IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***R. v. Nduwayo***,
2006 BCSC 1972

Date: 20060302
Docket: X066089-8
Registry: New Westminster

Regina

v.

Adrian Sylver Nduwayo

Ban on Disclosure
Before: The Honourable Mr. Justice Truscott

Corrigendum to Oral Reasons for Sentence

March 2, 2006

Counsel for Crown:	K. Wendel; A. MacDonald
Counsel for Defence:	P. McMurray
Place of Trial/Hearing:	New Westminster, B.C.

[1] **THE COURT:** We are here today for sentencing of Mr. Nduwayo for the convictions rendered against him by the jury.

[2] On December 13, 2005, a jury convicted Mr. Nduwayo of five counts of aggravated sexual assault; one count of attempted aggravated sexual assault; and one count of sexual assault. Each count concerned a different complainant.

[3] The combination of s. 265, 271 and 273 of the ***Criminal Code*** sets out that common assault is the application of force intentionally to another person without the consent of that other person, and sexual assault is a form of assault. Aggravated sexual assault is a sexual assault that endangers the life of the complainant. No consent is obtained to the sexual assault where the complainant submits or does not resist by reason of fraud.

[4] Section 24 and s. 660 of the ***Code*** set out the offence of attempt to commit an offence, and s. 463 sets out the penalties for attempt. In the case of an offence that carries a maximum penalty of life, the maximum penalty for attempt is 14 years.

[5] There was agreement between the Crown and Mr. Nduwayo that he had physical contact with all of the complainants in counts 1 to 6, but while he agreed that he had sexual intercourse with the complainants in 1, 2, 4, 5 and 6, he denied sexual intercourse or any genital contact with the complainant in count 3. He denied any contact at all with the complainant in count 7.

[6] On the issue of consent or lack of consent to sexual intercourse, the jury was instructed by me that the consent to engage in sexual intercourse naturally includes

the consent to the application of force inherent in that activity. However, that consent is vitiated by the existence of fraud, which is made out when the element of dishonesty, which includes non-disclosure of important facts, and the element of deprivation, which may be actual harm or risk of harm, co-exist.

[7] The jury was instructed that the Crown had to prove Mr. Nduwayo knowingly undertook the dishonesty and was aware that deprivation could result from such conduct. The jury was instructed that it was not necessary to establish that a complainant was in fact infected by the HIV virus, as deprivation was satisfied by the significant risk to the life of a complainant by unprotected sexual intercourse. The jury was instructed that there was a legal duty on Mr. Nduwayo to disclose his HIV-positive status if he had unprotected sexual intercourse with any complainant. They were instructed that there was no legal duty on Mr. Nduwayo to disclose his HIV-positive status if he used condoms at all times. The jury was also instructed that the Crown had to prove that Mr. Nduwayo had unprotected sexual intercourse with a complainant who would have refused to engage in unprotected sex with him if she had been advised he was HIV-positive. True consent must be consent to have unprotected intercourse with a partner, knowing he is HIV-positive.

[8] These instructions on the issue of consent and fraud vitiating consent were taken from the decision of the Supreme Court of Canada in ***R. v. Cuerrier***, (1998) 127 C.C.C. (3d) 1.

[9] The jury was also instructed that if it had a reasonable doubt whether any one of the complainants in counts 2, 3 or 5, who subsequently tested positive for the HIV

virus, was HIV negative when she had unprotected sexual intercourse with Mr. Nduwayo, because they believed she had, or may have already been infected by someone else or by some other means prior to Mr. Nduwayo, or in the case of the complainant in count 5, by Mr. Nduwayo himself when his condom broke, then they could not conclude beyond a reasonable doubt that he had endangered that complainant's life as she had or may have already been infected by someone else or through some other means, or again, by Mr. Nduwayo himself in the case of the broken condom in count 5. In that case, the jury was instructed that it must go on to consider the included charge against Mr. Nduwayo of attempted aggravated sexual assault.

[10] As a consequence of the finding of guilty to aggravated sexual assault of the complainants in counts 2 and 3, the jury must be taken to have concluded that Mr. Nduwayo infected these complainants with the HIV virus. With respect to the complainant in count 5, the jury was only asked to consider the included charge of attempted aggravated sexual assault, so it cannot be said that it concluded that Mr. Nduwayo infected that complainant.

[11] Now, dealing with the factual background: Mr. Nduwayo came to Canada in 1993 and to Vancouver in 1995. At some point prior to October 11th, 1996, he had attended a downtown health clinic for an HIV test, but was never contacted by the clinic after to advise of his result, and never inquired himself. Accordingly, it was not proven that he had knowledge of his HIV-positive status prior to October 1996.

[12] On October 11th, 1996, he was living with his future wife when they received

a telephone call from Dr. Patrick, a physician who held a specialty in infectious diseases including the HIV virus and AIDS. Dr. Patrick asked Mr. Nduwayo to come in to see him. Upon doing so, Mr. Nduwayo was tested again and informed that he was in fact HIV-positive. Dr. Patrick counselled Mr. Nduwayo on two occasions in two visits on the use of condoms to reduce the risk of transmission of the virus, and the importance of Mr. Nduwayo disclosing his HIV status to current and future partners.

[13] Dr. Patrick said at trial that the HIV virus endangers the recipient's life and creates a risk of early death. The virus can be transmitted after only one incident of unprotected sexual intercourse or never transmitted. Once it is transmitted, it multiplies very quickly until the recipient's immune system fights back in a few weeks. The virus remains in the body, however, and gradually, over time, the HIV virus overwhelms the body's immune system. This gradually leads to the condition of AIDS. This is the evidence of Dr. Patrick.

[14] The condition of AIDS may result in one or two years after infection, or up to ten years, but ultimately, the natural progression is to AIDS and AIDS is deadly. Dr. Patrick also said that current drug therapy does support the immune system and delays the onset of AIDS, but his opinion is that the transmission of the HIV virus still endangers a person's life through AIDS and also creates a greater risk of infection from other sources as that person's immune system begins to fail.

[15] Mr. Nduwayo agreed in his evidence that Dr. Patrick did advise him of the need to use condoms and to disclose his HIV-positive status to sexual partners. But

he said he understood disclosure to be a moral obligation only, and not a legal obligation. He understood that there was no risk of infection as long as he wore a condom. His evidence was that he wore a condom at all times with any sexual partners thereafter.

[16] As the jury was instructed that it could only convict Mr. Nduwayo for aggravated sexual assault or attempted aggravated sexual assault if they concluded, beyond a reasonable doubt, that he had unprotected sexual intercourse with the complainant they were considering in counts 1 to 6, his evidence of always using a condom for sexual intercourse with any of them must have been rejected by the jury.

[17] Mr. Nduwayo conceded in his evidence that he understood that he would be a risk if he did not use protection and had sexual intercourse, and he would have had an obligation to tell his partners he was HIV-positive, because they would have been in greater danger of him transmitting the HIV virus through unprotected sexual intercourse. I am satisfied on my review of his evidence that he was speaking of his understanding at the time, and not just of his understanding at trial.

[18] As the jury also convicted Mr. Nduwayo of sexual assault of the complainant in count 7, his evidence of not having any contact with her at all must also have been rejected by the jury.

[19] The evidence of the seven complainants that I accept for the purpose of sentencing is as follows:

[20] Count 1 is N.W., and of course there is a ban on publication that still exists.

Is that so, counsel?

[21] **MR. MacDONALD:** Yes, My Lord.

[22] **MR. McMURRAY:** Yes.

[23] **THE COURT:** N.W. met Mr. Nduwayo in March, 2001. On one occasion that month, he invited her over to his home where they had unprotected sexual intercourse in a downstairs bedroom. This was the only sexual encounter that she had with Mr. Nduwayo. He never told her he was HIV-positive, and he never used or suggested a condom. Her evidence was that she would not have had sexual intercourse with him if he had told her he was HIV-positive.

[24] Her victim impact statement indicates that she was in her final year of her undergraduate degree when she became involved in the investigation of Mr. Nduwayo and, upon being informed that she might be HIV-positive, it became very difficult for her to focus on her course work. She had to tell her fiancé that they both needed to be tested for the HIV virus and the emotions of having put her partner in danger, and having to inform him of the danger, has had a lasting effect upon her. Fortunately, she has continued to test negative for the virus. Emotionally, she does not consider that she has really begun to deal with Mr. Nduwayo's effect on her life. She became shut off and distant in her attempt to put her emotions aside, and it is only recently that she has realized the need for counselling.

[25] The second complainant is C.N. C.N. met Mr. Nduwayo in the year 2000 when she was 19 years of age. They had their first incident of sexual intercourse in

mid-September or early October, 2000. Before intercourse, she asked Mr. Nduwayo about condoms, but he said he did not want to use one because it did not feel the same for him. As she had started on birth control pills, she was not concerned about pregnancy and they proceeded to have unprotected sexual intercourse several times a week. She got sick in October, 2000, and she stopped taking birth control pills. When she was released from hospital, she resumed her relationship with Mr. Nduwayo but she could not afford to buy birth control pills any longer. She suggested condoms again, but Mr. Nduwayo said again that he had no interest in condoms as it did not feel the same for him.

[26] They continued with unprotected sexual intercourse and no birth control until January 2001 when she learned she was pregnant. She informed Mr. Nduwayo that the baby was his but he denied that and has never seen the baby. Their relationship ended in January or February, 2001. She visited her doctor in March, 2001, and it was he who told her for the first time that she was HIV-positive. Her son was born in March, 2001, and at one year of age was diagnosed as HIV-negative. Her evidence is that Mr. Nduwayo never informed her that he was HIV-positive, and if he had ever disclosed that, she would never have had sexual intercourse with him.

[27] Her victim impact statement indicates that the infection of her with the HIV virus has changed her life drastically. The last five years have been a terrible five years emotionally with depression, anxiety, lack of self confidence. She never enjoyed her pregnancy as she was stressed out and not sure if her baby was going to test positive. She was not able to breast-feed her baby because of the risk of transmission to him. She had thoughts of suicide so her family would not have to

worry about her, and she would not have to worry about her baby or herself.

[28] When her baby was born, she had to watch her son being tested for the virus and her depression became worse. The depression caused her to lose her self-esteem and gain weight and her personality changed. She became angry quite easily. She had wanted to go through schooling to be a nurse, but found out she could not because of her HIV-positive status, and so she began studies to become a legal secretary. However, she fell into another depression and left school before she graduated, putting herself into debt.

[29] She has had to disclose to men that she is now HIV-positive, which she finds to be absolutely humiliating. She refuses to date people who are not positive and she has turned to the internet to find men who are HIV-positive. Fortunately, she says, she has found someone who she loves, but she is constantly battling with her self-confidence in that new relationship.

[30] The third complainant is E.K. E.K. came to Canada from Kenya in 1996 on a student visa, and subsequently became a registered nurse in 2001. She was a virgin when she met Mr. Nduwayo in 2001. Initially, they were just friends, but towards the end of August or early September, 2001, he asked her if they could try out a relationship for a month, and she agreed. She told him that her faith did not allow her to have sexual intercourse before marriage, and she wanted to maintain her faith, and she told him that she had never had sexual intercourse before. During the initial trial period, there was only heavy petting.

[31] She says that early in the relationship, she asked him if he had ever been

tested for sexually-transmitted diseases, and he said that he had no diseases or his daughter from his marriage in 1997 would have it, and she did not.

[32] E.K. describes herself as very naïve at the time, and suggested that Mr. Nduwayo use a condom, but he said he would not come inside. She was not taking any birth control measures at the time and did not want to get pregnant. The heavy petting progressed, and they began to have unprotected sexual intercourse in October, 2001. She says that their sexual relationship continued with unprotected sex through to April, 2002, when they broke up.

[33] In June, 2002, she discovered that she was pregnant, and through a contact with the complainant, C.N., who said that she had contacted the HIV virus, she decided that she should be tested. In July, 2002, she was tested and confirmed to be HIV-positive. She started taking medication for the virus in September, 2002, and approximately two weeks later, she miscarried. Based upon her estimate of the date of conception of early April, 2002, she considers that Mr. Nduwayo was the father of her child, although she never told Mr. Nduwayo that he might be the father. She says that Mr. Nduwayo never told her that he was HIV-positive when they had unprotected sexual intercourse, and she would not have had intercourse with him if she had been told.

[34] In her victim impact statement, she says that the HIV-positive status has been absolutely devastating on her life. She met Mr. Nduwayo in 2001 when she had graduated from nursing and was so full of hope for the future and eager to begin her career. Now she looks back on that year with sadness and regret. When she found

out she was HIV-positive, she was devastated and felt like it was a death sentence, that her life was over. She withdrew from all her friends and loved ones as it was better to be isolated and alone than to face them. She feared sharing what happened with anyone for fear of being stigmatized and rejected. Her future was filled with fears and uncertainty, including her ability to have children and how much longer she would live. All her hopes for a nursing career that involved travel were out of the question. She says that, overnight, her life went from one of perfect health to one filled with blood tests and medications just to survive. Her energy level has been severely affected, both mentally and physically. Every day is a battle, sapping away her energy and leaving her depressed and hopeless. Her medications and side effects are a daily reminder that she is living with a life-threatening illness that also exposes her to a myriad of illnesses that she would not have to worry about if she did not have a compromised immune system.

[35] She has found that different forms require her to disclose her HIV status when she wishes to be involved in certain activities, and so she finds it easier to refrain from signing up for anything than risk the stigma and rejection that accompanies the disclosure. Volunteering for child care is something she misses dearly.

[36] Fortunately, she found that she can still have children and has done so, but she finds it painful to put her baby through all the blood work and medication and the fact that she cannot breastfeed her baby breaks her heart.

[37] Because she is HIV-positive, she is not allowed to emigrate to Canada as a skilled worker, and may not be allowed to stay in the country the next time she has

to apply for a work permit. Even if she can remain in the country, she fears she may not be able to continue working as a nurse.

[38] She says her relationship with her husband has been adversely affected as her HIV status hangs over their relationship like a cloud. She says it is difficult for her to consider herself worthy of his love and she feels like a reject. She dreads being intimate with her husband due to fear of transmission. The financial impact on her has also been significant as she has to travel to Vancouver for medical attention, often every week, missing work and costing money.

[39] She says that she has forgiven Mr. Nduwayo as she will not allow bitterness and anger towards him to ruin her life, but that does not change the fact that he violated her human right to health and life.

[40] The next complainant is D.T. D.T. was 24 years old when she met Mr. Nduwayo at the end of December, 2001. Matters progressed very soon thereafter to an intimate relationship. She says there was no discussion of safe sex, but she insisted he wear a condom. He said that was not necessary as there was nothing to worry about, but she insisted. She saw Mr. Nduwayo every couple of weeks for the next six months in what she terms a casual relationship.

[41] The second incident of sexual intercourse progressed faster than she wanted, without a condom, but she stopped it and insisted on a condom. Again, Mr. Nduwayo said it was not necessary but she insisted, and he put one on. She says that they had unprotected sexual intercourse for approximately 15 minutes that time before he put on a condom. With this exception, they used condoms every time they

had sexual intercourse over the six-month period of their relationship. She says that if he had told her he was HIV-positive, she would never have had sex with him. After six months, she stopped seeing Mr. Nduwayo. After he was arrested, she was tested for the HIV virus and was determined to be negative.

[42] In her victim impact statement, she says that when she found out Mr. Nduwayo had the HIV virus, she was scared that she had been infected and that her fiancé at the time could possibly be infected as well, and it would be her responsibility without even knowing it. When the full impact of the situation hit her, she became an emotional mess, crying uncontrollably. The experience of going to get an HIV test was humiliating and she considers that to be the longest week of her life. She had to drag herself out of bed to go to work and she was not talkative, ignoring all her friends and family.

[43] The next complainant is D.D. Mr. Nduwayo was found guilty of attempted aggravated sexual assault of her. She met Mr. Nduwayo in the fall of 2001 through mutual friends, but then had no further personal contact with him until February or March, 2002. She had her first occasion of sexual intercourse with him towards the end of April 2002. She says that they discussed sexually transmitted diseases and the fact that she did not want to get pregnant. She told him that either she had to wear a condom or he did. She says that there was no argument from him. She provided the condom on the first occasion, and she says she had problems with the comfort of the condom, but they persisted.

[44] The second incident of sexual intercourse between them was around the end

of May, 2002, and again, a condom was used that she provided. The third occasion was in early June, 2002, when she again provided the condom, but on this occasion, she realized that he had ejaculated in her, and when he pulled out, there was a hole in the condom. She says that he ejaculated just as the condom broke. She was concerned for pregnancy and for sexually-transmitted diseases but she did not have a test taken after that occasion, as she hoped that he would have told her if he had a concern for his own health.

[45] The final time that they had sexual intercourse was towards the end of July, 2002, when, again, a condom was used, but it was painful for her, and a point came when they discarded the condom and continued with unprotected sex. She says that it went through her mind on that occasion that since they had already had unprotected sex when the condom had broken and she had not caught anything, that it must be okay to go ahead with unprotected sex.

[46] She had ended a previous relationship about the time she started her relationship with Mr. Nduwayo, and she resumed that other relationship after her relationship with Mr. Nduwayo ended around the middle of 2002. She tested positive for the HIV virus, and this testing took place about 20 to 22 months after her last sexual intercourse with Mr. Nduwayo. It is not proven that Mr. Nduwayo caused her HIV-positive status. She says that Mr .Nduwayo never told her that he was HIV-positive and she would never have agreed to sexual intercourse with him if she had known.

[47] In her victim impact statement, she says that she has experienced bouts of

depression and anxiety since finding out that she has the HIV virus and when she had to notify her partners verbally. She sought counselling to deal with her emotions, such as constant crying, anger, denial, despair and hatred, and she also had thoughts of ending her own life. However, she says she has decided to try to live her life as best she can with a positive attitude. Her lifestyle has changed, however, in that she does not socialize with friends and co-workers as in the past because of her depression and the negative outlook she has on her life. She does not feel comfortable yet providing her medical status to anyone, so she has refrained from having any intimate relationships.

[48] The next complainant is T.F. She and Mr. Nduwayo started dating around the beginning of November, 2002, and they became sexually intimate for the first time about one month later. She says that she and Nduwayo discussed the subject of the HIV virus beforehand, and both said they were okay. However, she used a condom from her own wallet because, she says, she was concerned about getting the HIV virus as she had been in a relationship with someone else who she was concerned about, and she knew that Mr. Nduwayo had been with other partners as well and also had a child. She was having herself tested every six months.

[49] Her evidence is that she and Mr Nduwayo had sexual intercourse approximately three times a week, and for the first couple of months they used condoms because of her concern for the HIV virus, whenever those condoms were available. However, when they were not available, they had unprotected sexual intercourse. She was taking birth control pills.

[50] After the first couple of months, they abandoned the condoms completely and continued thereafter with unprotected sexual intercourse. Their relationship continued through to July, 2003, with unprotected sexual intercourse two or three times a week until she broke off the relationship. However, in October, 2003, they resumed their relationship again without condoms for sexual intercourse. That unprotected sexual intercourse continued for about a month until Mr. Nduwayo was arrested and put into custody.

[51] She had a hard time believing the allegations against him, that he was HIV-positive, and that he had not disclosed that to his partners with whom he was having unprotected sexual intercourse, and she visited him in custody in December, 2003, and discussed these allegations with him. At that time he said he did not know what she was talking about as he was only then just being tested and he showed her a bandage on his arm. She continued to visit him in custody two or three times a week, and about a month later, he told her that he had tested HIV-positive. She provided the surety for his release, and he came to live with her thereafter, but they only had sexual intercourse once when she used a condom to protect herself.

[52] However, at one point in time, she found papers of his that indicated that he might have known he had the HIV virus since 1997. She confronted him, and he acknowledged that he had known he was HIV-positive since 1997, but he did not feel that he had to tell anyone because it would ruin his soccer career and he wanted children, so he decided to keep it to himself. She was shocked by this, and one week later, she rendered his surety and asked him to leave the house and he did. She has always tested HIV-negative and continues to be tested. She says she

never would have had unprotected sex with him if she had known he was HIV-positive. T.F. did not file a victim impact statement.

[53] The final complainant is A.S. Mr. Nduwayo was convicted of sexually assaulting her. On one occasion in March, 2003, she returned to Mr. Nduwayo's house with him after being with him at a pub. She was 17 years old at the time. They stopped on the way home to buy a mickey of vodka. She had already had five or six bottles of Smirnoff ice cooler at the pub. When they got to his house, she had two double shots of vodka. She was feeling quite tipsy and ready to go home after she had been there for about one-and-a-half hours. She told him that she wanted to go home. He said he did not want her to go, but he would call his driver. However, after being on the telephone, he said he was not able to reach his driver and she would have to stay the night and she agreed. He showed her to his room and to his bed, and he started to take his own clothes off when she asked him what he was doing. He told her not to worry, that nothing could happen. She did not see anything wrong with both of them sleeping in the same bed. She says she was fully dressed and she put a pillow between them on the bed, and then she passed out.

[54] She woke up to find that he was lying on top of her and his feet were pinning her feet and he was groping her breasts underneath her shirt and rubbing on her. She told him to stop and pushed him off. She was still wearing her own clothes while he had shorts and a t-shirt on. She immediately passed out again, but woke up once more to find that her pants were undone and pushed down, and he was on top of her, pinning her hands over her head and grinding into her. She says she could feel his penis on her stomach as her shirt was up. He then ejaculated on her

stomach. She pushed him off once again and got up and washed herself off. He called a cab, and the cab appeared instantly and took her home. She has never spoken to him again. She says that she attended a clinic to be tested for the HIV virus and she has tested negative. She says she never agreed to any sexual contact with Mr. Nduwayo at any time. She also has not filed a victim impact statement.

[55] Now, I want to turn now to the sentencing requirements set out in the ***Criminal Code*** and by the case law. The ***Criminal Code*** states that the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

> To denounce unlawful conduct,
>
> To deter the offender and other persons from committing offences,
>
> To separate offenders from society where necessary,
>
> To assist in rehabilitating offenders,
>
> To provide reparations for harm done to victims or to the community and to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

[56] In my opinion, the particular objectives that are dominant in the circumstances here are denunciation, deterrence, the separation of Mr. Nduwayo from society, and

the need to promote a sense of responsibility in him and acknowledgement of the harm done to the victims.

[57] The ***Code*** requires that any sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. These are very grave offences in my view, and the degree of responsibility of Mr. Nduwayo I consider to be very high.

[58] The ***Code*** requires the court to take into account any relevant aggravating or mitigating circumstances relating to the offence or the offender. Additionally, the court must take into consideration that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances and that, where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[59] In the case of ***R. v. C.A.M.,*** another decision of the Supreme Court of Canada, the Chief Justice for the Supreme Court of Canada explained that the relevant weight and importance of the factors will vary depending on the nature of the crime and the circumstances of the offender. He said:

> In the final analysis, the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a 'just and appropriate' sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.

[60] In the case of ***R. v. Cuerrier***, referred to earlier, in reply to a submission that the criminal law is not the most effective tool for dealing with the HIV transmission and that issue should be left to public health initiatives, Mr. Justice Cory, in the

Supreme Court of Canada, writing for the majority stated that:

> The criminal law provides a needed measure of protection in the form of deterrence and reflects society's abhorrence of the self-centred recklessness and the callous insensitivity of the actions of the accused and those who have acted in a similar manner. The risk of infection and death of partners of HIV-positive individuals is a cruel and ever-present reality. The risks of infection are so devastating that there is a real and urgent need to provide a measure of protection for those in the position of the complainants. If there ever was a place for the deterrence provided by criminal sanctions, it is present in these circumstances. It may well have the desired effect of ensuring that there is disclosure of the risk and that appropriate precautions are taken.

[61] I want to turn now to the range of sentences that exist for offences such as this as established by previous case law. The Crown relies upon these cases as giving considerable guidance to the court for the appropriate sentences individually and the overall sentence that should be imposed in this case.

[62] The first case is a decision of the Newfoundland Court of Appeal in 1993 called ***R. v. Mercer***. In that case, in 1991, Mr. Mercer met a health officer who advised him that he had been identified as a partner of a female person who had tested HIV-positive, and accordingly, he was a potential carrier of the virus himself. He supplied a sample of his blood for testing and he was informed that until the results were known, he should assume he was a risk to others and if he was to engage in sexual activity, he should use a condom. Later analysis of his blood sample established conclusively that he was HIV-positive.

[63] In June, 1991, he established a relationship with a 16-year-old girl and began unprotected sexual intercourse with her without informing her of his potential health

condition. She had specifically asked him to use a condom, but he advised her that there was no need.

[64] At the outside, the conclusive proof that he knew he was HIV-positive was July 12, 1991, at a meeting with the same medical officer who reconfirmed the earlier advice regarding the risk he presented to current and future partners, and advised him that he should inform all partners of his HIV-positive status and ensure that he engaged in the safer practice of using a condom. Nevertheless, despite these warnings, he continued with unprotected intercourse with that 16-year-old girl without informing her of his HIV-positive status. She, that 16-year-old girl, was contacted indirectly to indicate that she should be tested for the HIV virus. She told Mr. Mercer that she had to be tested and she was privy to rumours that he had been engaged in relations with a person known to have the virus. He replied that, in that relationship, he had used a condom. When she said he should get tested also, he indicated he would without telling her that he already knew about his positive status.

[65] She was tested, the readings were not conclusive. She and Mr. Mercer moved from the area. Subsequently she was tracked down and advised that Mr. Mercer was HIV-positive. Even then she continued to engage in unprotected sexual relations with him, as she thought it was too late for her to do anything about it. Subsequently, she submitted to a second test and received confirmation that she was in fact infected with the HIV virus. Mr. Mercer was arrested and charged with the offence of criminal negligence causing bodily harm, which carries a maximum penalty of ten years.

[66] Following his arrest, the police received contact from another woman advising them that she had also been infected with the virus by Mr. Mercer the previous summer. They had had two sexual encounters in July, 1991. The first incident may have been after Mr. Mercer was advised that he was a potential carrier but before confirmation of that condition, but the second incident was at a date after he knew that he was HIV-positive. That complainant specifically asked Mr. Mercer on the first occasion whether there was any reason why he should use a condom, and he assured her that it was unnecessary and it was perfectly safe for him to engage in sexual relations without one. She relied on this assurance thereafter. As a result of rumours about Mr. Mercer, she was tested in September and her infection was confirmed.

[67] Mr. Mercer pleaded guilty on the basis of a statement of facts presented to the sentencing judge, substantially as I have already outlined, and the sentencing judge imposed a sentence of 12 months' imprisonment for criminal negligence against the 16-year-old girl, and 15 months' imprisonment for criminal negligence against the second complainant.

[68] The Crown appealed the sentences to the Newfoundland Court of Appeal. I am going to spend some time setting out the comments of the Court of Appeal in some detail, because I consider these comments to be equally applicable to Mr. Nduwayo. I do not consider that I can say it any better.

[69] The consequences of Mr. Mercer's conduct for the two women were viewed by the Court of Appeal as catastrophic and dreadful. While the court cautioned

against over-emphasizing the gravity of the consequences of a criminal act, the consequences could not be ignored, and it said that the magnitude and depth of the aftermath of Mr. Mercer's acts must find appropriate expression in the severity of his sentences. These comments are particularly applicable to Mr. Nduwayo in the case of the two women who he did infect with the virus.

[70] In addition, the court said that the fact that the evidence showed that Mr. Mercer acted deliberately, in full awareness of his condition and with foresight of the probable consequences which that knowledge imported, had to be taken into consideration as an aggravating factor in weighing the fitness of his sentences. Again, these comments apply to Mr. Nduwayo as well.

[71] Moreover, Mr. Mercer's deceitful assurances to his partners that protection was unnecessary heightened the deliberate aspect of his criminality, as did the whole pattern of his deceptive conduct throughout. The court stated that these calculated actions evidently undertaken to satisfy his own predilections and desires put the degree of his culpability at a very high level. The court said that that must tell against him as well in assessing his punishment. Once again, I consider these comments as applicable to Mr. Nduwayo in those cases where he tried to assure a complainant that no condom was necessary or he did not create any risk.

[72] The court noted that prevention remains the only effective means of controlling the spread of AIDS, and a deterrent sentence was one means of prevention in that it served to dissuade others who might be inclined to emulate Mr. Mercer's deplorable conduct. The court considered that to be a very good reason to

include general deterrence as a significant component in fixing the length of incarceration in the case. To those who argued that any period of imprisonment was counter-productive and operated at cross purposes to efforts directed towards curbing the spread of the disease, the court viewed that reasoning as suggesting that individuals are likely to be dissuaded from seeking voluntary testing if they are aware that criminal sanctions are more likely to be imposed once they know they are HIV-positive. In answer, the court noted that it was not dealing with the criminalization of the spread of HIV, as the sentences meted out would have potential consequences only for individuals capable of such callousness and ruthlessness that they would intentionally put their partners at mortal risk solely to satisfy their own immediate proclivities.

[73] The court said:

> Individuals who have proven themselves capable of paying no heed whatsoever to competent and authoritative medical instruction as to the measures absolutely essential for the protection of others from HIV infection represent a grave danger to society and they cannot be allowed to circulate freely in it for fear that they will continue to knowingly infect other unwitting partners with impunity. By the same token, others who might be inclined to emulate these actions must not be allowed to gain any impression that they can pursue such a deplorable course of conduct without risking sanctions. The consequences are too grave for society not to take every means at its disposal to curb such conduct and the court has a duty to protect the public accordingly.

[74] I totally concur with these comments.

[75] Mr. Mercer's conduct did not serve to instil any confidence in the court that he would abstain from unprotected sexual relations with unwitting partners if given the

opportunity. It showed that he had the capacity to act with calculated contempt for any warnings as to the danger of his actions purely to satiate his amorous desires and appetites. The same can be said for Mr. Nduwayo.

[76] The court also stated that the final factor bearing upon the length of the appropriate prison terms was that they must run consecutively because the crimes were separate and unrelated to one another. Not to impose successive custodial terms in these circumstances would signify to like-minded offenders that if one crime were committed, the same wanton reckless conduct could be visited upon others with impunity, without incremental consequences. I agree with this approach.

[77] Considering all the factors, the court imposed a sentence of six years on Mr. Mercer for criminal negligence involving the second complainant, and five years for criminal negligence with respect to the 16-year-old girl. The aggregate 11 years the court considered addressed the imperatives of general and specific deterrence without reduction.

[78] Finally, the court recognized that Mr. Mercer is, as Mr. Nduwayo, himself a victim of AIDS and subject to the same bleak prognosis as the women whom he infected. The court said that an equal measure of sympathy could be given to Mr. Mercer up to the time he was informed of his own condition. But since that point in time, he effectively and progressively dissipated the reservoir of compassion which might otherwise have been accorded to him. I say the same for Mr. Nduwayo.

[79] Nevertheless, Mr. Mercer was still entitled to a degree of compassion as one could not escape the realization that a long period of imprisonment imposed upon

him might be tantamount to a life sentence. However, the court said any such sentiment had to cede to the imperative of public protection. The court said:

> It is vital that persons similarly situate who might otherwise be inclined to emulate Mr. Mercer's conduct understand that they risk incurring a period of imprisonment commensurate with their conduct, even if it exceeds their life expectancy, if by their actions they effectively wreak a life sentence upon their unwitting partners.

[80] The next case is ***R. v. Miron***, a decision of the Manitoba Provincial Court. In this case, Mr. Miron was involved with four different complainants in sexual relations. He had unprotected sexual intercourse with each of them over a period of time without disclosing that he was HIV-positive. In the case of two of the complainants, he lied to them about his HIV status. Two of the complainants remained HIV-negative while the other two tested HIV-positive. However, it could not be proven that Mr. Miron infected these latter two complainants, so the circumstances were treated, for the purpose of sentencing, as if Mr. Miron did not infect them.

[81] He pleaded guilty to four charges of aggravated sexual assault and appeared remorseful. He had a lengthy criminal record and was on probation during some of the offences. The trial judge said that each of the charges in the circumstances could justify a significant term of incarceration of three years, but taking into account the principle of totality, Mr. Miron's early guilty plea and expression of remorse and taking into account his time in custody, the court sentenced him to a term of incarceration of two years on each of the charges for a total sentence of eight years.

[82] The next case is ***R. v. Williams***, a decision in 2004, again, another decision of the Newfoundland Court of Appeal. Mr. Williams was convicted at trial of offences

relating to exposing three complainants to the risk of HIV infection through sexual intercourse. As to the first complainant, he was convicted of aggravated assault but that conviction was set aside on appeal with a substitute conviction of attempted aggravated assault. As to the remaining two complainants, he pleaded guilty to aggravated assault but appealed the sentences. The maximum sentence for aggravated assault was and is 14 years.

[83] The circumstances were that in November, 1991, he was advised by a physician that he had tested positive for the virus and was counselled about HIV on at least three different occasions by two physicians and a nurse. He was told about transmission of the virus and his duty to disclose his HIV status to sexual partners. He was already in a relationship with the first complainant, but when he tested positive for the HIV virus, he did not tell her, but continued to have unprotected sexual intercourse with her until November in 1992, a period of one year. That complainant ultimately tested positive for the virus herself and Mr. Williams admitted that he had infected her with the virus.

[84] At trial, he was sentenced to five-and-a-half years' imprisonment for aggravated assault of that complainant, but as previously stated, that conviction was set aside in the Court of Appeal where he was sentenced for the attempted offence.

[85] The second complainant had unprotected sexual intercourse with Mr. Williams on two occasions in 1995. Mr. Williams had unprotected sexual activity with the third complainant over an extended period of time from August 1993 to December 1994, approximately 16 months. Neither of these complainants became

infected with the virus. The trial judge decided that an appropriate sentence for the offence against the second complainant would be three years' imprisonment, and against the third complainant, four years' imprisonment.

[86] On appeal, Mr. Williams submitted that these sentences were too harsh and should be reduced down to six to 12 months for the second complainant, and two years for the third complainant.

[87] Turning to the third complainant, the Court of Appeal considered the circumstances of that long-term relationship to be similar for those for which Mr. Mercer had been sentenced to six years' imprisonment except that the complainant in the case of Mr. Williams was not infected with the virus. The court also pointed out that Mr. Mercer had been convicted of criminal negligence causing bodily harm for which the maximum penalty was ten years imprisonment, while Mr. Williams was convicted on the more serious offence of aggravated assault for which the maximum penalty is 14 years. The court upheld the sentence for aggravated assault of the third complainant of four years, and of the second complainant of three years. The court noted that, in both instances, the Crown did not request an increase in the sentences, possibly suggesting the court might have been inclined to entertain such a submission.

[88] Also in the same time period as the decision in ***Williams***, our Provincial Court in ***R. v. Smith*** (phonetic) in the year 2004, considered the sentence of Mr. Smith following his guilty plea to a charge of sexual assault where the maximum sentence was and is ten years. Mr. Smith had unprotected sexual relations with the

complainant many times over several months while knowing he was HIV-positive and without disclosing his condition to the complainant. He apologized for his conduct during the proceedings. He had served seven months in custody. Taking in to account his time already served, he was sentenced to a further term of imprisonment of 42 months, three-and-a-half years. The woman had not contracted the virus.

[89] Mr. Smith appealed his sentence and our Court of Appeal upheld the sentence stating that it was not unfit given the authorities to which the trial judge was referred, and the court said that 42 months was in the mid-range of appropriate sentences for the case.

[90] Finally, in February, 2005, in ***R. v. DeBlois***, the Ontario trial court sentenced Mr. DeBlois on a guilty plea to attempted aggravated sexual assault. Mr. DeBlois had ignored evidence of his condition of being HIV-positive and had unprotected sex with the complainant in the summer of 2002 resulting in her contracting the disease. The early guilty plea and his remorse were mitigating factors. His prior criminal record and the serious nature of the offence, the impact on the complainant, as well as his knowledge of his condition, were considered to be aggravating factors. Mr. DeBlois had been in pre-trial custody for about a year. Recognizing that, the trial judge considered the appropriate sentence to be three years.

[91] The Crown submits here that the individual sentences for the offences against the seven complainants should total a range of 29 to 35 years, and that after giving Mr. Nduwayo double time for the time that he has already served in custody, and

after applying the principle that the combined sentence should not be unduly long or harsh, the total sentence should be 20 years.

[92] This might also be referred to as an application of the totality principle. This principle was explained by the Supreme Court of Canada in the case of ***R. v. C.A.M.*** through the adoption of the description by D.A. Thomas in "Principles of Sentencing" as follows:

> The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed, and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is just and appropriate.

[93] Mr. Nduwayo's counsel makes a number of submissions as to why the reasoning in the Crown's cases that I have just discussed should not be followed. He submits that the judgment in ***Cuerrier*** was a visceral reaction to the fact that Mr. Cuerrier had unprotected sexual intercourse with the complainant at least 100 times, and he points out that Mr. Cuerrier was never sentenced because he died before a new trial took place. He also points out that, at one time, these same circumstances were being charged under the offence of common nuisance or assault causing bodily harm with shorter maximum sentences. It was only because the Supreme Court of Canada in ***Cuerrier*** declared that conduct like Mr. Nduwayo's amounts to fraud vitiating consent that he finds himself convicted of the more serious offence of aggravated sexual assault carrying with it a maximum sentence of life.

[94] My response to this submission is that it may be unfortunate for Mr. Nduwayo

that the Supreme Court of Canada has determined that his conduct amounts to fraud vitiating consent, but the fact of the matter is that he has been found guilty on the law of the offence of aggravated sexual assault by a jury of his peers, and that conviction carries a maximum penalty of life imprisonment, rather than the maximum penalty for common nuisance of two years, or assault causing bodily harm of ten years.

[95] His counsel also makes the submission that treating the problem of the HIV virus in the context of criminal proceedings criminalizes a segment of society that may create a chilling effect on the willingness of people to be tested. That submission has already been rejected by the Supreme Court of Canada, which decision I, of course, accept.

[96] He submits that Mr. Nduwayo is going to have a tough time in prison because of the expected treatment by other prisoners, and he is in danger of not getting proper medical treatment for his condition. I do not consider that these issues of Mr. Nduwayo's treatment in prison, medical or otherwise, are to be given any consideration by the court on sentencing. These are issues to be determined by the rights of Mr. Nduwayo while he is in the penal system following sentencing.

[97] His counsel also submits that the 20 years that the Crown seeks for a total sentence applying the principle of totality would create the stiffest sentence for this offence in this country, and would possibly be beyond the life expectancy of Mr. Nduwayo. Mr. Nduwayo is a relatively young person who appears to be presently in good physical health. He has had the HIV virus now for at least ten years, and does

not show any signs of AIDS. His counsel says that he is taking medicine on prescription to reduce the level of infection and improve his immune system and has been successful. I hope for Mr. Nduwayo's sake that he is able to continue to receive the medicine and that it will continue to benefit him. I also have the same hope for the two complainants that he has infected. It is possible that a lengthy period of imprisonment could be beyond Mr. Nduwayo's life expectancy, but his life expectancy remains a matter of some speculation that I cannot take into account.

[98] Mr. Nduwayo's counsel submits that he should be given an enhanced credit for pre-trial custody beyond the approximate four years or double time that the Crown is prepared to concede and, in addition, should only be given a short period of incarceration if any more time is to be given at all. He cites cases throughout the country where violence was involved, either in the case of sexual assault causing bodily harm or aggravated assault causing brain injury, in which the sentences ranged from five years to 14 years. I do not find these cases to be of assistance as they all dealt with entirely different circumstances, and I am required to consider the principle that any sentence should be similar to those imposed on similar offenders for similar offences. In any event, they all deal with circumstances facing only a single complainant and here I must deal with a total sentence that is appropriate for the offences against seven complainants.

[99] Before considering the appropriate sentence that should be imposed in the case of each complainant, I will say again that I wholeheartedly endorse all the comments of the Newfoundland Court of Appeal in ***R. v. Mercer*** that I have already outlined in great detail. All are directly applicable to Mr. Nduwayo's conduct, and I

see no point in repeating them further. The consequences of Mr. Nduwayo's conduct are catastrophic and dreadful in the case of those complainants who have subsequently tested HIV-positive. The evidence shows that he acted deliberately and in full awareness of his condition with the foresight of the probable or at least possible consequences that could result. With some of the complainants, his deceitful assurances that protection was unnecessary heightened the deliberate aspect of his criminality and his calculated actions undertaken to satisfy his own predilections and desires put the degree of his culpability at a very high level. A deterrent sentence that will serve to dissuade others who might be inclined to emulate Mr. Nduwayo's conduct and that has the result of preventing Mr. Nduwayo himself from continuing to infect other unwitting partners with impunity is most appropriate.

[100] The individual sentences, in my view, should run consecutively because the crimes were separate and unrelated to one another.

[101] Mr. Nduwayo, would you please stand, and if you have anything to say to the court before I pronounce sentence, would you do that now, please.

(THE ACCUSED ADDRESSES THE COURT)

[102] **THE COURT:** Thank you, sir.

[103] ***** INSERT PREVIOUS REASONS HERE *****

"J. Truscott, J."
The Honourable Mr. Justice J. Truscott

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***R. v. Nduwayo***,
2006 BCSC 1972

Date: 20060302
Docket: X066089-8
Registry: New Westminster

Regina

v.

Adrian Sylver Nduwayo

Ban on Disclosure
Before: The Honourable Mr. Justice Truscott

Oral Reasons for Sentence

March 2, 2006

Counsel for the Crown:	K. Wendel; A. MacDonald
Counsel for the Accused:	P. McMurray
Place of Trial/Hearing:	New Westminster, B.C.

[1] **THE COURT:** Mr. Nduwayo, would you stand up again, please?

[2] In the case of the complainant, N.W., she had unprotected sexual intercourse with Mr. Nduwayo on one occasion. While there was no discussion between them of the HIV virus, Mr. Nduwayo did not disclose to her that he was HIV positive and no condom was used. Fortunately, she has subsequently tested HIV negative. I consider it to be an aggravating circumstance that Mr. Nduwayo acted deliberately, in flagrant disregard of the possible harm that his actions could cause to her. This is a circumstance bearing upon his degree of responsibility under the ***Criminal Code***.

[3] Mr. Nduwayo's counsel submits that he was operating under a mistaken belief that his risk of infection must be very low, because he was allowed to be part of a study group and because he was never informed otherwise. However, the jury rejected Mr. Nduwayo's evidence that he always used a condom for intercourse, and Mr. Nduwayo, in his own evidence admitted that for him to have had unprotected sexual intercourse with any of the complainants would have exposed them to a greater risk of transmitting the HIV virus and would have required him to tell them that he was HIV positive. Accordingly, I cannot accept, on the findings of the jury, that he had mistaken belief about his risk of infection.

[4] The only mitigating circumstance that Mr. Nduwayo is entitled to is the fact that he has no prior criminal record.

[5] In ***R. v. Williams***, [2004] N.J. 140, the second complainant had unprotected sex with Mr. Williams on two occasions and was not infected with the virus. Mr. Williams pleaded guilty to aggravated assault with a maximum sentence of 14 years

and was sentenced to imprisonment for three years. Mr. Nduwayo is not entitled to any credit for a guilty plea.

[6] I consider an appropriate sentence for Mr. Nduwayo, in the case of N.W., to be three years.

C.N.

[7] In the case of the complainant, C.N., she had unprotected sex with Mr. Nduwayo over a period of time of four to five months. Again, there was no discussion between them of the virus, but he failed to disclose his HIV-positive status. However, she suggested condom use and he rejected that suggestion, and that I consider to be an aggravating factor for the purpose of sentencing. The fact that he deliberately put her at risk, as in the case of N.W., is also an aggravating factor. C.N. subsequently tested positive for the HIV virus, but fortunately her child has continued to test negative. The consequence of her positive test for the HIV virus has had a devastating effect on her, as her victim impact statement indicates, and her infection increases the gravity of the offence for sentencing purposes.

[8] In ***R. v. Mercer*** (1993) 84 C.C.C. (3d) 41, one complainant had unprotected sex with Mr. Mercer on one occasion when he had knowledge of his condition, and she subsequently tested positive for the virus, as has C.N. Mr. Mercer pleaded guilty to that offence and was sentenced to six years for criminal negligence by the Newfoundland Court of Appeal. Mr. Mercer had lied to the complainant there about the need for a condom, as had Mr. Nduwayo.

[9] Again, the only mitigating factor for Mr. Nduwayo throughout is lack of a criminal record. I consider an appropriate sentence for you, Mr. Nduwayo, in the case of C.N., to be six years.

E.K.

[10] In the case of the complainant, E.K., Mr. Nduwayo lied to her that he had no diseases at the outset of their relationship. Initially, he said he would not have intercourse with her, so no condom was needed. As matters progressed, they moved to approximately seven months of unprotected intercourse without any disclosure by him of his condition. E.K. became pregnant, but miscarried, and she subsequently tested positive for the virus. As might be expected, the consequences for her have been devastating, as she has attested to in her victim impact statement. The same aggravating factors are in existence with respect to her as they were for C.N., and the authority that offers the same reasonable comparison is also the same.

[11] I consider an appropriate sentence, in the case of E.K., to be six years.

D.T.

[12] In the case of the complainant, D.T., she had one incident of unprotected sexual intercourse with Mr. Nduwayo for approximately 15 minutes when they did not use a condom. Otherwise, she insisted on the use of a condom over a six-month relationship, even when he said it was unnecessary. Fortunately, she has tested HIV negative, although she describes it as the longest week of her life before

she was tested. It is an aggravating factor that Mr. Nduwayo acted deliberately, in flagrant disregard of possible foreseeable harm, and it is also an aggravating factor that he tried to persuade her that condom use was not necessary.

[13] I consider an appropriate sentence in the case of D.T. to be three years.

D.D.

[14] The next complainant, D.D., had unprotected sexual intercourse with Mr. Nduwayo once when they discarded condom use during sex. Otherwise, she required condom use on the four occasions in which they had sex. She subsequently tested positive for the virus 22 months later, but Mr. Nduwayo is convicted of only attempted aggravated sexual assault because it is uncertain whether D.D. was already infected before having relations with Mr. Nduwayo or when the condom broke while they were having sex.

[15] The only case offered to me which has some similarity is the case of ***R. v. DeBlois***, [2005] O.J. 2267, where Mr. DeBlois pleaded guilty to attempted aggravated sexual assault, and was sentenced to a term of three years imprisonment after credit for one year in pre-trial custody. There, his guilty plea and remorse were mitigating factors, while his prior criminal record, the serious nature of the offence and the infection of the complainant, as well as the knowledge of his condition, were considered to be aggravating factors. There, as I said, the complainant had been infected by Mr. DeBlois, whereas here, D.D. might have been infected by someone else or some other means.

[16] I consider an appropriate sentence in the case of D.D. to be two years.

T.F.

[17] She and Mr. Nduwayo had a sexual relationship over approximately eight months in total. He told her he did not have the HIV virus, but she insisted on condoms for the first couple of months whenever available, but otherwise not. After the first couple of months, they had unprotected sexual intercourse thereafter. Fortunately, she also has tested negative for the virus. Aggravating factors are Mr. Nduwayo lying to her about his HIV status and deliberately exposing her to the risk on multiple occasions. She is in much the same situation as C.N. and E.K., save that she was not infected with the virus. Her circumstances are much like the third complainant in ***Williams***, who had unprotected sex with Mr. Williams for approximately 16 months. She also was not infected. Mr. Williams was sentenced to four years for aggravated assault.

[18] I consider an appropriate sentence in the case of T.F. to also be four years.

A.S.

[19] In the case of the last complainant, A.S., the sexual assault was on one occasion which involved Mr. Nduwayo groping her breasts and rubbing his penis against her stomach and ejaculating on it. I accept the Crown's submission that an appropriate sentence is one year in that case.

[20] These sentences will run consecutively. The total of the individual sentences equals 25 years. From this figure, Mr. Nduwayo is to be given credit for his time in

custody before conviction. The Crown submits that he should be given standard double time, while Mr. Nduwayo's counsel submits that he should be given enhanced credit.

[21] Mr. Nduwayo was arrested on December 12th, 2003 and remained in custody until February 2004 when he was released on a recognizance. He was taken back into custody on May 13th, 2004, and on May 19th was granted bail but could not perfect the terms of bail. He therefore remained in custody until December 2004. Technically, in December 2004, he was detained again by the Provincial Court and remained in custody until August 2005 when he was granted bail by this court, but again could not perfect the terms of bail and therefore remained in custody throughout to the trial. His counsel refers to the fact that Mr. Nduwayo spent time in isolation or protective custody and has cited a number of authorities, mostly out of Ontario, that allowed enhanced credit beyond two-for-one.

[22] I do not find any of these cases cited to be persuasive. They either concern the Don Jail in Toronto, with evidence about the conditions there being led, are circumstances in which the accused was prepared to plead guilty at the outset, or was being held in protective custody through no fault of his own. I do not consider that any of these circumstances exist here. Accordingly, I give Mr. Nduwayo credit for four years of pre-trial custody.

[23] Deducting the four years from the totality of the individual sentences leaves a combined sentence of 21 years. At this point, it must be considered whether such a combined sentence should be reduced because it is unduly long or harsh as the

Criminal Code cautions against and does not constitute a just and appropriate fixed-term sentence. Considering all the circumstances, I find that a just and appropriate sentence that I impose upon you, Mr. Nduwayo, is a term of imprisonment of 15 years for these crimes.

[24] In addition, pursuant to s. 487.051(1)(a) of the ***Criminal Code***, I order, in Form 5.03, the taking from you of any number of samples of one or more bodily substances reasonably required for the purpose of a forensic DNA analysis, by means of the investigative procedures described in subsection 487.06(1).

[25] Pursuant to s. 490.012 of the ***Criminal Code***, I order, in Form 52, that you comply with the ***Sex Offender Information Registration Act*** for life.

[26] The last matter, Ms. Wendel, is your request for a firearms prohibition under s. 109(1). Where do you find that within 109(1)?

[27] **MS. WENDEL:** My Lord, I apologize, I do not have a copy of my ***Criminal Code*** with me at this time. If we could stand down, I can get a copy.

[28] **THE COURT:** Would you give Ms. Wendel my copy?

[29] **MS. WENDEL:** Thank you. My Lord, in the Crown's submission, the offences are caught by subsection (1), paragraph (a), indictable offence in which the commission of violence against a person was used, threatened or attempted, for which a person may be sentenced to imprisonment for 10 years or more. At the very least, in the situation involving A.S., the maximum sentence is 10 years, therefore catching that in the circumstances, the factual scenario that the Crown submits there

was violence used in that, and as well, in the context of all of the other offences, the Crown submits that that is the appropriate section. Alternatively, I would ask that Your Honour make that order pursuant to s. 110.

[30] **THE COURT:** Which is a discretionary one, is it?

[31] **MS. WENDEL:** Yes.

[32] **THE COURT:** I do not know that it could be said Mr. Nduwayo had any violence towards the other complainants on the evidence that I heard, and I do not know whether his conduct with respect to A.S. constitutes violence in law. That was my concern when I read the section, Ms. Wendel. So what do you propose, Ms. Wendel, under 110?

[33] **THE COURT:** I do not propose any firearm prohibition whatsoever.

[34] **MS. WENDEL:** Your Honour (sic), with respect to the ***SOIRA*** order, s. 490, there is an obligation of the Crown to provide a copy of the order to - sorry, My Lord - at the time of sentence, and I have prepared that and will pass that up at this time.

[35] **THE COURT:** Is there anything else, counsel?

[36] **MR. MacDONALD:** No, My Lord.

[37] **THE COURT:** Mr. McMurray?

[38] **MR. McMURRAY:** No, My Lord.

"J. Truscott, J."
The Honourable Mr. Justice J. Truscott