Date: 20010614
Docket: C. R. 168060

IN THE SUPREME COURT OF NOVA SCOTIA

HER MAJESTY THE QUEEN

- versus -

JAMES ROBERT EDWARDS

[Cite as: The Queen v. James Robert Edwards 2001NSSC80]

D E C I S I O N

HEARD BEFORE: **The Honourable Justice Walter R. E. Goodfellow in the Supreme Court of Nova Scotia on June 12th, 13th and 14th, 2001**

DECISION: **June 14th, 2001 (Orally)**

WRITTEN RELEASE OF ORAL: **June 14th, 2001**

COUNSEL: **Denise C. Smith, Solicitor for the Prosecution**
Anne S. Derrick, Q.C. and Maureen Cullinan, A/C, Solicitors for the Defence

GOODFELLOW, J.: (Orally)

BACKGROUND

[1] James Robert Edwards stands charged:

> THAT he, on or about the 28th day of May, A.D. 2000, at, or near Halifax, in the County of Halifax, Province of Nova Scotia, did endanger the life of X, thereby committing an aggravated assault, contrary to Section 268 of the Criminal Code.
>
> AND FURTHER AT THE SAME TIME AND PLACE AFORESAID did unlawfully commit a sexual assault on X, contrary to Section 271(1)(a) of the Criminal Code.

[2] Mr. Edwards met X at a local bar called Reflections and after a short interval, they proceeded by taxi to Mr. X's residence. They performed oral sex on each other. X indicates that shortly thereafter, anal sex occurred with Mr. Edwards penetrating X. Mr. Edwards, in his evidence, places this act of anal intercourse at a much later time, probably around 7:30 - 8:00 A.M. in the morning. They were together from approximately 1:30 A.M. to about 8:40 A.M. when Mr. Edwards left and subsequently X discovered he was a missing a diamond ring. X came to the conclusion that Mr. Edwards likely stole it and reported the theft to the police.

[3] Mr. Edwards, on being contacted by the police, adamantly denied any knowledge of the ring. He attended at Police Headquarters and was fully cooperative with the police, including readily agreeing to take a polygraph test. The test was set up, conducted and it concluded Mr. Edwards was truthful in his denial of the theft. This result was conveyed to X who apologized to Mr. Edwards.

[4] During the preliminary stage leading up to the polygraph, the operator made inquiries as to the general and psychological health of Mr. Edwards. This is standard procedure to make such inquiries of the person intended to be tested and it includes whether or not the person is on any medication, etcetera. During the course of the preliminary stage, Mr. Edwards indicated he was in good health other than the fact he was HIV positive. The polygraph expert reviewed the ethical considerations that gave rise to this admission and quite correctly felt compelled to advise X. When he advised X, he observed the reaction from X was shock, fear, as X indicated that sexual activity had been unprotected and that he and Mr. Edwards had not practised safe sex. In other words, no condom had been used during penetration of X by Mr. Edwards. Subsequently, X had a number of blood tests, all of which he advised were negative.

[5] X' evidence is that the anal sex was unprotected. Mr. Edwards' evidence is that the anal sex was protected.

[6] The Crown acknowledges the unprotected oral sex is conduct at a low risk that would not bring it within s.268(1) of the *Criminal Code* and had only unprotected oral sex taken place, no charges would have been laid.

[7] The Defence put into issue the character of Mr. Edwards and the evidence indicates he is perceived in the community to be a responsible honest individual.

CRIMINAL CODE PROVISIONS

ASSAULT / Application / Consent

265 (1) A person commits an assault when
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

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

AGGRAVATED ASSAULT / Punishment / Excision / Consent

268 (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

SEXUAL ASSAULT

271 (1) Every one who commits a sexual assault is guilty of
(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years.

R. v. CUERRIER (1998), 127 C.C.C. (3rd) 1 (S.C.C.)

[8] Cuerrier tested positive for HIV in August, 1992 and was advised at the time by a public health nurse to use condoms every time he engaged in sexual intercourse and to inform all perspective sexual partners that he was HIV positive. Cuerrier rejected this advice, explaining that he would not be able to have a sex life, if he told anyone that he was HIV positive.

[9] Subsequently, he met one of the complainants and began an eighteen month relationship with her during which they had sexual intercourse, for the most part unprotected, at least a hundred times. During the course of their relationship, Cuerrier assured her that he had tested negative for HIV some eight or nine months prior and did not disclose that he had recently tested positive for HIV. The partner developed hepatitis and she was advised to have a HIV test . Both Cuerrier and her were tested in January, 1993 and she was told that her test was negative but that Cuerrier tested positive. They continued to have unprotected sex, however, her evidence was that she would not have had unprotected sexual intercourse with Cuerrier, if she had known he was HIV positive. Presumably, she

means that she would never have entered into a sexual relationship in the first place. When this relationship ended in May, 1994 Cuerrier was advised in writing by a public health nurse that he should use condoms and advise future partners that he was HIV positive. Mr. Cuerrier formed a new sexual relationship resulting in sexual intercourse approximately ten times on most occasions without a condom. Cuerrier did not disclose that he was HIV positive and when this came to light, he apologized for lying and she indicated that had she known Cuerrier was HIV positive, she would never have engaged in unprotected sexual intercourse with him.

[10] Cuerrier was charged with two counts of aggravated assault and was acquitted at trial which acquittal was not set aside by the British Columbia Court of Appeal.

[11] The Supreme Court of Canada heard the Appeal and in the main, concerned itself with what constituted fraud and the majority opinion of the Court articulated a harm based approach for deciding what would constitute fraud that vitiates consent to sexual intercourse.

[12] Justice Cory conducted an analysis:

IV. Analysis

> **[95]** The respondent was charged with two counts of aggravated assault. This charge requires the Crown to prove first that the accused's acts "endanger[ed] the life of the complainant" (s.268(1)) and, second, that the accused intentionally applied force without the consent of the complainant (s.265(1)(a)). Like the Court of Appeal and the trial judge I agree that the first requirement was satisfied. There can be no doubt the respondent endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse. The potentially lethal consequences of infection permit no other conclusion. Further, it is not necessary to establish that the complainants were in

fact infected with the virus. There is no prerequisite that any harm must actually have resulted. This first requirement of s. 268(1) is satisfied by the significant risk to the lives of the complainants occasioned by the act of unprotected intercourse.

[96] The second requirement of applied force without the consent of the complainants presents greater difficulties. Both complainants consented to engage in unprotected sexual intercourse with the respondent. This must include consent to the application of the force inherent in that activity. The Crown contends that the complainants' consent was not legally effective because it was obtained by fraud. The complainants testified that if they had been informed that the respondent was HIV-positive they would never have agreed to unprotected sexual intercourse with him.

[13] Justice Cory at p. 47:

[116] In summary, it can be seen that the essential elements of fraud are dishonesty, which can include non-disclosure of important facts, and deprivation or risk of deprivation.

At p. 49:

[124] In my view, it should now be taken that for the accused to conceal or fail to disclose that he is HIV-positive can constitute fraud which may vitiate consent to sexual intercourse.

Also, at p. 49:

[126] The possible consequence of engaging in unprotected intercourse with an HIV-positive partner is death. In these circumstances there can be no basis for distinguishing between lies and a deliberate failure to disclose. Without disclosure of HIV status there cannot be a true consent.

At p. 53:

[137] It follows that in circumstances such as those presented in this case there must be a significant risk of serious harm if the fraud resulting from non-disclosure is to vitiate the consent to the act of intercourse. For the purposes of this case, it is not necessary to consider every set of circumstances which might come within the proposed guidelines. The standard is sufficient to encompass not only the risk of HIV infection but also other sexually transmitted diseases which constitute a significant risk of serious harm. However, the test is not so broad as to trivialize a serious offence.

Also, at p. 53:

[138] In summary, on facts presented in this case, it would be open to the trier of fact to conclude that the respondent's failure to disclose his HIV-positive status was dishonest; that it resulted in deprivation by putting the complainants at a significant risk of suffering serious bodily harm. If that conclusion is reached, the complainants' consent to sexual intercourse could properly be found to have been vitiated by fraud. It can be seen that applying the proposed standard effectively resolves the issue in this case. However, it is said that the test is too vague. Yet, it cannot be forgotten that all tests or definitions are based on words. They are the building blocks of the law.

[139] The phrase "significant risk of serious harm" must be applied to the facts of each case in order to determine if the consent given in the particular circumstances was vitiated. Obviously consent can and should, in appropriate circumstances, be vitiated. Yet this should not be too readily undertaken. The phrase should be interpreted in light of the gravity of the consequences of a conviction for sexual assault and with the aim of avoiding the trivialization of the offence. It is difficult to draw clear bright lines in defining human relations particularly those of a consenting sexual nature. There must be some flexibility in the application of a test to determine if the consent to sexual acts should be vitiated.

[14] Cuerrier concluded that non disclosure of being HIV positive followed by unprotected sex would be viewed as dishonest by a reasonable person. Indeed, in my view, such would be viewed by a reasonable person using any number of adjectives including, selfish, despicable and most importantly, criminal. It seems clear, therefore, that when there is a finding of unprotected sex with a failure to disclose, then consent would have been obtained by fraud.

[15] I have instructed myself with respect to the presumption of innocence and burden of proof and in particular, that the burden of proof never shifts and remains on the Crown throughout the entire trial. I have also instructed myself with respect to the doctrine of reasonable doubt and in particular, modification in *R. v. Lifchus* handed down the 30th of January, 1998. The final paragraph of that reads:

> In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[16] There are two formal admissions; namely, that on the day in question Mr. Edwards was HIV positive and secondly, that he knew at that time that he was HIV positive. I have reviewed all of the essential ingredients of both offences and in particular, CRIMJ.

[17] What this case is about is whether or not the Crown has established beyond a reasonable doubt that **"unprotected"** anal intercourse took place between these two men.

[18] It is clear that X did not inquire of Mr. Edwards nor did Mr. Edwards inquire of X whether the other was infected with any disease and in particular, if the other was HIV positive. While it is easy to suggest that such an inquiry would be particularly wise and very much appropriate in the gay community when anal sexual intercourse is anticipated, there is no such standard in law and human nature and circumstances, alcohol, passion, etcetera, dictate against such a standard.

[19] The standard to be applied in the gay community is the obligation of one who is infected to practice safe sex or make clear disclosure so that there can be informed consent if unprotected sex is to be pursued.

[20] I agree that this case is about credibility and I must apply the burden of proof. In other words, it is not a matter of choosing one version over the other.

[21] In situations such as presented in this case before me, it must be emphasized that the Crown is required to prove beyond a reasonable doubt that X would

have refused to engage in protected sex with Edwards if he had been advised by Edwards that Edwards was HIV positive.

[22] Consensual sexual activity would not be criminal conduct, ie. assault, unless it is in fact non consensual due to the consent being obtained by fraud. Additionally, does the failure to disclose the presence of HIV where safe sex is practised put the victim at a significant risk of serious bodily harm? The evidence before me suggests that the possibility of becoming HIV positive in unprotected sex varies depending upon the type of activity. Indeed, the expression of likelihood given by Dr. Schlech was with respect to oral intercourse one in ten thousand, vaginal intercourse one in one thousand and anal intercourse one in five hundred but he also expressed the view that the risk is lower if there is no ejaculation. He stated anal intercourse is more dangerous because the rectum is not designed for intercourse and presents a greater risk of trauma. He indicated that the proper use of a condom reduces or renders the risk low, however, no statistical information or in depth assistance was given to the Court that would provide specific scientific or medical conclusions as to the degree of risk that remains when protected sex is engaged in. It seems to me that the Crown has the obligation to establish conduct is criminal in that it creates significant risk.

[23] I must ask myself the following questions:

1. Do I believe X?
2. Do I believe Mr. Edwards?
3. If I do not believe Mr. Edwards, does his evidence raise a reasonable doubt?
4. On the totality of the evidence, am I satisfied that the Crown has proven its case beyond a reasonable doubt?

[24] I found the evidence of X most convincing. I also found the evidence of Mr. Edwards most convincing. It follows that I have a reasonable doubt, based not only upon Mr. Edwards's own evidence but on the totality of the evidence and conclude that the Crown has failed to establish beyond a reasonable doubt that the men engaged in unprotected anal sex. It follows that the Crown has failed to establish that the anal sexual intercourse was not consensual in these circumstances. The Crown has also failed beyond a reasonable doubt to establish conduct "or endangers the life of X".

[25] It is not for a trial judge to expand what constitutes a criminal act. Such a determination is for the Legislature or the Supreme Court of Canada in its interpretation of Legislation. The gay community and its leaders vigorously urge the practice of safe sex, not abstinence. If the failure to disclose a

contagious disease before engaging in “protected” sex is to be a criminal offence, it is for the Legislature to so define such activity.

[26] In the result, I enter a finding of not guilty to both counts. Accused dismissed.

J.