WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Mekonnen, 2013 ONCA 414
DATE: 20130621
DOCKET: C51878 and C51376

Cronk, Epstein and Lauwers JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Yonatan Mekonnen

Appellant

Jonathan A. Shime, for the appellant

Kim Crosbie, for the respondent

Heard: February 11, 2013

On appeal from the conviction entered by Justice Joseph W. Bovard of the Ontario Court of Justice on September 14, 2009 (C51376), with reasons reported at 2009 ONCJ 643, and the conviction entered by Justice James J. Keaney of the Ontario Court of Justice on January 26, 2010 (C51878).

Cronk J.A.:

I. Introduction[1]

[1] The appellant, Yonatan Mekonnen, is HIV–positive. Following two separate trials in 2009, he was convicted of two counts of aggravated sexual

[1] These appeals were heard together with a companion appeal in *R. v. Felix*, 2013 ONCA 415. This court's reasons in *Felix* are being released contemporaneously with these reasons.

assault in relation to two different women for not disclosing his HIV–positive status prior to sexual activity. He appealed both convictions. He has fully served the sentences imposed at his trials.

[2] While the appellant's conviction appeals were pending, the Supreme Court of Canada released its decision in *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, together with its companion decision in *R. v. D.C.*, 2012 SCC 48, [2012] 2 S.C.R. 626. In *Mabior*, the Supreme Court revisited its approach in *R. v. Cuerrier*, [1998] 2 S.C.R. 371 to the determination whether fraud vitiates consent to sexual relations and whether the non-disclosure of HIV–positive status prior to sexual relations can constitute fraud vitiating consent within the meaning of the *Criminal Code*, R.S.C. 1985, c. C-46.

[3] The parties accept that *Mabior* has overtaken the original grounds of appeal advanced by the appellant and the Crown's responding positions on the appellant's conviction appeals.

[4] Although the appellant in his factum originally sought acquittals concerning his convictions, during oral argument he submitted that, based on *Mabior*, his appeals should be allowed and stay orders should be granted in respect of all proceedings on the charged offences.

[5] The Crown initially argued in its post-*Mabior* factum that the appellant's appeals should be allowed and new trials ordered in each case. However, during

oral argument, the Crown also altered its position. The Crown now supports the appellant's request that the appeals be allowed and stay orders granted in relation to each proceeding.

[6] Given the significantly narrowed scope of the appeals, the task for this court is to apply the *Mabior* decision to the facts of these cases and, if the appeals are allowed, to fashion proper remedies in the circumstances.

[7] For the reasons that follow, I agree that the appeals should be allowed. I am also of the view that the Crown's position at the appeal hearing regarding suitable remedies was professional and appropriate. I would accept the joint position of the parties, allow the appeals, set aside the convictions and grant a stay of each proceeding. I would also alter the ancillary orders imposed at the appellant's trials in the manner described below.

II. Background Facts

[8] The relevant background facts are essentially undisputed and may be set out in brief compass.

(1) The First Trial – Complainant L.L. (C51376)

[9] On September 26, 2008, the appellant was charged with one count of aggravated sexual assault involving the complainant, L.L. It was alleged that between November 2007 and January 2008, the appellant had vaginal

intercourse with L.L. on three separate occasions without disclosing his HIV–positive status.

[10] The appellant was tried before Bovard J. of the Ontario Court of Justice in September of 2009. At trial, the complainant testified that during each of the three sexual encounters, the appellant wore a condom prior to intercourse. On one occasion, the complainant performed fellatio on the appellant. The complainant said that the appellant may have worn a condom when she fellated him, but she could not recall. She testified that he probably did not ejaculate in her mouth.

[11] Based on an agreed statement of facts filed at trial, it was established that the appellant knew he was HIV–positive before he met the complainant. The complainant said that the appellant did not disclose his HIV–positive status to her. She claimed that she would not have engaged in sexual activity with the appellant if she had known he was HIV–positive.

[12] The complainant discovered that the appellant had HIV when a friend told her that she had seen his picture in the newspaper. The complainant then saw her doctor and was tested for HIV. She testified that she was in "agony" during the ensuing month as she awaited her test results. She said that she was scared, devastated, cried daily, and thought that she was going to die.

Fortunately, the complainant's test results eventually revealed that she had not contracted HIV.

[13] The appellant testified in his own defence. He denied having any sexual contact with the complainant.

[14] No medical or expert evidence was called by the Crown to quantify the risk associated with the three acts of protected sexual intercourse described by the complainant. Although the agreed statement of facts contained an acknowledgment that "HIV can be transmitted through the exchange of any bodily fluid", there was no evidence that bodily fluids, in fact, were exchanged on any of the three occasions of sexual intercourse.

[15] Defence counsel at trial (not counsel on appeal) conceded that if the trial judge found that the appellant and the complainant had engaged in either sexual intercourse or oral sex and that the appellant had not disclosed his HIV–positive status to the complainant, a conviction for aggravated sexual assault should follow.

[16] The trial judge rejected the appellant's claim that he had not engaged in sexual activity with the complainant. He accepted the complainant's account of protected sexual activity without disclosure by the appellant that he was HIV–positive.

[17] Accordingly, and in light of defence counsel's concession, the appellant was convicted on September 14, 2009, of aggravated sexual assault. On December 15, 2009, he was sentenced to 12 months' incarceration, plus three years' probation. A ten-year weapons prohibition order, a lifetime order under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 ("SOIRA"), and a DNA data bank order were also imposed.

(2) The Second Trial – Complainant K.S. (C51878)

[18] In a separate information dated June 20, 2008, as amended on July 14, 2009, the appellant was charged with two counts of aggravated sexual assault involving the complainant, K.S. In respect of these charges, it was alleged that the appellant had sexual relations with the complainant during the months of January and February 2008, without disclosing his HIV–positive status. Justice James J. Keaney of the Ontario Court of Justice presided over this trial.

[19] At trial, it was established that the complainant met the appellant in December 2007, one month after he learned that he had HIV. The complainant testified that she began to date the appellant and first had sex with him in January of 2008. She said that during their first sexual encounter, the appellant performed oral sex on her and they then had vaginal intercourse, without the protection of a condom. The complainant claimed that immediately afterwards, she and the appellant discussed the possibility of contracting sexually transmitted

diseases. She said that the appellant lied to her, claiming that he was free of infection.

[20] The complainant's relationship with the appellant continued over the next few months, during which they had sexual intercourse, on a protected and unprotected basis, on numerous occasions.

[21] In about February 2008, the appellant began living with the complainant and her mother. Towards the end of February or early March, the complainant and the appellant decided to rent their own apartment together. The complainant maintained that on the day before they were scheduled to move, the appellant told her that he had just learned that he was HIV–positive.

[22] The complainant was shocked and upset. The next day, she broke down at work and her boss arranged for her to attend a public health clinic where she was tested for HIV. Fortunately, she later learned that she had not contracted the disease.

[23] Notwithstanding these events, the complainant and the appellant moved into their own apartment together and continued to have sex, using a condom. The complainant said that, on occasion, the use of a condom was delayed. Their relationship ended in April or May 2008.

[24] The Crown also called Dr. David Richardson, the appellant's HIV doctor. He testified that the use of condoms substantially reduces, but does not

eliminate, the risk of HIV transmission. However, he provided no evidence concerning the specific level of risk associated with unprotected sex or the reduction in that risk to be gained with condom use.

[25] Dr. Richardson's clinical notes were filed as an exhibit at trial. In one of his notes, dated April 2, 2008, Dr. Richardson recorded that he had explained to the appellant "that his viral load is low". It appears that the issue of the appellant's viral load was not addressed at the trial.

[26] The appellant testified that he was in denial about being HIV–positive when he first met the complainant. He said that he and the complainant had intercourse once – on Valentine's Day in February 2008 – before moving into their own place together. He claimed that they used a condom on that occasion but acknowledged that he did not disclose his HIV–positive status to the complainant. According to the appellant, the couple used a condom on each subsequent occasion when they had sex together.

[27] The trial judge held, on the authority of *Cuerrier*, that because the appellant admitted to having had sex with the complainant without first disclosing his HIV–positive status, the appellant's own evidence established fraud vitiating the complainant's consent to sex regardless of whether a condom had been used. He found that condom use, in any event, is not absolutely safe and that the

appellant had endangered the complainant's life when he knowingly failed to disclose his HIV–positive to her on their first sexual encounter.

[28] However, the trial judge was unable to conclude that the complainant and the appellant had sex in January of 2008. Accordingly, he convicted the appellant on the count of aggravated sexual assault pertaining to the events of February 2008 and acquitted him of the like count relating to the alleged events of January 2008. The appellant was subsequently sentenced to nine months' incarceration, plus three years' probation. He was also ordered to provide a sample of his DNA and to register, for life, under the SOIRA. A lifetime weapons prohibition order was also made under s. 109 of the Code.

III. The *Cuerrier* Decision

[29] In *Cuerrier*, the Supreme Court held that the failure to inform a sexual partner of one's HIV status may constitute fraud vitiating consent. The Supreme Court emphasized that the essential elements of fraud are dishonesty and deprivation or risk of deprivation. Justice Cory, writing for the majority, described the proof of dishonesty requirement of fraud in part in this fashion, at paras. 125–127:

> Persons knowing that they are HIV–positive who engage in sexual intercourse without advising their partner of the disease may be found to fulfil the traditional requirements for fraud namely dishonesty and depri-vation. That fraud may vitiate a partner's consent to engage in sexual intercourse.

> [T]he dishonest action or behaviour must be related to the obtaining of consent to engage in sexual intercourse, in this case unprotected intercourse. The actions of the accused must be assessed objectively to determine whether a reasonable person would find them to be dishonest. The dishonest act consists of either deliberate deceit respecting HIV status or non-disclosure of that status.
>
> Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV–positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV–positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent.

[30] Justice Cory then turned to the second requirement of fraud – that the dishonesty result in deprivation or risk of deprivation. He said, at para. 128:

> [The deprivation or risk of deprivation] may consist of actual harm or simply a risk of harm. Yet it cannot be any trivial harm or risk of harm that will satisfy this requirement in sexual assault cases where the activity would have been consensual if the consent had not been obtained by fraud. For example, the risk of minor scratches or of catching cold would not suffice to establish deprivation. What then should be required? *In my view, the Crown will have to establish that the dishonest act (either falsehoods or failure to disclose) had the effect of exposing the person consenting to a significant risk of serious bodily harm. The risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet that test.* [Emphasis added.]

[31] Justice Cory then added this important observation, at para. 129:

> To have intercourse with a person who is HIV–positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation.

[32] The application of the *Cuerrier* test sometimes proved difficult and controversial. The Crown fairly put it this way in its supplementary factum, at para. 26:

> The test was viewed by many as vague, resulting in considerable uncertainty concerning the scope of disclosure obligations and the protection of the public. Further, establishing a threshold for determining what a significant risk actually was had become a numbers game – and given the variable factors that impact on transmission rates, that assessment often proved difficult. Triers of fact applied different thresholds to determine the significance of the risk, with inconsistent results across the country and within provinces.

[33] Since HIV poses a risk of serious bodily harm, the operative offence under the Code is aggravated sexual assault. Although *Cuerrier* established the requirements for this offence, the precise circumstances in which the failure to disclose HIV status would vitiate consent, thereby giving rise to criminal liability, remained unclear. In *Mabior*, the Supreme Court was asked to clarify those circumstances and the *Cuerrier* test of "significant risk of serious bodily harm".

IV. The *Mabior* and *D.C.* Decisions

[34] In *Mabior*, the accused was charged with nine counts of aggravated sexual assault for failing to disclose his HIV–positive status to nine complainants before

they had sex with him. None of the complainants contracted HIV. At trial, the accused was convicted on six of the counts. He was acquitted on the other three counts on the basis that protected intercourse – the use of a condom – when the HIV–positive person's viral loads are undetectable does not place a sexual partner at "significant risk of serious bodily harm" within the meaning of *Cuerrier*.

[35] The Manitoba Court of Appeal varied the trial decision, holding that *either* a low viral load or condom use could negate significant risk of serious bodily harm. The Court of Appeal upheld the convictions on two counts where neither was established and entered acquittals on the remaining four counts, based on proof of either condom use or a low viral load.

[36] On a Crown appeal from the acquittals, the Supreme Court restored the convictions for the incidents in which the accused did not have a low viral load and use of a condom was not established. The court confirmed the continuing validity of the *Cuerrier* test of a "significant risk of serious bodily harm", commenting, at para. 58, that the test's approach to consent "accepts the wisdom of the common law that not every deception that leads to sexual intercourse should be criminalized, while still according consent meaningful scope".

[37] The *Mabior* court also sought to clarify the meaning of the "significant risk of serious bodily harm" test by indicating when the test is met "in terms of

principle and concrete situations": *Mabior*, at para. 81. Chief Justice McLachlin, writing for a unanimous court, held at para. 84:

> In my view, a "significant risk of serious bodily harm" connotes a position between the extremes of no risk (the trial judge's test) and "high risk" (the Court of Appeal's test). *Where there is a realistic possibility of transmission of HIV, a significant risk of serious bodily harm is established, and the deprivation element of the Cuerrier test is met.* [Underlined emphasis in original; italicized emphasis added.]

[38] After reviewing various considerations that supported this approach, McLachlin C.J. indicated, at para. 91:

> These considerations lead me to conclude that *the Cuerrier requirement* of "significant risk of serious bodily harm" *should be read as requiring disclosure of HIV status if there is a realistic possibility of transmission of HIV*. If there is no realistic possibility of transmission of HIV, failure to disclose that one has HIV will not constitute fraud vitiating consent to sexual relations under s. 265(3)(*c*) [of the Code]. [Emphasis added.]

[39] As McLachlin C.J. noted, at para. 92, " 'significant risk' depends both on the degree of harm and risk of transmission. These two factors vary inversely." With respect to when there is a realistic possibility of transmission of HIV, McLachlin C.J. made this central finding, at para. 94:

> The evidence adduced here satisfies me that, as a general matter, a realistic possibility of transmission of HIV is negated if (i) the accused's viral load at the time of sexual relations was low, *and* (ii) condom protection was used. [Emphasis in original.]

[40] Chief Justice McLachlin went on to add, at paras. 101 and 104:

> [O]n the evidence before us, the ultimate percentage risk of transmission resulting from the combined effect of condom use *and* low viral load is clearly extremely low – so low that the risk is reduced to a speculative possibility rather than a realistic possibility.
>
> ….
>
> [T]he general proposition that a low viral load combined with condom use negates a realistic possibility of transmission of HIV does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in the present case are at play.
>
> [Emphasis in original.]

[41] The Supreme Court summarized its findings in *Mabior*, at paras. 104-105, in these terms:

> To summarize, to obtain a conviction under ss. 265(3)(*c*) and 273, the Crown must show that the complainant's consent to sexual intercourse was vitiated by the accused's fraud as to his HIV status. Failure to disclose (*the dishonest act*) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV–positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm (*deprivation*). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV. On the evidence before us, a realistic possibility of transmission is negated by evidence that the accused's viral load was low at the time of intercourse and that condom protection was used.
>
> The usual rules of evidence and proof apply. The Crown bears the burden of establishing the elements of the offence – a dishonest act and deprivation – beyond a reasonable doubt. Where the Crown has made a *prima facie* case of deception and deprivation as

> described in these reasons, a tactical burden may fall on the accused to raise a reasonable doubt, by calling evidence that he had a low viral load at the time and that condom protection was used. [Emphasis in original.]

[42] The holdings in *Mabior* were directly applied in the companion case of *D.C.* In that case, the accused was charged with sexual assault and aggravated assault. It was alleged that when the accused first engaged in vaginal intercourse with her male partner, she did not disclose her HIV–positive status. At the time, the accused's viral load was undetectable. The critical issue, therefore, was whether the couple had used a condom.

[43] Based on the accused's and her partner's evidence at trial, there was conflicting evidence regarding whether a condom had been used. The trial judge, relying on a dated note in the accused's medical records, inferred that no condom had been worn and convicted the accused of both charges. Contrary to the standard subsequently set out in *Mabior*, the Quebec Court of Appeal set aside the convictions on the ground that even without condom use, the significant risk test established in *Cuerrier* had not been met, given the accused's undetectable viral load.

[44] The Supreme Court applied the *Mabior* significant risk standard, holding that condom use, in addition to a low viral load, was necessary in order for the accused to avoid criminal liability for failing to disclose her HIV–positive status. In other words, in accordance with *Mabior*, *D.C.* also holds that condom use is

required to preclude a realistic possibility of HIV transmission. In the result, the Supreme Court dismissed the appeal but set aside the convictions based on the trial judge's impermissible inference from the accused's medical records that a condom had not been used.

V. Application of *Mabior* and *D.C.* to the Facts of these Cases

[45] The appellant argues that in light of *Mabior* and *D.C.*, these appeals must be allowed. I agree.

[46] First, and importantly, the Crown concedes that the appeals should be allowed.

[47] Second, based on the *Mabior* court's clarification of the significant risk of serious bodily harm test enunciated in *Cuerrier*, the findings at both of the appellant's trials are insufficient to support the convictions entered.

[48] The conviction at the appellant's first trial (involving L.L.) was grounded, at least in part, on defence counsel's concession at that trial that the appellant should be convicted of aggravated sexual assault if sexual intercourse or oral sex was found to have occurred without disclosure by the appellant of his HIV–positive status. I agree with Crown counsel's submission before this court that a conviction on this basis alone does not meet the *Mabior* standard of a realistic possibility of HIV transmission.

[49] The conviction entered at the appellant's second trial (involving K.S.) is also unsustainable. There was no evidence at this trial as to the risk associated with the sexual activity engaged in by the appellant. Critically, the trial judge made no finding to resolve the conflicting evidence on whether a condom was actually used. On the state of the law at the time, the trial judge regarded it as immaterial to resolve this issue. However, under the *Mabior* standard, proof of condom use, while not always essential, may be highly material to the demonstration of a realistic possibility of transmission of HIV. Without such a realistic possibility, a significant risk of serious bodily harm cannot be made out.

[50] Accordingly, I would accept the parties' joint position that the appeals must be allowed.

[51] That leaves only the question of remedy. Although originally contested, the parties now agree that stay orders should be granted in respect of both proceedings.

[52] Generally, a stay of criminal proceedings is granted only in exceptional circumstances. The high threshold for a stay recognizes that stayed charges may never be prosecuted or resolved by a trier of fact. See for example, *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53. In the cases at bar, in my opinion, there is a basis on which the appellant could be convicted of the charges against him, in accordance with the *Mabior* standard, depending on how

the evidence played out at new trials. It is therefore not axiomatic that a stay of proceedings should be granted in cases of this kind.

[53] That said, I am persuaded that several compelling factors justify a stay order in respect of both proceedings against the appellant. First, the appellant has fully served and complied with all components of his sentences. Second, the hearing of his appeals was twice adjourned pending the release of *Mabior* and *D.C.* As a result, the appellant has been engaged in the appeal process for about three years, with the ever-present stigma of his convictions throughout. Finally, and importantly, the Crown now professionally and appropriately consents to the requested stay orders. As I understood Crown counsel's submissions, the Crown acknowledges that stay orders in these cases are warranted in the interests of the administration of justice.

[54] In these specific circumstances, I would accede to the joint request of the Crown and the defence that stay orders be granted. In my view, both fairness and the public interest are served by this outcome.

VI. Disposition

[55] Accordingly, for the reasons given, I would allow the appeals, set aside the appellant's convictions and grant a stay of each proceeding. As agreed by the parties, I would also direct that the appellant's name be removed forthwith from the provincial sex offender registry (Christopher's Law) and from SOIRA, that the

sample of the appellant's DNA previously provided be destroyed forthwith, and that the convictions and charges also be removed forthwith from the appellant's vulnerable sector check.

Released:

"JUN 21 2013"
"EAC"

"E.A. Cronk J.A."
"I agree Gloria Epstein J.A."
"I agree P. Lauwers J.A."