was not a sexually transmitted disease. The risk to contract it through sex was low. Jones was advised to wear condoms. However, he was never advised to tell his partners about his health.

HELD: Jones was acquitted. M was not a credible witness. There was no evidentiary basis for the charge that involved him. T was a credible witness. Consent was not an issue. Jones did not have a duty to disclose his illness because the risk of contracting the disease through sex was low.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 265, 265(1)(a), 265(2), 265(3)(c), 268(1), 268(2).

Counsel:

Kevin Connell, for the Crown.

Karen Lee Lamrock, for the accused.

1 GARNETT J. (orally):-- I am going to deliver judgment in this matter. I want to remind any members of the press who may be present that there is a publication ban on the publication of the names or identity of the following people: K.C., H.S., B.M., and B.W.T.

Darren Jason Jones is charged that he:

Count 1: between the 1st day of October, A.D., 2000 and the 31st day of December, A.D., 2000, both dates inclusive, at Fredericton, New Brunswick, did commit an aggravated assault by endangering the life of B.J.M., contrary to and in violation of Section 268(2) of the Criminal Code of Canada and amendments thereto.

Count 2: between the 1st day of April, A.D. 2001, and the 30th day of April, A.D., 2001, both dates inclusive, at Fredericton, New Brunswick, did commit an aggravated assault by endangering the life of B.W.T., contrary to and in violation of Section 268(2) of the Criminal Code of Canada and amendments thereto.

2 Section 265 of the Criminal Code reads in part as follows:

265 (1) A person commits an assault when

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

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

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

(c) fraud.

3 Section 268, which is the section under which the accused is charged, reads:

268. (1) Everyone commits an aggravated assault who wounds, maims, disfigures, or endangers the life of the complainant.

(2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

4 In order to convict the accused the Crown must prove each ingredient of each charge beyond a reasonable doubt. The ingredients which the Crown must prove with respect to each count here are the following:

- (1) the identity of the accused;
- (2) the time and the place of the offence;
- (3) that the accused applied force to each of the complainants;
- (4) that the accused intended to apply force to each complainant;
- (5) that the complainants did not consent to the application of force;
- (6) that the accused knew that they did not consent;
- (7) that the assault by the accused endangered the life of the complainants and that a reasonable person would have realized that the assault would subject the complainant to the risk of bodily harm.

5 I will begin by saying that the Crown has proven the first four ingredients of each charge beyond a reasonable doubt. More specifically, I find that Darren Jason Jones did have sex with each of the complainants at the time and places alleged.

6 I will deal with the two charges separately in analyzing the remaining ingredients.

7 Count One relates to an alleged assault on B.J.M. Mr. M. testified concerning his two to three month sexual relationship with Mr. Jones. I found Mr. M. to be an unreliable witness. His testimony with respect to important events was inconsistent. For example, in direct testimony he said he first met Jones in 1998 in a mall. On cross-examination he admitted that he had met Jones previous to this when they were both in the hospital. Subsequent testimony established that Jones was in the hospital because of "acute Hepatitis C". Notwithstanding having met Jones while Jones was a patient in the hospital, M. says he never asked him why he was there or in any way inquired about Jones' health. In addition, when asked on direct examination how he first learned about Jones' health, he said he was informed by Constable Quartermain that Jones had Hepatitis "C". He maintained that this was true even on cross-examination. Constable Quartermain, who testified later, said that she did not tell M. about Jones' health. When she initially spoke to Mr. M. he already knew about Jones' health status. M. told her that somebody else had told him. It was never clear who that person was.

8 Added to these discrepancies in his testimony is the fact that the relationship between M. and Jones ended unpleasantly. According to M., on the last occasion when the two were together Jones physically assaulted him. M. unsuccessfully attempted to have Jones charged in relation to that last encounter.

9 As stated above, I found M. to be an unreliable witness. In particular, I do not believe his testimony that he did not know that Jones had Hepatitis "C" when he consented to engage in unprotected sex with him. The Crown has therefore failed to prove that the consent given by M. was vitiated by fraud and I therefore find the accused not guilty on count number one.

10 Before I go on to deal specifically with count number two, it is convenient to deal with the credibility of one other witness called by the Crown. Steven Clair was Jones' sponsor in Narcotics Anonymous. It was Clair who reported Jones to the police. I found his testimony to be unconvincing and unreliable.

11 I will now deal with count two.

12 B.W.T. also testified and I found him to be a credible and responsible witness. I believe all of his testimony.

13 He said he met Jones in April 2001 in a bar. Jones, Jones' female roommate and T. went to a party then they went back to Jones' apartment. Jones and T. had unprotected sex, which consisted of oral sex and anal sex, the latter of which was performed by Jones on T. T. said he does not believe that Jones ejaculated.

14 Jones did not tell T. that he had Hepatitis "C". The Crown says that the failure to advise T. of his health status vitiated T.'s consent to what would have otherwise been a consensual sexual act. The Crown says that this failure to inform amounted to fraud under Section 265(2)(c) of the Criminal Code.

15 The Crown relies on the case of *R. v. Cuerrier* [1998] 2 S.C.R. 371. In that case the accused tested positive to HIV in August 1992. At the time he was explicitly instructed to use condoms and to inform all prospective partners that he was HIV positive. He responded angrily, rejected the advice and said he would never have a sex life if he told anyone. He then embarked on an 18 month relationship with a woman whom he informed that he had tested negative for HIV. The accused was tested again in January 1993 and was again told to use condoms and inform his partners. Several months later, after his relationship with the first complainant ended, a public health nurse delivered a letter to him ordering him to inform future partners and to use a condom. He then formed a second sexual relationship with the second complainant. Again, he engaged in unprotected sex and, again, he did not inform his partner of his HIV status.

16 The issue before the Supreme Court of Canada in that case was whether the accused's failure to inform his partners amounted to fraud and thereby vitiated their consent.

17 The Court held that in some circumstances non-disclosure could amount to fraud and could result in a conviction for aggravated assault under Section 268 of the Criminal Code. The issue for this Court is whether the facts here are one of those circumstances.

18 Justice Cory, who wrote the majority judgment, points out at paragraph 126 that the first requirement of fraud is proof of dishonesty. He says, "The actions of the accused must be assessed objectively to determine whether a reasonable person could find them to be dishonest." And at paragraph 128 he says:

The second requirement of fraud is that the dishonesty result in deprivation, which may consist of actual harm or simply a risk of harm. Yet it cannot be any trivial harm or risk of harm that will satisfy this requirement in sexual assault cases where the activity would have been consensual if the consent had not been obtained by fraud. For example, the risk of minor scratches or of catching cold would not suffice to establish deprivation. What then should be required? In my view, the Crown will have to establish that the dishonest act (either falsehoods or failure to disclose) had the effect of exposing the person consenting to a significant risk of serious bodily harm. The risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet that test. In this case the complainants were exposed to a significant risk of serious harm to their health. Indeed their very survival was placed in jeopardy.

19 I will now review the evidence which I consider to be relevant to these issues in the circumstances surrounding count two.

20 Mr. T. says that there was no discussion about disease at all. In other words, Mr. Jones did not lie about his health. It was simply not discussed.

21 Dr. Broeren and Dr. Koller both told Jones to use a condom.

22 Jones' roommate said that she called the Hepatitis "C" organization for information and was told that Jones was not obliged to tell people he had Hepatitis "C". She told Jones what she had been told.

23 All three doctors who testified on behalf of the Crown said that the risk of transmission of Hepatitis "C" through sexual activity is very low even in married couples.

24 Dr. Peltekian, who was accepted as an expert in the treatment and transmission of Hepatitis "C", said it is not a sexually transmitted disease. It is not present in semen or vaginal fluids. It is present in blood. In order for it to be transmitted sexually, there must be blood-to-blood contact. The chances of this happening are very low. He says he tells Hepatitis "C" patients to wear a condom for their own protection. He says the consequences of contracting other diseases from sexual partners is more serious for someone who already has Hepatitis "C".

25 On cross-examination he reiterated that Hepatitis "C" is not a sexually transmitted disease and the risk of contracting it through sex is low. He said physicians are not required to report it as a venereal disease. By contrast, he said HIV is a sexually transmitted disease and the risk is high.

26 For Hepatitis "C" in monogamous heterosexual couples, the risk of transmission is less than 1%. The risk increases for those engaging in anal sex to between 1 - 2.5%.

27 He does not advise his patients to tell other people about their condition because of the stigmatization which is associated with the disease.

28 As stated above, the issue for this Court is whether Jones' failure to tell T. of his health status was an omission which amounted to fraud. I find that it was not.

29 Although Jones had been advised to use condoms he was never advised to tell his partners about his health and was told on at least one occasion that he had no obligation to do so.

30 Secondly, there is a great deal of evidence that the risk of transmission through sex is very low. On this point, the Crown argues that it is not the risk of transmission which matters, but rather the serious consequences to the health after it is contracted.

31 In the Cuerrier case at paragraph 129 Justice Cory says this:

To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation. To repeat, in circumstances such as those presented in this case, there must be a significant risk of serious bodily harm before the section can be satisfied. In the absence of those criteria, the duty to disclose will not arise.

32 I interpret this paragraph to mean that the risk referred to by the Supreme Court of Canada is both the risk of contracting the disease and the risk to the health of the person after it is contracted.

33 On the basis of the evidence before me, I find that in the case of Hepatitis "C" the risk of contracting it through unprotected sex is so low that it cannot be described as significant. Therefore, the positive duty to disclose does not arise.

34 I wish to emphasize that I am referring to a legal duty in the context of Section 268 of the Criminal Code of Canada.

35 I therefore find that Darren Jason Jones is not guilty on Count 2.

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