Case Name:
R. v. Bear

Between
Her Majesty the Queen, and
Clifford Wayne Bear, Accused

[2011] M.J. No. 263

2011 MBQB 191

Docket: CR 10-01-30492

Manitoba Court of Queen's Bench
Winnipeg Centre

D.J. McCawley J.

August 9, 2011.

(70 paras.)

Counsel:

For the Crown: Wendy E. Friesen.

For the Accused: Edmond G. Murphy.

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1 **D.J. McCAWLEY J.**:-- Clifford Wayne Bear is charged with one count of theft, two counts of assault, one count of utter threats, and one count of aggravated assault arising from an incident that occurred at the Bargain Store on Portage Avenue, in the City of Winnipeg, Manitoba, on the evening of August 13, 2009.

2 The court heard testimony as to what happened at the store from the security guard on duty, the store supervisor, and a customer who was shopping with his son. Excerpts from the store video surveillance system confirmed the essential story of these witnesses. Any discrepancies were minor and can be attributed to the fact that the incident took place very quickly, the nature of it and the passage of time.

3 The uncontroverted evidence disclosed that around 7:30 that evening, a male came into the Bargain Store with a shopping cart that had a cardboard box inside. He was carrying a white plastic bag with what was later discovered to contain clothing. The man appeared to be aboriginal and had long black hair tied back in a pony tail. He was wearing a back muscle shirt, khaki shorts and a hat.

4 The man walked over to the electronics department where he was observed taking what looked like DVDs or video games from a shelf. A few minutes later he was observed moving towards and then past the cash register/check out area. He was approached by a store employee and the security guard who had been watching him. They both testified he did not want to open the box or give it up and they prevented him from leaving. He said he would put the box down and did so, but only after moving it a few times towards the door while talking to himself. He ultimately put the box near a drink cooler beside the front door.

5 As he tried to push his way past them, the three of them moved into the area between the exit door and the street door. When the man pushed the security guard to her knees on the floor, some customers jumped in to assist her and the supervisor and a scuffle ensued. The man was ultimately able to free himself and left the store. The security guard suffered bruising to her knees as a result of the incident and the supervisor had a cut hand, although he testified he did not know exactly when or how it happened in the mêlée.

6 One customer (who had intervened to assist) and his son decided to follow the man whom they saw leave the store and walk down the street. They got into their vehicle and followed him to a bus stop a couple of blocks away where he stopped and remained, apparently waiting for a bus. They returned quickly to the store and spoke to two police officers who had arrived on the scene, Constable E.H. and his partner Constable Bevan, and told them where they had seen the man go.

7 Since the description the officers had received from the store personnel matched the one the civilians had provided, the officers got into their marked police car and drove towards the bus stop where the male had last been seen. As they approached they observed no one at the stop, but noticed a city bus was just pulling away. They followed the bus to the next stop, at Polson Avenue, about 6 or 7 blocks away, where they stopped it and got on. There were only a handful of people on the bus including a male up front who matched the description they had been given.

8 When they asked the male to stand up, he complied. He was put under arrest, handcuffed behind his back and escorted off. When asked, he told them his name was Clifford Bear. The officers ran his name on their Niche system and the name of Clifford Bear came up with a picture that matched the person they had just arrested. In court, the officers indicated that since the incident Mr. Bear had gained some weight, but they both confirmed his identity as did a number, although not all, of the civilian witnesses.

9 Although none of the civilian witnesses recollected that Mr. Bear was intoxicated, the police officers both indicated he had been drinking and smelled of liquor, although he was able to walk and otherwise function. It should be noted they were with him a considerably longer period of time, in close circumstances, whereas the others had only very brief contact with him. Although Mr. Bear was initially co-operative, when he was taken to the Public Safety Building and Constable E.H. read him his rights from his notebook, Mr. Bear became belligerent and swore at him each time he was asked to respond.

10 While the officers were transporting Mr. Bear from the Public Safety Building to District 3, they testified that Mr. Bear was talking about HIV/AIDS and made some comments about spitting.

Although he was slurring his words and was difficult to understand, a note was made of this. Although they didn't take the threat all that seriously, they decided they should exercise caution and put a spit sock on Mr. Bear's head. The court heard that this is frequently used by the police in situations where someone is spitting and may have a contagious disease that can be spread by saliva or other bodily fluids. Here, the undisputed evidence was that Mr. Bear had scrapes to his neck and arms and a cut lip that was bleeding, as well as spots of blood on his shoes that the officers assumed had been incurred in the fight at the store. They later learned that Mr. Bear had in fact been diagnosed with HIV.

11 Upon arriving at District 3, Mr. Bear was placed in a holding cell while the officers ran some more checks. The room was about 10' x 12' and contained a table and two benches. It had one door with a window, but no surveillance capability. The court was advised Mr. Bear was not put in a room with surveillance because it had been decided that he would be interviewed the next day. Although not specifically stated, the implication was that Mr. Bear was still under the influence of alcohol and it would be best to wait till morning to question him.

12 When the two officers returned to the holding cell to check on Mr. Bear about 20 minutes later he could not be seen through the window. Past experience told them that he had either suffered some kind of medical emergency, passed out, or was waiting to ambush them when they opened the door.

13 Constable E.H. knocked on the cell door and shouted at Mr. Bear to go to the back of the cell where they could see him. After getting no response, he repeated his demand twice to no avail. He then unlocked the cell door, pushed it open with his foot and stepped back 2 or 3 feet whereupon Mr. Bear walked out, looked directly at him and spit into his face. Mr. Bear had managed to get his handcuffed wrists in front of him and had pushed the spit sock up above his nose. The spit landed on the officer's nose, in his eye and on his forehead.

14 Constable E.H.'s immediate reaction was to punch Mr. Bear, who fell to the ground and continued to kick and spit and flail around. After a further skirmish, Mr. Bear was eventually subdued and returned to his cell. Constable E.H. went immediately to the washroom and washed his face and rinsed his eyes for several minutes before being taken to the hospital for treatment. Because of the possibility of infection with HIV due to the possibility of an unknown quantity of blood being in the saliva that had come into contact with his eye and mucous membrane of his nose, on the treating physician's advice, Constable E.H. decided to undergo a 28 day course of treatment. He was instructed to take two pills a day for the 28 days or however long he could tolerate the drug, having been told that most people are unable to tolerate a full course of treatment. Constable E.H. testified he was only able to stay on the drug for four days because he was violently ill and so tired he was unable to go out. Since the incident, he indicated that all tests for HIV/AIDS have been negative.

15 Mr. Bear required hospital treatment after the altercation at the police station and was taken to the Health Sciences Centre. He was observed there by the supervisor at the Bargain Store who was having the cut on his hand treated. He identified the person he saw as the same person who had attempted to leave the store with unpaid goods and as the one who had assaulted him and another store employee and the security officer.

16 The first three counts of the indictment relate to what happened at the Bargain Store whereas counts 5 and 6 relate to Mr. Bears' later dealings with Constable E.H. For simplification, I propose

to deal with the first three counts and then the last two, along with the remaining evidence that relates to them.

Count One

17 Mr. Bear is charged with theft pursuant to s. 334(b) of the ***Criminal Code*** for stealing items from the electronics section of the Bargain Store. At the outset of trial, the court was advised that the date and time of the alleged offence and continuity of exhibits were not at issue with respect to all charges, but that identity was at issue with respect to counts one and two.

18 It was argued by counsel for Mr. Bear that the Crown failed to prove beyond a reasonable doubt the identity of Mr. Bear as the person who attempted to leave with what turned out to be video games. I do not accept this argument. The overwhelming evidence is that it was Mr. Bear who was at the Bargain Store that night and was stopped attempting to take the items in question; who was recorded on the surveillance tape; who was followed to the bus stop and a few minutes later arrested on the bus; who matched the description of several eye witnesses; and who was taken to the police station and then ultimately to the Health Sciences Centre where he was again identified as the same person who had been in the Bargain Store attempting to steal goods earlier that evening. Although a couple of witnesses were unable to identify him in court, several others did. He also identified himself to the officers and the information and picture they had on their Niche system confirmed what he told them. I therefore have no difficulty in finding he is one and the same.

19 Defence counsel also argued that since the items allegedly stolen were never filed in court as exhibits, there was insufficient evidence to find that Mr. Bear had taken anything from the store without paying. However, the uncontradicted evidence from the store personnel and a civilian witness, which was supported by the surveillance tape, was that Mr. Bear went past the checkout point with the goods and never paid. The obvious inference to be drawn is that he would have continued out the door had he not been stopped. The evidence also disclosed that, although he said the items were his and could produce a receipt, he never did. Furthermore, after he left the store and the staff looked inside the box they found video games that were clearly marked with the Bargain Store's price stickers. This was in addition to the unrefuted evidence that he was seen taking the items off the shelves.

20 Although not raised in argument, defence counsel's cross-examination implied that Mr. Bear did not steal the goods because he did not take them past the check stand. However, to the extent this was raised, I find it does not accord with the evidence.

21 In light of the foregoing, I am satisfied beyond a reasonable doubt that Mr. Bear is guilty of count 1.

Count 2

22 Mr. Bear is charged with assaulting T.S., the Bargain Store supervisor who was on duty that evening. Mr. S.' evidence was clear and uncontradicted and is supported by other evidence, including the surveillance tape. For the same reasons stated with respect to count 1, I am satisfied beyond a reasonable doubt that Mr. Bear was the person who assaulted Mr. S. in the store. I therefore find him guilty of count 2.

Count 3

23 For the same reasons I am satisfied beyond a reasonable doubt that Mr. Bear is guilty of count 3 for assaulting J.L., the security guard on duty that night. Ms. L.'s testimony was credible and un-

shaken in cross-examination. Although it was apparent that she had some difficulty understanding some of the questions posed to her, English not being her first language, she was careful to indicate when she needed the questions repeated and answered them all clearly and unequivocally.

Count 4

24 Crown counsel advised that, in light of the evidence, she would not be seeking a conviction with respect to count 4 and accordingly it was withdrawn.

Count 5

25 Mr. Bear is charged with aggravated assault on Constable E.H. in that, knowing that he was infected with HIV, he spat in Constable E.H.'s face in an attempt to infect him with the virus.

26 The wording of the charge was amended at the outset of trial, by consent, to read as follows:

> THAT HE, the said CLIFFORD WAYNE BEAR, on or about the 13th day of August, 2009, at the City of Winnipeg, in the Province of Manitoba, did commit aggravated assault on E.H., a peace officer engaged in the execution of his duty (amendment underlined).

27 After the Crown closed her case and after she had made her submission to the court, defence counsel argued for the first time that Count 5 was a nullity. He based his submission on the fact that the offence of aggravated assault against a police officer under s. 270.02 of the ***Criminal Code*** came into effect on October 2, 2009, after the time of the offence cited in the indictment. Crown counsel was clearly taken by surprise. When asked, defence counsel acknowledged that he had been considering the argument for a week. So as not to unduly delay the matter, it was agreed that both counsel would submit written argument on the point, along with copies of any authorities on which they wished to rely and, if necessary, would be given an opportunity to speak to the matter.

28 Section 601(1) of the ***Criminal Code*** provides:

> **Amending defective indictment or count**
>
> **601.** (1) An objection to an indictment or to a count in an indictment for a defect apparent on the face thereof shall be taken by motion to quash the indictment or count before the accused has pleaded, and thereafter only by leave of the court before which the proceedings take place, and the court before which an objection is taken under this section may, if it considers it necessary, order the indictment or count to be amended to cure the defect.

29 Here no motion to quash was brought at any time nor was leave of the court sought as required by s. 601(1). The argument was simply advanced without notice after eight days of trial and after hearing from six Crown witnesses relative to issues raised by count 5 including expert witnesses on the transmission of HIV/AIDs.

30 Had the motion been properly brought I would have dismissed it. The section, under which the Crown proceeded was s. 268 of the ***Criminal Code***. This is clear from the cover page of the indictment and from the pre-trial memorandum. There can be no suggestion that the defence was taken by surprise or in any way prejudiced because he did not know the section under which the Crown was proceeding. I accept the Crown's argument that the impugned amendment, to which defence counsel

consented, simply added further specificity to the charge by indicating that the person Mr. Bear is alleged to have committed aggravated assault against was a peace officer engaged in the execution of his duty. The fact that Constable E.H. was a police officer in the execution of his duty at the time does not change the averments of the offence of aggravated assault. Furthermore, at no time did the Crown seek a conviction under the new provision.

31 It is also the case that the amendment to count 5 did not change the nature of the allegedly culpable conduct. It simply added a description of the complainant and therefore can be viewed as simply providing particulars and clarifying the charge with a description that was already known to everyone. See, ***R. v. Denis***, [1969] 2 O.R. 205 (C.A.), 1969 CarswellOnt 870 at para. 7; ***R. v. E.A.D.M.***, 2008 MBCA 78, 228 Man.R. (2d) 238; and ***R. v. McConnell*** (2005), 196 C.C.C. (3d) 28 (Ont. C.A.), 2005 CarswellOnt 1596.

32 The cases provided by the defence are all distinguishable from the case at bar. In ***R. v. S. (A.)*** (1998), 130 C.C.C. (3d) 320, the Ontario Court of Appeal was asked to amend an indictment charging an accused with anal intercourse and substituting a charge of sexual assault after the accused had already been convicted, where the provision charging the accused with anal intercourse had been found to be unconstitutional. The court declined to do so noting that the accused had been found guilty of an offence that was unconstitutional in the sense that it did not exist in law.

33 In ***R. v. Roth (L.C.)***, 2002 ABQB 145, 306 A.R. 387, on which defence counsel also relied, the court held that to allow a new charge would have placed the accused in a position where he would not have been aware of the specific offence with which he was charged. The court had been asked to permit a continuation of the proceedings against the accused under a new indictment after s. 159 of the ***Criminal Code*** had been found to be unconstitutional. The request was denied on the basis that the proceedings up until then were a nullity, a different circumstance than found here.

34 Similar reasoning was applied in ***R. v. Beaulieu (A.)***, 2004 NWTSC 19. This case concerned an appeal from a dog by-law where it was conceded by the Crown that the by-law did not create an offence. The court was invited to approve a charge with an offence under a different section or to amend the information. The court refused finding that the proceeding up until then was a nullity. Again, that is not the case here.

35 Without addressing the issue of when the motion was made and the procedural irregularities, I find that the defence argument that the count is a nullity fails. I will now turn to the merits of count 5.

36 The evidence overwhelmingly supports a finding that Mr. Bear assaulted Constable E.H. when he spit in his face. That it was an intentional act is evidenced by the comments he made in the cruiser car about HIV/Aids and spitting; his lifting up the spit sock; his refusal to answer the officer's calls and knocks at the cell door; and his hiding himself from view in an obvious attempt surprise the officer when he opened the door.

37 The issue before the court is whether Mr. Bear's conduct amounted to aggravated assault under 268(1) of the ***Criminal Code*** as charged, or attempted aggravated assault, which the Crown argued in the alternative.

38 Section 268 (1) provides:

Aggravated assault

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

39 To "endanger the life" of another person is to put him or her in a situation that could cause him or her to die. Here, the Crown says that by spitting in Constable E.H.'s face in an attempt to infect him with HIV, Mr. Bear endangered the life of the police officer.

40 Counsel for Mr. Bear submits that the Crown has failed to prove beyond a reasonable doubt that Constable E.H. was exposed to any significant risk so as to endanger his life and at most Mr. Bear is guilty of assault.

41 The evidence was that on April 25, 2007, Mr. Bear's wife took him into the Nine Circles Community Health Centre to be tested for HIV. Mr. Bear met with Dennis Loeptkey, an HIV clinician and primary care nurse who treats people who are HIV positive. Mr. Bear was tested and was also told about some of his risks for HIV.

42 On May 16, 2007, Mr. Loeptkey advised Mr. Bear that the results had come back positive and what having HIV would mean to him. He was also counselled about what supports were available and the intake process for him was started.

43 Mr. Loeptkey testified there is a set standard of care for core education about HIV/AIDS which includes information about transmission, prevention, what fluids carry HIV, progression of the virus, life expectancy, medications and safe sex. Although HIV is found in sex fluids, he indicated it is not found in saliva. It is found in blood and he talked to Mr. Bear about this and risky behaviour such as sharing needles. When asked about the risk of infection where blood is mixed with saliva or tears, he answered it would depend on a number of factors, including how long the blood had been outside the body, but that likely there would be a "low to negligible risk" of infection.

44 Lorraine Cameron-Munroe, another HIV clinician, testified she met with Mr. Bear four times prior to his diagnosis with HIV and two times after for regular testing. She confirmed that each time she discussed HIV/AIDS educational issues with him including that HIV is transmitted by blood. She could not remember whether she had ever told him it is not transmitted by saliva.

45 Mr. Bear was assigned to receive care from Dr. David Willems at the clinic. He was first seen by him on July 11, 2007, and met with Dr. Willems a total of eleven occasions, the last time being February 2010. Dr. Willems testified that these meetings included times when Mr. Bear was in custody. Dr. Willems explained how he treats people with HIV, the progress that has been made in treating it, and how the virus progresses. He testified that the virus attacks a person's CD4 cells which are therefore used as a marker as to the status of the patient's infection. As the CD4 level drops the risk of opportunistic infection rises so that early intervention is important. When a person's CD4 level is less than 200 they are considered to have AIDS. Overall the treatment is to "hit hard, hit fast," but despite the availability of new drugs, toxicity and adherence to treatment is a continuing problem.

46 Dr. Willems talked about the importance of building trust and a good therapeutic relationship with a patient because of the range of things with which HIV patients must deal. He noted that Mr. Bear's wife of eight years was HIV positive and suspects that Mr. Bear may well have had the virus for some time before being diagnosed.

47 In November 2007, Dr. Willems testified Mr. Bear was asymptomatic and his CD4 counts were less than 500, but by January 14, 2009, his CD4 counts had dropped to 206. He stated "it was not an easy appointment" and he told Mr. Bear he should be starting medication soon. Dr. Willems talked about the importance of the patient "buying in" and the numerous barriers to successful treatment that exist for people, especially those whose lives are chaotic.

48 The court heard that on February 18, 2010, Mr. Bear's CD4 count was 631 and his viral load was 21,200. The viral load is the number of HIV copies present per millilitre of blood and does not necessarily alter the decision to start medication. In Mr. Bear's case, from an HIV perspective, he was not sick, although Dr. Willems qualified this by saying "wellness is not simply the absence of disease." He also acknowledged that the guidelines for treatment have changed and treatment is now recommended for those with a CD4 count of 500 or lower although other considerations as to when to start medication are always at play.

49 Dr. Michael Dillon is a medical practitioner at Klinic, a core area health centre in Winnipeg. His area of preferred practice is treating patients with HIV/AIDS. He testified in some detail about the evolution of HIV/AIDS, how it is transmitted, the types of available treatment and the risk factors associated with them. He confirmed that saliva is not considered a risk factor against skin, mucous membrane, or broken skin and that blood on intact skin also does not expose one to risk of transmission. However, blood to mucous membrane does pose a risk which is why occupational health care providers wear masks. Even then, their eyes are exposed so that doctors and nurses are always potentially at risk.

50 Dr. Dillon stated unequivocally that a risk of HIV infection does exist if someone gets a splash of blood in the eye. Operating staff know they should rinse their eyes with saline solution and go to the emergency department for treatment immediately. The degree of risk depends on a number of factors including how big the exposure was, what was done immediately after and the amount of time that has elapsed before emergency treatment is obtained. He stated the sooner the treatment the better and after 72 hours it is not effective. In deciding what treatment, if any, is appropriate, if it is known already that the patient has HIV that will help. If the "donor" is HIV positive, is being treated, and has a low viral load, that too will be factored in. One has to balance the relative risks of treatment against the relative risk of infection.

51 When asked about someone who is HIV positive with a moderate viral load, and an open cut who spit into someone's eye, Dr. Dillon said it was "possible" some HIV blood could be transmitted from that person through the mucous membrane of the receiving person - in other words a person could be infected with blood tainted saliva. He said it was an unusual situation involving a bodily fluid considered to be no risk mixed with one considered to be high risk, but that in his opinion any amount in the eye would lead him to offer post-exposure prophylaxis. If the donor was known to have HIV and was not in treatment, as was the case here, he would recommend treatment. In cross-examination he added that it is impossible to be more precise about the nature of the risk because the same situation cannot be recreated. The consequences of being infected with HIV are too drastic to conduct any studies of this kind.

52 Dr. Dillon reviewed Mr. Bear's medical records from Nine Circles and confirmed that, based on 2007 criteria and Mr. Bear's initial CD4 counts and personal preferences, there was no strong indication for starting treatment. Over the next couple of years the records changed and antiretroviral treatment was discussed and offered twice, but Mr. Bear chose not to start. The evidence dis-

closed that Mr. Bear's viral load was in the mid four range (4.5) in December 2007 and that pattern remained fairly consistent thereafter.

53 Mr. Bear's medical records also revealed that his viral load was 4.74 on June 19, 2009, and 4.73 on September 14, 2009. Dr. Dillon opined that, at the time of the incident, he would assume Mr. Bear's plasma (blood) viral load to have been 4.73 to 4.74, which he described as a "steady, moderately high viral load." He testified about the correlation between the viral load and likelihood of infection and indicated that every time the viral load increases by one point, the risk of infection increases by three.

54 For those same dates, Mr. Bear's CD4 readings were 330 and 587 respectively and overall fluctuated fairly significantly.

55 In cross-examination, when questioned about when a doctor would prescribe post-exposure prophylaxis, Dr. Dillon was asked if doctors would prescribe treatment where the risk is negligible, but the patient is insistent. He replied that most doctors and practitioner nurses would be loath to prescribe treatment in those circumstances. With respect to the situation before the court, he reiterated that he would discuss the various factors, including the risk of exposure and the risk posed by the source, but if he were nervous about the source he would play it safe and prescribe treatment. In August 2009, it was his view that Mr. Bear could transfer HIV through blood and that one could not eliminate the possibility of it being transferred through blood mixed with saliva. When asked about Constable E.H.'s risk of getting HIV now, he testified that given his test results and in the absence of any new exposures, it was his opinion Constable E.H. should remain HIV negative.

56 As already noted, the issue to be determined in order for the Crown to prove that Mr. Bear is guilty of aggravated assault is whether his spitting into Constable E.H.'s face caused significant risk of serious bodily harm to the officer. It is clear that when Mr. Bear did so he knew he was infected with HIV, he had been counselled several times about how it is transmitted and that the virus is transmitted in blood, and therefore he can be taken to know that his cut and bleeding lip could potentially contaminate his saliva and pose some risk of HIV infection.

CASE LAW and ANALYSIS

57 The leading authorities dealing with the possible transmission of HIV in the context of a charge of aggravated assault are the 1998 decision of the Supreme Court of Canada in ***R. v. Cuerrier***, [1998] 2 S.C.R. 371 and the 2010 decision of the Manitoba Court of Appeal in ***R. v. Mabior (C.L.)***, 2010 MBCA 93, 258 Man.R. (2d) 166. ***R. v. Mabior (C.L.)*** is currently under appeal before the Supreme Court of Canada. Both cases deal with the issue of unprotected sex with an individual who has HIV, and to that extent may be distinguished, but both provide helpful dicta as to what constitutes an aggravated assault in the context of possible HIV transmission.

58 In ***R. v. Cuerrier***, the Supreme Court held that the failure to disclose one's HIV - positive status constitutes fraud and invalidates any consent to sexual activity where the activity creates a significant risk of serious bodily harm.

59 In ***R. v. Mabior (C.L.)***, the Manitoba Court of Appeal applied the "significant risk of serious bodily harm" test in considering whether the sexual activity in question endangered the life of several complainants and laid down the requirement that evidence of risk must be assessed in light of all relevant factors. The court candidly acknowledged that any assessment of risk must, to a certain extent, involve a question of probabilities, and stated that such factors as information about the ac-

cused, his or her medical condition, the nature of the activity in question, as well as other factors, would all be relevant considerations.

60 In ***R. v. Mabior (C.L.)***, the court recognized the dramatic consequences of becoming HIV positive, HIV being the precondition to the development of AIDS. The court noted (at para. 64):

> Nonetheless, I do not think it can be disputed that being infected with HIV subjects an individual to serious bodily harm. Although no longer necessarily fatal if treated medically, HIV is an infection that cannot be cured at this time and is a lifelong, chronic infection. For those who do become infected, it is a life-altering disease, both physically and emotionally. Individuals must take medications every day, and the condition is potentially lethal if they do not have access to treatment of [*sic*] fail to take medications. Even with treatment, HIV infection can still lead to devastating illnesses. Moreover, the emotional and psychological impact of dealing with such a disease is, no doubt, overwhelming. ....

61 The court specifically rejected the argument that, given the nature of the serious bodily harm that might occur, any risk of harm is significant. It did accept, however, that the nature of the harm can affect a determination of what constitutes significant risk, and stated that, as the magnitude of the harm goes up, the threshold of probability that it will be considered significant goes down.

62 The court went on to say that whether the particular facts of a case will result in a finding of a significant risk of serious bodily harm will depend on the scientific and medical evidence adduced. In ***R. v. Mabior (C.L.)***, the court found that the scientific evidence established that either the careful use of a condom or effective antiretroviral therapy which reduced viral loads to an undetectable level could potentially reduce the level of risk of transmission of HIV to below the legal test of significant risk. It is significant that in ***R. v. Mabior (C.L.)***, the accused was receiving treatment and had low viral loads, including some so low the court found he could be considered non-infectious.

63 In ***R. v. Mabior (C.L.)***, the court also had the benefit of medical studies which established a baseline of the rate of transmission of HIV in unprotected sex and noted that, as a result of advances in medical science, transmission rates could be distinguished between the trivial and significant.

64 In the present case, no such scientific information or studies are available, nor will they likely ever be. The best evidence available on the effect of Mr. Bear's likely viral load of 4.73 to 4.74 and fluctuating CD4 reading on the question of risk, where blood is mixed with saliva in an unknown quantity and comes into contact with the eye and possibly the mucous membrane of the nose is that of the nurse, Mr. Loeptkey, that risk of transmission was "low to negligible" and Dr. Dillon's opinion that the possibility of transmission could not be eliminated.

65 Following the rationale laid down in ***R. v. Mabior (C.L.)*** and the clear pronouncement that elimination of risk is not the test, I find that the Crown has not established beyond a reasonable doubt that the risk of serious bodily harm was significant. In coming to this conclusion I am mindful of the *obiter* comments of the Court of Appeal on endangerment to life and agree that it can occur without any bodily harm actually occurring. However, the evidence to support the charge is insufficient to prove a charge of aggravated assault beyond a reasonable doubt, as the Crown is required to do, because it is unavailable.

66 Here we cannot know the quantity of blood to which the officer was exposed, or what quantity would be necessary to pose a significant risk when mixed with saliva. The officer was able to rinse

his eyes out within minutes of the incident taking place and get to a hospital shortly thereafter. The fact that he was not counselled that the risk was so negligible treatment was unnecessary suggests some degree of risk, but the expert opinion evidence could not go beyond mere possibility.

67 I in no way wish to minimize the trauma of facing the possibility of having contracted HIV, the agony of waiting for test results over several months as well as the seriously toxic effect of undergoing post-exposure prophylaxis. This case points out the difficulty of applying a risk assessment in circumstances where the nature of the activity is reprehensible and highly blameworthy, the public policy considerations of officer safety and respect for the police are high, but the availability of scientific evidence is problematic. I am, however, obliged to follow the ***R. v. Mabior (C.L.)*** decision.

68 In light of the foregoing I find Mr. Bear not guilty of aggravated assault.

69 The Crown argues alternatively that if Mr. Bear is not convicted of aggravated assault he is guilty of the offence of attempted aggravated assault. The applicable provision is s. 660 of the ***Criminal Code*** which, in my view, does not apply to the circumstances here. It addresses the situation of where there is the necessary intent to commit an offence, but the offence is incomplete due to some intervening event. Here, the offence was complete, but the evidence falls short of proving the offence charged. See, ***Detering v. The Queen***, [1982] 2 S.C.R. 583.

70 I therefore find that the Crown has proved beyond a reasonable doubt that Mr. Bear is guilty of the included offence of assault.

D.J. McCAWLEY J.

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