TOP FIVE 2013

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v MABIOR, 2012 SCC 47, [2012] 2 SCR 584

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http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10008/index.do

Facts

The accused, Clato Mabior, is HIV-positive. His house was the site of many parties where alcohol and drugs were freely exchanged. On occasion, Mabior had sex with women who came to his parties, but he did not disclose his HIV status to the women he was having sex with. Sometimes he wore a condom; other times he did not.

Nine women came forward alleging that they had sex with Mabior and that he did not disclose that he was HIV-positive. Eight of the nine women testified that they would not have had sex with him had they known of his HIV status. None of the women contracted HIV.

Mabior was charged with nine counts of aggravated sexual assault. In his defence, he put forward evidence that he was under treatment that greatly reduced his viral load (the concentration of HIV in his blood) and that there was therefore a low risk of transmission of the disease.

Criminal Code RSC 1985, c C-46

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, … 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;

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

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

Procedural History

At trial, Mabior was convicted on six of the nine counts. The trial judge acquitted him on three of the counts because, during these three sexual encounters, he was wearing a condom and his viral load was undetectable. With a condom and undetectable viral load, he did not put the three women at "significant risk of serious bodily harm", namely, contracting HIV.

Mabior appealed the six convictions. The Manitoba Court of Appeal varied the trial judge's decision, acquitting him of an additional four charges. The Court found that the trial judge had erred in determining that **both** an undetectable viral load **and** the use of a condom were required to adequately reduce the risk of serious harm. Rather, the Court held that **either** a low viral count **or** condom use would negate the serious risk he posed of transmitting the disease. The Crown appealed these four acquittals to the Supreme Court of Canada (SCC).

Issues

1. Under what circumstances does failure to disclose HIV status before sex negate consent and thus become "fraud" as set out in s. 265 of the *Criminal Code*?

Decision

The SCC allowed the appeal in part. Mabior's convictions in respect to three of the four women were restored.

Ratio

The ratio can be found in para. 4 of the decision: "[A] person may be found guilty of aggravated sexual assault under s. 273 of the *Criminal Code* if he fails to disclose HIV-positive status before intercourse and there is a realistic possibility that HIV will be transmitted." Without a realistic possibility of transmission, the HIV-positive person will not have defrauded his or her partner. Without fraud, the sex will be deemed consensual and no crime will have occurred.

A realistic possibility of transmission will not exist if the HIV-positive person: (a) has a low viral count as a result of treatment; and (b) uses a condom. However, the Court concluded that the law could adapt in the future with advancements in treatment that reduce the likelihood of transmission or the danger posed by HIV.

As well, the Court restricted its decision to the disclosure of HIV status, and not to the disclosure of other sexually transmitted diseases.

REASONS

Chief Justice McLachlin clarified the test for when fraud would negate sexual consent. The existing test was established in *R v Cuerrier*, [1998] 2 SCR 371, which was then the leading case on HIV and sexual consent. In *Cuerrier*, the SCC held that not disclosing HIV-positive status would amount to

aggravated sexual assault if the accused was shown to have committed 1) a dishonest act, either falsehoods or failure to disclose HIV status; and 2) a deprivation, as in denying the sexual partner knowledge which would have caused her to refuse sexual relations that exposed him or her to a significant risk of serious bodily harm.

The Court kept the *Cuerrier* framework, but noted that the second part of this test was uncertain. It did not specify how significant a "significant risk" must be to qualify as a deprivation, define what would constitute "serious" bodily harm or explain the interaction of these two factors. The Court needed to clarify this test because in order for a law to be effective, it must be clear enough to allow citizens to conduct their behaviour accordingly.

To resolve these issues, the SCC considered the purposes of criminal law, the history of cases involving non-disclosure, the law in other jurisdictions, and how the *Charter of Rights and Freedoms* should apply. Writing for a unanimous Court, Chief Justice McLachlin noted that the criminal law must be careful not to punish conduct that is solely dishonest, but not harmful. At the same time, the criminal law must protect and balance the *Charter* value of human dignity and the freedom of individuals to make informed choices about their behaviour and sexual health. Thus, the Chief Justice formulated the test below to balance these competing concerns.

A person may be found guilty of aggravated sexual assault under s. 273 of the *Criminal Code* if he or she fails to disclose HIV-positive status before intercourse and there is a realistic possibility that HIV will be transmitted. There will be no realistic possibility of bodily harm if: (a) condom protection was used; **and** (b) the accused's viral load at the time of sexual relations was low.

As reported in the decision, with no condom usage and a normal viral load, there is a 0.05 to 0.26% chance that an HIV-positive individual will transmit their disease to a sexual partner. Use of a condom reduces the risk of HIV transmission by 80%, on average, and a low viral load further decreases the chances of transmission by 89 to 96%. Thus, these two precautions together reduce the risk of transmission so greatly that they negate a realistic chance of transmission. With no realistic chance of transmission, no significant risk of bodily harm exists, and therefore, a sexual partner is not deprived of knowledge that might lead them to withhold consent.

Applied to this case, Chief Justice McLachlin noted that it had been established at trial that Mabior had a low viral load but did not use a condom when having sex with three of the four women. Thus, he was convicted of aggravated sexual assault on those three counts. However, he was acquitted on one count because he had used a condom and had a low viral load in that sexual encounter.

Mabior was deported to South Sudan in February 2012, after serving his criminal sentence, but before this ruling was issued.

DISCUSSION

1. Consider the perspectives of both Mr. Mabior and the victims. Why might someone want to keep their HIV status private, if there was no significant risk of transmission? Why might a potential partner want to know about it prior to sex, even if there was no significant risk of transmission?

2. Consider the percentages that describe the chances of HIV being transmitted. How likely is transmission? Is it necessary to require **both** a low viral load **and** the use of a condom, given this likelihood? Explain.

3. Does the condom-use requirement put women with HIV in a different situation with respect to the law than it does for men with HIV? Why or why not?

4. In your opinion, why did the SCC specify that these guidelines apply only to HIV and not to other sexually transmitted diseases?

5. What kinds of medical developments might cause this ruling to be modified in the future?