

Her Majesty the Queen (appellant) v. D.C. (respondent) and Attorney General of Alberta,
Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario, Coalition des
organismes communautaires québécois de lutte contre le sida, Positive Living Society of British
Columbia, Canadian AIDS Society, Toronto People With AIDS Foundation, Black Coalition for
AIDS Prevention, Canadian Aboriginal AIDS Network, Criminal Lawyers' Association of
Ontario, British Columbia Civil Liberties Association, Association des avocats de la défense de
Montréal and Institut national de santé publique du Québec (interveners)
(34094; 2012 SCC 48; 2012 CSC 48)

Indexed As: R. v. D.C.

Supreme Court of Canada
McLachlin, C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and
Karakatsanis, JJ.
October 5, 2012.

Summary:

The accused was charged with sexual assault and aggravated assault on the basis that she had sex with her partner without disclosing her HIV-positive status.

The Court of Quebec, in a decision with neutral citation 2008 QCCQ 629, convicted the accused. The accused appealed.

The Quebec Court of Appeal, in a decision with neutral citation 2010 QCCA 2289, allowed the appeal and set aside the convictions. The Crown appealed.

The Supreme Court of Canada dismissed the appeal.

Editor's Note: Certain names in the following case have been initialized or the case otherwise edited to prevent the disclosure of identities where required by law, publication ban, Maritime Law Book's editorial policy or otherwise. In this case the editing was done by the court.

Criminal Law - Topic 666

Sexual offences - Rape or sexual assault - Consent and extorted consent - The accused was convicted of sexual assault and aggravated assault for having sex with the complainant without disclosing her HIV-positive status - The trial found that neither the accused nor the complainant were credible, but inferred from a doctor's note in the accused's medical records that no condom was worn - The Supreme Court of Canada held that the verdict had to be set aside - The note and inferences were not evidence capable of confirming the complainant's otherwise unsatisfactory evidence - The prosecution failed to prove that the accused failed to disclose her HIV status to the complainant, where there was a significant risk of serious bodily harm (i.e., a realistic possibility of transmission which could be negated by both low viral load and condom protection) - Here, where low (in fact undetectable) viral load was established, the critical issue was whether a condom was used.

Criminal Law - Topic 666

Sexual offences - Rape or sexual assault - Evidence and proof - [See **Criminal Law - Topic 666**].

Criminal Law - Topic 5311

Evidence and witnesses - Inferences - General - [See **Criminal Law - Topic 666**].

Evidence - Topic 200

Inferences and weight of evidence - Inferences - Whether reasonable inference or speculation - [See **Criminal Law - Topic 666**].

Cases Noticed:

R. v. Mabior, [2012] N.R. TBE d. OC.005; 2012 SCC 47, appld. [para. 1].

R. v. Cuerrier (H.G.), [1998] 2 S.C.R. 371; 229 N.R. 279; 111 B.C.A.C. 1; 181 W.A.C. 1; 127 C.C.C.(3d) 1, refd to. [para. 10].

Statutes Noticed:

Criminal Code, R.S.C. 1985, c. C-46, sect. 265(3)(c) [para. 1]; sect. 686(1)(a)(ii) [para. 3].

Counsel:

Caroline Fontaine and Magalie Cimon, for the appellant;

Christian Desrosiers, for the respondent;

Christine Rideout, for the intervener, the Attorney General of Alberta;

Jonathan Shime, Corie Langdon, Richard Elliott and Ryan Peck, for the interveners, the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario, Coalition des organismes communautaires québécois de lutte contre le sida, the Positive Living Society of British Columbia, the Canadian AIDS Society, the Toronto People With AIDS Foundation, the Black Coalition for AIDS Prevention and the Canadian Aboriginal AIDS Network;

P. Andras Schreck and Candice Suter, for the intervener, the Criminal Lawyers' Association of Ontario;

Michael A. Feder and Angela M. Juba, for the intervener, the British Columbia Civil Liberties Association;

François Dadour, for the intervener, Association des avocats de la défense de Montréal;

Lucie Joncas and François Côté, for the intervener, Institut national de santé publique du Québec.

Solicitors of Record:

Poursuites criminelles et pénales du Québec, Longueuil, Quebec, for the appellant;

Desrosiers, Joncas, Massicotte, Montreal, Quebec, for the respondent;

Attorney General of Alberta, Calgary, Alberta, for the intervener, the Attorney General of Alberta;

Cooper & Sandler, Toronto, Ontario, for the interveners, the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario, Coalition des organismes communautaires québécois de lutte contre le sida, the Positive Living Society of

British Columbia, the Canadian AIDS Society, the Toronto People With AIDS Foundation, the Black Coalition for AIDS Prevention and the Canadian Aboriginal AIDS Network;
Schreck Presser, Toronto, Ontario, for the intervener, the Criminal Lawyers' Association of Ontario;
McCarthy Tétrault, Vancouver, British Columbia, for the intervener, the British Columbia Civil Liberties Association;
Poupart, Dadour, Touma et Associés, Montreal, Quebec, for the intervener, Association des avocats de la défense de Montréal;
Desrosiers, Joncas, Massicotte, Montreal, Quebec, for the intervener, Institut national de santé publique du Québec.

This appeal was heard on February 8, 2012, before McLachlin, C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis, JJ., of the Supreme Court of Canada. The decision of the court was delivered on October 5, 2012, in both official languages, by McLachlin, C.J.C.

Appeal dismissed.

Editor: Elizabeth M.A. Turgeon

Criminal Law - Topic 666

Sexual offences - Rape or sexual assault - Evidence and proof - The accused was convicted of sexual assault and aggravated assault for having sex with the complainant without disclosing her HIV-positive status - The trial found that neither the accused nor the complainant were credible, but inferred from a doctor's note in the accused's medical records that no condom was worn - The Supreme Court of Canada held that the verdict had to be set aside - The note and inferences were not evidence capable of confirming the complainant's otherwise unsatisfactory evidence - The prosecution failed to prove that the accused failed to disclose her HIV status to the complainant, where there was a significant risk of serious bodily harm (i.e., a realistic possibility of transmission which could be negated by both low viral load and condom protection) - Here, where low (in fact undetectable) viral load was established, the critical issue was whether a condom was used.

Criminal Law - Topic 5311

Evidence and witnesses - Inferences - General - The accused was convicted of sexual assault and aggravated assault for having sex with the complainant without disclosing her HIV-positive status - The trial found that neither the accused nor the complainant were credible, but inferred from a doctor's note in the accused's medical records that no condom was worn - The Supreme Court of Canada held that the verdict had to be set aside - The note and inferences were not evidence capable of confirming the complainant's otherwise unsatisfactory evidence - The prosecution failed to prove that the accused failed to disclose her HIV status to the complainant, where there was a significant risk of serious bodily harm (i.e., a realistic possibility of transmission which

could be negated by both low viral load and condom protection) - Here, where low (in fact undetectable) viral load was established, the critical issue was whether a condom was used.

Evidence - Topic 200

Inferences and weight of evidence - Inferences - Whether reasonable inference or speculation - The accused was convicted of sexual assault and aggravated assault for having sex with the complainant without disclosing her HIV-positive status - The trial found that neither the accused nor the complainant were credible, but inferred from a doctor's note in the accused's medical records that no condom was worn - The Supreme Court of Canada held that the verdict had to be set aside - The note and inferences were not evidence capable of confirming the complainant's otherwise unsatisfactory evidence - The prosecution failed to prove that the accused failed to disclose her HIV status to the complainant, where there was a significant risk of serious bodily harm (i.e., a realistic possibility of transmission which could be negated by both low viral load and condom protection) - Here, where low (in fact undetectable) viral load was established, the critical issue was whether a condom was used.