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Summary: *R. v. Williams*[1]

Attempted aggravated assault/ Non-disclosure/ Unprotected vaginal sex with a partner already potentially HIV-positive

"The same act of sexual assault by an HIV positive accused would undoubtedly injure or put at risk many potential partners but if, because of a complainant's particular circumstances, she was not put in harm's way by the assault charged, there is no aggravated assault."[2]

Applicable law:

Section 265 of the Criminal Code

> (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;
>
> […]
>
> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of:
>
> (c) fraud

Section 268 of the Criminal Code

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

Section 24 of the Criminal Code

> (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

Section 660 of the Criminal Code

[1] *R. v. Williams*, [2003] S.C.C. 41 [*Williams 2003*].
[2] *Ibid*. at para. 46.

> Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.

Section 463 of the Criminal Code

> (b) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, on conviction, an accused is liable to imprisonment for fourteen years or less is guilty of an indictable offence and liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable.

Court and Date of Decision

The Supreme Court of Canada issued its unanimous decision in September 2003

Parties

The Crown was the appellant before the Supreme Court and Williams the respondent. There was one woman complainant in the Williams case.

Facts

Williams began an 18-month relationship in June 1991 with a woman who was eventually the complainant in this case. They had unprotected sex on numerous occasions. On 15 November 1991, Williams learned that he had recently tested positive for HIV. The complainant received a negative test result a few days later. However, the Court acknowledged that at the time she was tested, Williams may have already infected her and she may have been in the "window period" between infection and seroconversion.

After Williams learned of his positive diagnosis, he did not disclose to his partner either that he had been tested for HIV or that he had tested positive. The relationship continued for another year and included unprotected sex. Williams had been counselled on three occasions by two doctors and a nurse about HIV, its transmission, safer practices and his duty to disclose his HIV status to sexual partners.

The relationship ended in November 1992. In April 1994, the complainant learned she was HIV-positive.

It was accepted as a fact that the complainant would not have had unprotected vaginal sex with Williams had she known he was HIV-positive. The prosecution conceded that it was possible that Williams had infected the complainant before learning of his HIV-positive status.

Proceedings

The Newfoundland trial court convicted Williams of aggravated assault and common nuisance.[3]

The Court of Appeal of Newfoundland and Labrador upheld the conviction for common nuisance, but substituted a conviction for *attempted* aggravated assault in place of aggravated assault.[4]

The Court of Appeal based its decision on the Supreme Court of Canada's decision in *Cuerrier*. In that case, the Supreme Court held that not disclosing one's (known) HIV-positive status before unprotected (vaginal) sex could amount to fraud, which makes a sexual partner's consent to sex legally invalid. Therefore, the Supreme Court said, such sexual contact amounts to an assault. Since the *Cuerrier* decision, HIV positive people have had a legal duty to disclose their HIV infection before engaging in any activity that posed a "significant risk" of transmitting HIV. The Court of Appeal found that Williams breached his duty because, after being diagnosed as HIV-positive, he had unprotected vaginal sex on at least some occasions with the complainant without disclosing this fact.

The Court of Appeal went on to analyse whether Williams was guilty of the offence of *aggravated assault*, which further requires that the assault "endangers the life of the complainant". It determined on the evidence that the complainant might already have been infected through unprotected sex with Williams before he learned he was HIV-positive. The Court therefore agreed that it could not be proved beyond a reasonable doubt that William's conduct, *after* learning he was HIV-positive, endangered her life through the risk of HIV infection.

However, but for this, Williams' conduct would amount to the offence of aggravated assault, in line with the earlier *Cuerrier* decision. As a result, the Court of Appeal decided that it was appropriate instead to convict Williams of the offence of *attempted* aggravated assault.

The prosecution appealed this finding to the Supreme Court of Canada. Williams simultaneously appealed the conviction of attempted aggravated assault. The Supreme Court of Canada dismissed both appeals, ruling that Williams has been properly convicted of attempted aggravated assault.[5]

He was sentenced to three years of imprisonment for attempted aggravated assault and 18 months for the offence of common nuisance, which sentences were to be served concurrently.[6]

Legal arguments and issues addressed

To date, this is the first and the last case on the issue of criminal liability for HIV non-disclosure decided by the Supreme Court since *Cuerrier* in 1998.

[3] *R. v. Williams*, [2000] NJ No 138 (SCTD) (QL) [conviction, 26 April 2000].
[4] *R. v. Williams*, [2001] NFCA 52, [2001] NJ No 274.
[5] *Williams 2003*, *supra* note 1.
[6] *R. v. Williams* [2004] NJ No 140.

The Court was called upon to determine whether persons with HIV who have unprotected sexual intercourse without disclosing their status to sexual partners who are or might already have HIV, can be convicted of aggravated assault or attempted aggravated assault.

The Supreme Court decided that only a charge of attempted aggravated assault could stand because it could not be proved beyond reasonable doubt that the accused's conduct, after learning that he had tested positive for HIV, risked endangering the complainant's life, if the complainant was or might already be HIV-positive

Indeed, the Court concluded that based on the evidence, it was "likely" that the complainant was already infected with HIV through unprotected sex with Williams before he learned his positive diagnosis. As a result, the prosecution could not prove beyond a reasonable doubt that William endangered the complainant's life and decided that, absent the aggravating factor of endangerment, he could not be convicted of aggravated assault.

Specific legal issues raised in the Court's analysis of essential elements of the offences of aggravated assault and attempted aggravated assault

1- Aggravated assault

- Aggravated assault *mens rea*

Although not specifically necessary to its decision about whether Williams could be convicted of aggravated assault or the attempt, the Supreme Court addressed the issue of criminal intent. Specifically, the Court examined what awareness an HIV-positive person must have about his our her HIV status before it can be said that the person has committed fraud for the purposes of vitiating a sexual partner's consent transforming consensual sex into an assault. The Court said:

> The critical date for establishing fraud to vitiate consent (Criminal Code, s. 265(3)(c)) is when the respondent had sufficient awareness of his HIV positive status that he can be said to have acted intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them."[7]

The Court later stated:

> Once an individual becomes aware of a risk that he or she has contracted HIV, and hence that his or her partner's consent has become an issue, but nevertheless persists in unprotected sex that creates a risk of further HIV transmission without disclosure to his or he partner, recklessness is established.[8]

[7] *Williams 2003*, *supra* note 1 at para. 27.
[8] *Ibid*. at para. 28.

However, there was not sufficient evidence according to the Court to establish that Williams was aware of the danger or even a risk of the danger of infection before he actually learnt about his status to establish a criminal intent before that date.

- Aggravated assault *actus reus*

a) Consent

In case of HIV non-disclosure prior to sexual intercourses, it must be proved beyond a reasonable doubt that the partner's consent was vitiated by fraud.

According to *Cuerrier*, non disclosure may amounts to fraud vitiating consent when there is a significant risk of serious bodily harm and, unprotected (vaginal) sex is considered to represent such a "significant risk". The Crown is then required to prove beyond a reasonable doubt that the complainant would have refused to engage in that unprotected sex with the accused if he or she had been advised that the accused was HIV-positive

In *Williams*, the Supreme Court solely examined whether the complainant could be said to have consented to unprotected sex with the accused. The Supreme Court, relying on *R. v. Ewanchuk*[9], adopted a subjective approach that focused on the complainant's state of mind at the time she had unprotected sex with the accused while he knew already about his HIV status but did not disclose to her. The Court decided that there was no evidence to suggest that, at that time, she had consented to run the risk to be exposed to HIV, even if she might have already been HIV positive (but undiagnosed). On the contrary, she testified that she would not have had unprotected sex had she known her partner's status. Therefore, the Court concluded that there was no consent from the complainant to unprotected intercourse.

b) Endangerment of life

Endangerment of life was considered as an essential element of the offence aggravated assault. According to the Court "aggravation" in aggravated assault comes from the consequences of the assault and these consequences can vary from a person to another.

> The same act of sexual assault by an HIV positive accused would undoubtedly injure or put at risk many potential partners but if, because of a complainant's particular circumstances, she was not put in harm's way by the assault charged, there is no aggravated assault. By the way of further illustration, the gunman who fires a shot into a sleeping figure intending to kill him is not guilty of murder if, in fact, the intended victim had already died of natural causes.[10]

The Court concluded that based on the evidence, it was "likely" that the complainant was already infected with HIV through unprotected sex with Williams before he learned his positive diagnosis. Therefore, there was a reasonable doubt as to whether

[9] *R. v. Ewanchuk*, [1999] 1 S.C.R 330.
[10] *Williams 2003*, *supra* note 1 at para. 46.

the life of the complainant was capable of being endangered by re-exposure to a virus that she had likely already acquired.

As a result, the prosecution could not prove beyond a reasonable doubt that William endangered the complainant's life and decided that, absent the aggravating factor of endangerment, he could not be convicted of aggravated assault.

2- Attempted aggravated assault

The Supreme Court reviewed the law on *attempted* crimes, and found that in order to secure a conviction for an attempt, the Crown is required to prove the accused intended to commit the crime in question and took legally sufficient steps toward its commission.

The Court stated:

> The requisite intent is established here for the period after November 15, 1991. The respondent, knowing at that time that he was HIV-positive, engaged in unprotected sex with the complainant intending her thereby to be exposed to the lethal consequences of HIV. The evidence showed that he had been fully counselled by two doctors and a nurse on all relevant aspects of the potential result of unprotected sex.[11]
>
> Clearly, the respondent [Williams] took more than preparatory steps [toward committing the offence of aggravated assault]. He did everything he could to achieve the infection of the complainant by repeated acts of intercourse for approximately one year between November 15, 1991 [the date of the diagnosis] and November 1992 when the relationship ended. The reasonable doubt about the timing of her actual infection was the product of circumstances quite extraneous of the respondent's post November 15, 1991 conduct.[12]

In such circumstances, the Court concluded that there was an attempt of committing an aggravated assault.

Comments

The *Williams* decision may lead to a significant extension of the criminal law and therefore raised concerns about the direction of the Canadian criminal law with respect to conduct that risks transmitting HIV.

1- Criminal intent

First, on criminal intent, the Supreme Court said that there was sufficient intent for a conviction on an assault charge if person acts "recklessly". The Court's reference to reckless behaviour suggest that there could be a duty to disclose the possibility of HIV infection even before a person receives a definitive diagnosis of HIV infection – that

[11] *Ibid.* at para. 62.
[12] *Ibid.* at para. 64.

is, a duty to disclose arises as soon as a person becomes "aware of a risk" that he or she *might* be HIV-positive.

Setting such a standard for criminal intent is to invite an overly broad application of serious criminal penalties and could lead to undesirable invasions of privacy. Indeed, the Supreme Court's comments invite prosecutors and lower courts to scrutinize a person's past sexual and needle-use activities in search of risk-taking behaviour, and to ask whether such behaviour put them at risk of HIV infection.

To date, there has been no conviction for non-disclosure by someone who had not received a definitive diagnosis of HIV infection.

2- Unprotected sex with HIV-positive partners

Secondly, the Court commented on the medical evidence that might be adduced in future cases related to sexual transmission or exposure of HIV, specifically in relation to the potential medical consequences of unprotected sex between HIV-infected partners, such as the possibility of "re-infection" with perhaps a different strain of HIV. It acknowledged the possibility of proof that "regardless of the infection, there was a significant risk to the complainant's life"[13] (emphasis added).

This means that criminal law may be potentially extended to concern situations involving sexual relations where both partners are HIV-positive, but either one or both have not disclosed their status before engaging in behaviour that poses a "significant risk" of "serious bodily harm" in the circumstances. To date, there is no known case in Canada where a person living with HIV has been prosecuted for (aggravated sexual) assault on the basis of possible "re-infection" of a partner who is already HIV-positive.

3- Fraud vitiating consent

Finally, the fact that the Supreme Court addressed the question of consent on the sole basis of a subjective approach may also raise concerns.

Cuerrier requires two elements for the fraud to be established in case of HIV exposure, a dishonest act and a significant risk of serious bodily harm (deprivation). Then the Crown must prove that the complainant would not have consented to sexual intercourse if he or she had known about the accused's serostatus.

When examining the issue of consent in *Williams*, the Supreme Court did not address the question of a "significant risk". It only determined whether the complainant could be said to have not consented to unprotected sex with the accused while she might have already acquired HIV. Does that mean that the *Cuerrier* test requiring a "significant risk" of HIV transmission to establish fraud vitiating consent does not apply anymore?

[13] *Ibid*. at para. 68.

The Court's decision in *Williams* does not allow us to draw such a conclusion. Indeed, nothing in the decision suggests that the Court intended to overrule *Cuerrier* which remains the precedent-setting case on HIV non-disclosure cases.

It is essential to note that *Williams* concerned unprotected (vaginal) sex and that this was acknowledged as a matter of fact which was not challenged before the Supreme Court. And, according to the *Cuerrie*r's decision, such relations are deemed to pose a significant risk of HIV transmission. It seems that the Supreme Court in *Williams* did not question this finding and accepted that unprotected sex poses a significant risk for the purposes of fraud vitiating consent. According to the Court:

> The medical evidence indicates that "a single act of unprotected vaginal intercourse carries a significant risk of HIV transmission" (emphasis added).[14]

The fact that the complainant may already be infected with HIV did not affect the very nature of unprotected sex that is considered as posing a significant risk of HIV transmission. *A fortiori,* it did not affect the fact that the complainant's consent could be vitiated by fraud.

> Each act of unprotected sex exposed [the complainant] to the lethal virus. There is nothing whatsoever in the evidence to suggest that the complainant, believing rightly or wrongly that she was HIV-free, consented to run such a risk (emphasis added).[15]

The complainant's status does not need to be taken into account to establish fraud that vitiates consent for the purposes of proving an assault. It only influences the "aggravating" factor of the aggravated assault (endangerment of complainant's life) which, as the Court mentioned, comes from the consequences of the assault and can vary from a person to another.

Such an interpretation of the *William*' decision is confirmed by the way prosecutors and court continue to apply the *Cuerrier* test for fraud vitiating consent.

Bibliography

R. Elliott and G. Betteridge, "HIV positive person who did not disclose status convicted of attempted aggravated assault," *HIV/AIDS Policy and Law Review* 2003; 8(3): 50-52.

For a summary and analysis of the Newfoundland & Labrador Court of Appeal's decision, see R. Elliott, "Criminal law and HIV transmission/exposure: three new cases," *HIV/AIDS Policy and Law Review* 2002; 6(3): 64-66.

[14] *Ibid* at para. 11.
[15] *Ibid*. at para. 38.