

R. v. Mabior, 2012 SCC 47 – Aggravated Sexual Assault – HIV Disclosure

Facts:

Mr. Mabior lived in Winnipeg. His was a party house where drugs and alcohol were readily available. Mr. Mabior had sex with women who came to his house including the nine complainants. Mr. Mabior did not tell the complainants he was HIV-positive. He told one that he had no STDs. He used condoms only some of the time. Sometimes the condoms broke or were removed. Eight of the nine complainants said they would not have had sex with Mr. Mabior if they had known he was HIV-positive. None of the complainants were infected. Mr. Mabior was charged with nine counts of aggravated sexual assault. At trial he was convicted of six counts. He appealed. The Court of Appeal acquitted him on four of the counts. The Crown appealed these acquittals.

The Decision:

Sex without consent is sexual assault under section 265 of the Criminal Code. The case of *R. v. Cuerrier* establishes that if someone who is HIV-positive does not disclose his condition, that may be fraud and therefore there is no consent. Because HIV poses a serious risk of bodily harm, the offence would be aggravated sexual assault (section 273 of the Criminal Code) and the maximum penalty is life in prison.

Cuerrier requires two elements: 1) a dishonest act (lies or failure to disclose) and 2) deprivation (denying the complainant knowledge which would have caused her to refuse sex).

A person may be found guilty of aggravated sexual assault if he does not disclose his HIV-positive condition before having sex and if there is a realistic possibility that HIV will be transmitted. If the viral count is low as a result of treatment and a condom is used for protection there is no realistic possibility of transmitting the virus.

The majority built on the *Cuerrier* test.

“To summarize, to obtain a conviction under sections 265(3)(c) and 273, the Crown must show that the complainant’s consent to sexual intercourse was vitiated by the accused’s fraud as to his HIV status. Failure to disclose (*the dishonest act*) amounts to fraud where the complainant would not have consented had he or she know the accused was HIV-positive, and where sexual contact poses a significant risk or or causes actual serious bodily harm (*deprivation*). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV. On the evidence before us, a realistic possibility of transmission is negated by evidence that the accused’s viral load was low at the time of intercourse and that condom protection was used. However, the general proposition that a low viral load combined with condom use negates a realistic possibility of transmission of HIV does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in the present case are at play.”

Mabior had a low viral count at the time of intercourse with three of the complainants but did not use a condom. Therefore the trial judge’s

Discussion Questions:

- 1) The Chief Justice states: “It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act. The rule of law requires that laws provide in advance what can and cannot be done.” What does this mean? Give examples?
- 2) In Canada a persons who do not disclose their HIV-status can be charged with aggravated sexual assault. In other jurisdictions, the offence is inflicting bodily harm. Which approach do you think is preferable and why?
- 3) The Crown in this case argued that all HIV-positive people should be required to disclose their condition to their sexual partners in all cases. The court did not accept this argument. What do you think?

Relevant Law:

Criminal Code of Canada: Sections 265, 273

Resources:

You can read the entire case at:

<http://www.canlii.org/en/ca/scc/doc/2012/2012scc256/2012scc47.html>

You can find The *Criminal Code* at:

<http://laws.justice.gc.ca/eng/>

You can find the *Cuerrier* case at:

1998 CanLII 796 (SCC)

For a critique of the Mabior decision see: Where the Supreme Court went wrong on HIV disclosure

<http://www.theglobeandmail.com/news/national/where-the-supreme-court-went-wrong-on-hiv-disclosure/article4610682/>

convictions on those three counts were restored. Mabior had a low viral count at the time of intercourse with the fourth complainant and had used a condom, therefore the trial judge's conviction on that count was reversed.

Relevant Law:

Criminal Code of Canada

Assault

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;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Application

(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.

Consent

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

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

Accused's belief as to consent

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

Aggravated sexual assault

273 (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

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

- (i) in the case of a first offence, five years, and
- (ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(a.2) if the complainant is under the age of 16 years, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years; and

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