

Her Majesty the Queen (appellant) v. Clato Lual Mabior (respondent) and 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, British Columbia Civil Liberties Association, Criminal Lawyers' Association of Ontario, Association des avocats de la défense de Montréal and Institut national de santé publique du Québec (interveners)
(33976; 2012 SCC 47; 2012 CSC 47)

Indexed As: R. v. Mabior (C.L.)

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 aggravated sexual assault involving nine complainants, M.P., K.R., K.G., D.C.S., D.H., S.H., F.L., C.B., and J.L.L. The Crown claimed that the accused failed to disclose his HIV-positive status to the complainants before having sex with them. None of the complainants contracted HIV. The accused claimed that his duty to disclose his condition did not arise since the risk of transmission was low or negligible at the time and there was no significant risk of bodily harm to the complainants.

The Manitoba Court of Queen's Bench, in a decision reported at 230 Man.R.(2d) 184, discussed the issues of viral load, infectivity and condom use. In the result, the court convicted the accused respecting six of the complainants (M.P., K.R., K.G., D.C.S., D.H. and S.H.), and acquitted the accused respecting the other three complainants (F.L., C.B. and J.L.L.), on the basis that sexual intercourse using a condom when viral loads were undetectable did not put a sexual partner at "significant risk of serious bodily" harm as required by *R. v. Cuerrier* (SCC 1998). The accused appealed. The Canadian HIV/AIDS Legal Network moved for leave to intervene in the conviction appeal.

The Manitoba Court of Appeal, per MacInnes, J.A., in a decision reported at 245 Man.R. (2d) 81; 466 W.A.C. 81, granted the intervention application. The appeal proceeded.

The Manitoba Court of Appeal, in a decision reported (2010), 258 Man.R.(2d) 166; 499 W.A.C. 166, allowed the appeal in part. The appeal court held that *R. v. Cuerrier* remained the law. However, that the trial judge erred in her application of the test of "significant risk of serious bodily harm" by ruling that a combination of both undetectable viral load and the use of a condom would be required to escape criminal liability. Rather, the appeal court held that either low viral loads or condom use could negate significant risk. That finding reduced to two the counts on which the accused could be convicted (i.e., respecting M.P. and K.R.). Acquittals were entered respecting K.G., D.C.S., D.H. and S.H. The Crown appealed the acquittals.

The Supreme Court of Canada allowed the appeal in part and stated that the convictions

respecting S.H., D.C.S. and D.H. should be restored. The appeal was dismissed with respect to K.G.

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 - Section 265(3) (c) of the Criminal Code provided that "fraud" vitiated consent to sexual activity - The Supreme Court interpreted "fraud" in this context - The court's interpretation of s. 265(3) (c) was informed by four considerations, namely (a) the purposes of the criminal law; (b) the common law and statutory history of the concept; (c) Charter values, particularly equality, autonomy, liberty, privacy and human dignity; and (d) the experience of other common law jurisdictions - See paragraphs 12 to 105.

Criminal Law - Topic 666

Sexual offences - Rape or sexual assault - Consent and extorted consent - Section 265(3) (c) of the Criminal Code provided that "fraud" vitiated consent to sexual activity - R. v. Cuerrier (SCC 1998) provided that the test for "fraud" in the case of undisclosed HIV status required proof of two elements: (1) a dishonest act (i.e., a misrepresentation or non-disclosure of HIV); and (2) deprivation (i.e., whether the act posed a "significant risk of serious bodily harm") - The Supreme Court of Canada stated that "While it may be difficult to apply, the Cuerrier approach is in principle valid. It carves out an appropriate area for the criminal law - one restricted to 'significant risk of serious bodily harm'. It reflects the Charter values of autonomy, liberty and equality, and the evolution of the common law, appropriately excluding the Clarence line of authority. The test's approach to consent accepts the wisdom of the common law that not every deception that leads to sexual intercourse should be criminalized, while still according consent meaningful scope. While Cuerrier takes the criminal law further than courts in other common law jurisdictions have, it can be argued other courts have not gone far enough ... It followed that Cuerrier should not be jettisoned. The problems of uncertainty and appropriate reach that have emerged in its application should be addressed, but to the extent possible within the general framework of Cuerrier" - See paragraphs 58 and 60.

Criminal Law - Topic 666

Sexual offences - Rape or sexual assault - Consent and extorted consent - In R. v. Cuerrier (1998 SCC), the court established that the failure to advise a sexual partner of one's HIV status may constitute fraud vitiating consent giving rise to a charge of aggravated assault - The Supreme Court of Canada stated that while Cuerrier laid down the basic requirements for the offence, the precise circumstances when failure to disclose HIV status vitiated consent and converted sexual activity into a criminal act remained unclear - In clarifying the Cuerrier test, the court stated that "... 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. If the HIV-positive person has a low viral count as a result of

treatment and there is condom protection, the threshold of a realistic possibility of transmission is not met, on the evidence before us" - See paragraphs 1 to 4 and 81 to 92.

Criminal Law - Topic 666

Sexual offences - Rape or sexual assault - Consent and extorted consent - The Supreme Court of Canada stated that "to obtain a conviction under ss. 265(3)(c) and 273 [of the Criminal Code], 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 known the accused was HIV-positive, and where sexual contact poses a significant risk of 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. The usual rules of evidence and proof apply. The Crown bears the burden of establishing the elements of the offence - a dishonest act and deprivation - beyond a reasonable doubt. Where the Crown has made a prima facie case of deception and deprivation as described in these reasons, a tactical burden may fall on the accused to raise a reasonable doubt, by calling evidence that he had a low viral load at the time and that condom protection was used" - See paragraphs 104 and 105.

Criminal Law - Topic 666

Sexual offences - Rape or sexual assault - Consent and extorted consent - The accused, who was HIV positive, had intercourse by vaginal penetration with four complainants (K.G., D.C.S., D.H. and S.H.) - He did not disclose his HIV status - None of the complainants were infected - He was convicted of aggravated sexual assault - The Supreme Court of Canada noted that the accused had a low viral load at the time of intercourse with S.H., D.C.S. and D.H., but did not use a condom - Consequently, the convictions on those counts should be maintained - As to K.G., the trial judge convicted on the ground that, although the accused used a condom at the time of the encounter, the accused's viral load "was not suppressed" - The Supreme Court stated that the combination of a low viral load, as opposed to an undetectable viral load, and of condom use negated a realistic possibility of transmission - The record showed that the accused's viral load was low at the time of sexual relations with K.G. - When combined with condom protection, the low viral load did not expose K.G. to a significant risk of serious bodily harm - The trial judge's conviction on this count had to be reversed - See paragraph 109.

Criminal Law - Topic 670.2

Sexual offences - Rape or sexual assault - Aggravated sexual assault defined - [See all **Criminal Law - Topic 666**].

Words and Phrases

Fraud - The Supreme Court of Canada interpreted the word fraud in s. 265(3)(c) of the Criminal Code, R.S.C. 1985, c. C-46 - See paragraphs 12 to 105.

Cases Noticed:

- 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, appld. [para. 2].
- R. v. D.C., [2012] N.R. TBEEd. OC.006; 2012 SCC 48, refd to. [para. 13].
- Proprietary Articles Trade Association v. Attorney General of Canada, [1931] A.C. 310, refd to. [para. 23].
- Reference Re Validity of Section 5(a) of the Dairy Industry Act (Margarine Case), [1949] 1 D.L.R. 433; [1949] S.C.R. 1, affd. [1950] 4 D.L.R. 689; [1951] A.C. 179 (P.C.), refd to. [para. 23].
- Margarine Case - see Reference Re Validity of Section 5(a) of the Dairy Industry Act.
- Lord's Day Alliance of Canada v. Attorney General of British Columbia, [1959] S.C.R. 497, refd to. [para. 23].
- R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299; 21 N.R. 295; 3 C.R.(3d) 30, refd to. [para. 23].
- R. v. Boggs, [1981] 1 S.C.R. 49; 34 N.R. 520; 19 C.R. 245; 58 C.C.C.(2d) 7, refd to. [para. 23].
- R. v. Skoke-Graham - see R. v. Hafey et al.
- R. v. Hafey et al., [1985] 1 S.C.R. 106; 57 N.R. 321, refd to. [para. 23].
- R. v. Roy (R.L.) (2012), 430 N.R. 201; 321 B.C.A.C. 112; 547 W.A.C. 112; 2012 SCC 26, refd to. [para. 24].
- R. v. Beatty (J.R.), [2008] 1 S.C.R. 49; 371 N.R. 119; 251 B.C.A.C. 7; 420 W.A.C. 7; 2008 SCC 5, refd to. [para. 24].
- R. v. Clarence (1888), 22 Q.B.D. 23, not folld. [para. 25].
- R. v. Flattery (1877), 13 Cox C.C. 388, refd to. [para. 25].
- R. v. Dee (1884), 15 Cox C.C. 579, refd to. [para. 28].
- R. v. Bennett (1866), 4 F. & F. 1105; 176 E.R. 925, refd to. [para. 29].
- R. v. Sinclair (1867), 13 Cox C.C. 28, refd to. [para. 30].
- Hegarty v. Shine (1878), 14 Cox C.C. 124, affd. 14 Cox C.C. 145, refd to. [para. 32].
- Papadimitropoulos v. R. (1957), 98 C.L.R. 249, refd to. [para. 38].
- R. v. Harms (1943), 81 C.C.C. 4, refd to. [para. 39].
- Bolduc v. R., [1967] S.C.R. 677, refd to. [para. 39].
- R. v. Petrozzi (1987), 35 C.C.C.(3d) 528 (B.C.C.A.), refd to. [para. 40].
- R. v. Lee (1991), 3 O.R.(3d) 726 (Div. Ct.), refd to. [para. 40].
- R. v. Ssenyonga (1993), 81 C.C.C.(3d) 257 (Ont. Div. Ct.), refd to. [para. 40].
- State v. Marcks (1897), 41 S.W. 973, refd to. [para. 41].
- State v. Marcks (1898), 43 S.W. 1095, refd to. [para. 41].
- State v. Lankford (1917), 102 A. 63 (Del. Ct. Gen. Sess.), refd to. [para. 41].
- United States v. Johnson (1988), 27 M.J. 798 (A.F.C.M.R.), refd to. [para. 41].
- United States v. Dumford (1989), 28 M.J. 836 (A.F.C.M.R.), refd to. [para. 41].
- R. v. Maurantonio, [1968] 1 O.R. 145 (C.A.), refd to. [para. 41].
- R. v. Sharpe (J.R.), [2001] 1 S.C.R. 45; 264 N.R. 201; 146 B.C.A.C. 161; 239 W.A.C. 161; 2001 SCC 2, refd to. [para. 44].

Application Under Section 83.28 of the Criminal Code, Re, [2004] 2 S.C.R. 248; 322 N.R. 205; 199 B.C.A.C. 45; 326 W.A.C. 45; 2004 SCC 42, refd to. [para. 44].
R. v. Ewanchuk (S.B.), [1999] 1 S.C.R. 330; 235 N.R. 323; 232 A.R. 1; 195 W.A.C. 1, refd to. [para. 47].
R. v. B., [2006] EWCA Crim. 2945; [2007] 1 W.L.R. 1567, refd to. [para. 51].
R. v. Mwai, [1995] 3 N.Z.L.R. 149 (C.A.), refd to. [para. 53].
R. v. Find (K.), [2001] 1 S.C.R. 863; 269 N.R. 149; 146 O.A.C. 236; 2001 SCC 32, refd to. [para. 71].
R. v. Spence (S.A.), [2005] 3 S.C.R. 458; 342 N.R. 126; 206 O.A.C. 150; 2005 SCC 71, refd to. [para. 71].
Twining v. Morrice (1788), 2 Bro. C.C. 326; 29 E.R. 182, refd to. [para. 73].
Conolly v. Parsons (1797), 3 Ves. 625n, refd to. [para. 73].
Walters v. Morgan (1861), 3 De G. F. & J. 718; 45 E.R. 1056, refd to. [para. 73].
R. v. McCraw, [1991] 3 S.C.R. 72; 128 N.R. 299; 49 O.A.C. 47, refd to. [para. 82].
R. v. Jones, 2002 NBQB 340, refd to. [para. 90].
R. v. J.A.T., [2010] B.C.T.C. Uned. 766; 2010 BCSC 766, refd to. [para. 90].

Statutes Noticed:

Canadian Charter of Rights and Freedoms, 1982, sect. 7 [para. 14].
Criminal Code, R.S.C. 1985, c. C-46, sect. 265, sect. 273 [para. 10].

Authors and Works Noticed:

Bingham, Tom, *The Rule of Law* (2010), generally [para. 14].
Boily, Marie-Claude, et al., *Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies* (2009), 9 *Lancet Infect. Dis.* 118, generally [para. 97].
Burriss, Scott, et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial* (2007), 39 *Ariz. St. L.J.* 467, p. 501 [para. 59].
Cohen, Myron S., et al., *Prevention of HIV-1 Infection with Early Antiretroviral Therapy* (2011), 365 *New Eng. J. Med.* 493, generally [para. 101].
Grant, Isabel, *The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink Cuerrier* (2011), 5 *M.J.L.H.* 7, pp. 31 to 41 [para. 50]; 42 [para. 54].
Leigh, L.H., *Two cases on consent in rape* (2007), 5 *Arch. News* 6, generally [para. 58], p. 7 [para. 63].
Nightingale, Brenda L., *The Law of Fraud and Related Offences*. Scarborough, Ont.: Carswell, 1996 (loose-leaf updated 2011, release 3), generally [para. 72].
Wainberg, Mark A., *Criminalizing HIV transmission may be a mistake* (2009), 180 *C.M.A.J.* 688, generally [para. 59].
Weller, Susan C., and Karen Davis-Beaty, *Condom effectiveness in reducing heterosexual HIV transmission* (2002), 1 *Cochrane Database Syst. Rev.* CD003255, generally [para. 98].

Counsel:

Elizabeth Thomson and Ami Kotler, for the appellant;
Amanda Sansregret and Corey La Berge, for the respondent;
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;

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

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

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:

Attorney General of Manitoba, Winnipeg, Manitoba, for the appellant;

Legal Aid Manitoba, Winnipeg, Manitoba, for the respondent;

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;

McCarthy Tétrault, Vancouver, British Columbia, for the intervener, the British Columbia Civil Liberties Association;

Schreck Presser, Toronto, Ontario, for the intervener, the Criminal Lawyers' Association of Ontario;

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 following decision was delivered for the court on October 5, 2012, in both official languages, by McLachlin, C.J.C.

Appeal allowed in part.

Editor: Elizabeth M.A. Turgeon

Criminal Law - Topic 670.2

Sexual offences - Rape or sexual assault - Aggravated sexual assault defined - Section 265(3)(c) of the Criminal Code provided that "fraud" vitiated consent to sexual activity - The Supreme Court interpreted "fraud" in this context - The court's interpretation of s. 265(3)(c) was informed by four considerations, namely (a) the purposes of the criminal

law; (b) the common law and statutory history of the concept; (c) Charter values, particularly equality, autonomy, liberty, privacy and human dignity; and (d) the experience of other common law jurisdictions - See paragraphs 12 to 105.

Criminal Law - Topic 670.2

Sexual offences - Rape or sexual assault - Aggravated sexual assault defined - Section 265(3)(c) of the Criminal Code provided that "fraud" vitiated consent to sexual activity - R. v. Cuerrier (SCC 1998) provided that the test for "fraud" in the case of undisclosed HIV status required proof of two elements: (1) a dishonest act (i.e., a misrepresentation or non-disclosure of HIV); and (2) deprivation (i.e., whether the act posed a "significant risk of serious bodily harm") - The Supreme Court of Canada stated that "While it may be difficult to apply, the Cuerrier approach is in principle valid. It carves out an appropriate area for the criminal law - one restricted to 'significant risk of serious bodily harm'. It reflects the Charter values of autonomy, liberty and equality, and the evolution of the common law, appropriately excluding the Clarence line of authority. The test's approach to consent accepts the wisdom of the common law that not every deception that leads to sexual intercourse should be criminalized, while still according consent meaningful scope. While Cuerrier takes the criminal law further than courts in other common law jurisdictions have, it can be argued other courts have not gone far enough ... It followed that Cuerrier should not be jettisoned. The problems of uncertainty and appropriate reach that have emerged in its application should be addressed, but to the extent possible within the general framework of Cuerrier" - See paragraphs 58 and 60.

Criminal Law - Topic 670.2

Sexual offences - Rape or sexual assault - Aggravated sexual assault defined - In R. v. Cuerrier (1998 SCC), the court established that the failure to advise a sexual partner of one's HIV status may constitute fraud vitiating consent giving rise to a charge of aggravated assault - The Supreme Court of Canada stated that while Cuerrier laid down the basic requirements for the offence, the precise circumstances when failure to disclose HIV status vitiated consent and converted sexual activity into a criminal act remained unclear - In clarifying the Cuerrier test, the court stated that "... 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. If the HIV-positive person has a low viral count as a result of treatment and there is condom protection, the threshold of a realistic possibility of transmission is not met, on the evidence before us" - See paragraphs 1 to 4 and 81 to 92.

Criminal Law - Topic 670.2

Sexual offences - Rape or sexual assault - Aggravated sexual assault defined - The Supreme Court of Canada stated that "to obtain a conviction under ss. 265(3)(c) and 273 [of the Criminal Code], 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 known the accused was HIV-positive, and where sexual contact poses a significant risk of 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. The usual rules of evidence and proof apply. The Crown bears the burden of establishing the elements of the offence - a dishonest act and deprivation - beyond a reasonable doubt. Where the Crown has made a prima facie case of deception and deprivation as described in these reasons, a tactical burden may fall on the accused to raise a reasonable doubt, by calling evidence that he had a low viral load at the time and that condom protection was used" - See paragraphs 104 and 105.

Criminal Law - Topic 670.2

Sexual offences - Rape or sexual assault - Aggravated sexual assault defined - The accused, who was HIV positive, had intercourse by vaginal penetration with four complainants (K.G., D.C.S., D.H. and S.H.) - He did not disclose his HIV status - None of the complainants were infected - He was convicted of aggravated sexual assault - The Supreme Court of Canada noted that the accused had a low viral load at the time of intercourse with S.H., D.C.S. and D.H., but did not use a condom - Consequently, the convictions on those counts should be maintained - As to K.G., the trial judge convicted on the ground that, although the accused used a condom at the time of the encounter, the accused's viral load "was not suppressed" - The Supreme Court stated that the combination of a low viral load, as opposed to an undetectable viral load, and of condom use negated a realistic possibility of transmission - The record showed that the accused's viral load was low at the time of sexual relations with K.G. - When combined with condom protection, the low viral load did not expose K.G. to a significant risk of serious bodily harm - The trial judge's conviction on this count had to be reversed - See paragraph 109.