

[2] There is no dispute in relation to the following facts:

1. Dr. Rice (“Rice”) and Pottelberg were friends. Rice was also the accused’s physician. In 2006, Rice informed Pottelberg that he was HIV positive. Pottelberg was living at Rice’s residence in London, Ontario as a house guest in the latter part of 2007 and the first half of 2008.
2. Rice and Pottelberg communicated with NB on the internet through a website called gay.com. NB said that most people do not use their real name when communicating with others on the website and he used the name “Mazda Queen.” NB advised that he was interested in an arrangement whereby he would provide sexual services in exchange for receiving living accommodations and support.
3. NB was living in Lethbridge, Alberta in the latter part of 2007. Rice invited NB to visit him in London when NB travelled to Ontario to visit friends and family in the Kitchener-Waterloo area.
4. On or about December 29, 2007, Rice invited about 10 friends to his house for a social gathering. NB and Rice arranged for NB to drive to Rice’s residence to attend the gathering. NB stayed as a house guest at Rice’s residence for two nights. Pottelberg spent the evening of December 29, 2007 and the early hours of the following morning in bed because he suffers from agoraphobia and depression.
5. In the early morning of December 30, 2007, Rice introduced NB to Pottelberg just after the accused had awoken and was still lying in bed. NB removed his pants and got into bed with Pottelberg and started gyrating against the accused immediately following the introduction. NB and Pottelberg engaged in sexual activity on more than one occasion that day. NB and Pottelberg engaged in sexual activity on one or more subsequent occasions at Rice’s residence between January 1, 2008 and August 30, 2008. Pottelberg did not inform NB that he was HIV positive. NB did not inquire

about Pottelberg's HIV status before engaging in sexual activity with him. NB learned in March 2009 that a blood test revealed he was HIV positive.

6. NB contacted Pottelberg who confirmed that he was HIV positive. NB subsequently contacted the London Police Department and informed the police that Pottelberg transmitted the HIV virus to him.

7. Detective Constable Poaavola contacted Pottelberg and requested the accused to attend the London police station for an interview. On April 14, 2009, DC Poaavola informed the accused that she was investigating an allegation of aggravated sexual assault in relation to NB. The prosecutor filed the videotaped interview and a transcript as exhibits. In his videotaped statement, the accused discussed his initial meeting with the complainant, the nature of the sexual activity between them and his HIV status as follows:

- a. Pottelberg told the investigator that NB was an acquaintance whom he met while a house guest at Rice's residence.
- b. Pottelberg said he learned that he was HIV positive in 2006. While the accused's other partners were aware of his HIV status, he did not tell the complainant that he was HIV positive.
- c. DC Poaavola asked Pottelberg if he had protected or unprotected sex with NB. Pottelberg responded that NB did not give him a chance to consider protection. Pottelberg said that he had just awoken and was lying in bed when NB leapt on top of him. He said that NB was very sexually aggressive. Pottelberg said there was no conversation between him and the complainant prior to the commencement of the sexual activity and he did not know NB's name at this time. The accused said that the complainant spoke approximately five words with him over the course of the two-day visit.

- d. Pottelberg said that Rice was aware that he was HIV positive. He presumed Rice had told NB of his HIV status before leading NB to the guest bedroom where he was sleeping. Pottelberg thought that NB knew his HIV status before NB leapt into his bed without any thought of protection. Pottelberg assumed that NB was also HIV positive.
- e. Pottelberg told DC Poavola that he thought NB engaged in sexual activity with other guests during the initial two-day visit. Pottelberg said that NB was too aggressive and he tried to avoid NB during a subsequent visit to Rice's residence. He said that he hid from NB on one visit because NB would not stop pestering him. Pottelberg told the officer that NB was extremely sexually active and NB had no desire to have protected sex.
- f. Pottelberg said that he felt bad for NB and would be mortified if he was the cause of NB's HIV infection. The accused told the officer that he would not have had unprotected sex with NB if he knew that NB was HIV negative.
- g. Pottelberg said that he last saw NB in the spring of 2008.

[3] NB and Rice confirmed many of the details of Pottelberg's account of his first sexual encounter with NB. Rice testified that he did not tell NB that Pottelberg was HIV positive on the ground of patient confidentiality, but informed NB and Pottelberg that his residence was a safe sex house and left the bedroom to retrieve condoms. When Rice returned with a box of condoms less than a minute later, NB and Pottelberg were under the sheets.

ANALYSIS AND DECISION

[4] Pottelberg is charged with the offence of aggravated sexual assault. The Crown must prove beyond a reasonable doubt that the accused intentionally applied force (touching) to the complainant in circumstances of sexuality without the complainant's consent. For the crime of aggravated sexual assault, the Crown must prove beyond a reasonable doubt that in committing a sexual assault, the accused caused one of the following consequences: wounds, maims,

disfigures or endangers the life of the complainant. When the offence of aggravated sexual assault is based on the transmission of HIV, the inquiry focuses on the complainant's consent and the consequence of the assault.

[5] Pottelberg intentionally applied force (touching) when he engaged in anal intercourse with the complainant. The subjective element for the issue of consent is determined by the complainant's state of mind at the time of the touching. The complainant's evidence of non-consent, however, is a matter of credibility for the trier of fact to determine (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330).

[6] The complainant consented to engage in anal intercourse with the accused. However, s. 265(3)(c) of the *Criminal Code* provides: "For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of fraud." In *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at para. 127, Cory J., for the majority held:

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 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.

[7] Cory J. held that there is a positive duty on an accused to disclose his HIV positive status because the failure to disclose can lead to a devastating illness with fatal consequences. I find that: (1) Pottelberg did not inform the complainant that he was HIV positive; (2) the accused had a positive duty to disclose his HIV status to NB before engaging in unprotected anal sex with the complainant; and (3) NB's consent to engage in sexual intercourse was vitiated by the accused's failure to disclose his HIV status.

[8] NB had engaged in unprotected sexual activity with other persons prior to his first encounter with the accused. He also engaged in unprotected sexual activity with others after his last sexual activity with the accused but before learning that he was HIV positive. Even though the Crown has proven beyond a reasonable doubt that Pottelberg engaged in sexual intercourse with the complainant without a legally valid consent, the Crown could not prove that Pottelberg

endangered the life of the complainant, (*R. v. Williams*, [2003] 2 S.C.R. 134 at paras. 62-63) since there was a possibility that a third party transmitted the virus to the complainant. Accordingly, the prosecution proceeded on the included offence of attempted aggravated sexual assault.

POSITION OF THE PARTIES

[9] The position of the Crown is that the accused did not disclose to the complainant that he was HIV positive. NB testified that he would not have engaged in unprotected sexual intercourse with Pottelberg if he had known the accused was HIV positive.

[10] The position of the defence is that the complainant consented or the accused had a mistaken belief that the complainant consented. Counsel for the accused also submitted that the court should re-visit the issue of consent because the transmission of HIV is no longer life-threatening by reason of medical advances since the Supreme Court decided *Cuerrier* and *Williams*. He argued that the Crown failed to prove that the complainant would not have consented if informed that Pottelberg was HIV positive.

[11] The crime of attempted aggravated sexual assault requires the Crown to prove beyond a reasonable doubt that the accused intended to commit the *actus reus* of aggravated sexual assault and took sufficient steps towards its commission whether or not it was possible under the circumstances to commit the completed offence. In *Williams, supra*, at para. 65, the Supreme Court of Canada adopted the law of attempt set out in *United States v. Dynar*, [1997] 2 S.C.R. 462 at paras. 73-74:

An accused is guilty of an offence if he intends to commit a crime and takes legally sufficient steps towards its commission. Because an attempt is in its very nature an incomplete substantive offence, it will always be the case that the *actus reus* of the completed offence will be deficient, and sometimes this will be because an attendant circumstance is lacking...

...The law of attempt is engaged only when, as in this case, the *mens rea* of the completed offence is present entirely and the *actus reus* of it is present in an incomplete but more-than-merely-preparatory way.

[12] NB testified that he would not have engaged in unprotected sex with Pottelberg if he knew that the accused was HIV positive. As mentioned, the complainant's credibility is a matter for the determination of the trier of fact (*Ewanchuk, supra*). In situations where the accused fails to disclose his HIV status, at para. 130 of *Cuerrier*, the Supreme Court held:

...it must be emphasized that the Crown will still be required to prove beyond a reasonable doubt that the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was HIV-positive. As unlikely as that may appear it remains a real possibility. In the words of other decisions it remains a live issue.

[13] There were inconsistencies between NB's evidence at the preliminary hearing and his evidence at trial. NB testified that he started to experience memory problems prior to the preliminary inquiry, which became worse after he was involved in a motor vehicle collision shortly after the preliminary hearing was completed on February 20, 2010. This memory loss may explain some of the inconsistencies in the complainant's evidence but not others.

[14] NB was a very articulate witness. He was just 14 years old when he volunteered at an AIDS clinic managing files and stocking condoms. He was very knowledgeable about the transmission of the AIDS virus and knew that homosexual men who engaged in unprotected anal intercourse were in a high risk category for contracting HIV. He agreed that Pottelberg showed visible signs which were consistent with someone infected with AIDS, such as skin lesions, before he initiated unprotected sexual intercourse with the accused. Nonetheless, NB initiated sexual activity and engaged in unprotected anal intercourse with Pottelberg without speaking to him.

[15] A CD4 test measures the number of immune cells in a sample. A person infected with advanced AIDS will have a low immune cell count. NB testified that he underwent six to twelve CD4 tests between 2005 and 2009 to obtain a baseline in the event he was infected with HIV. Rice testified that the CD4 test counts are relatively constant within a range but drop significantly when a person is infected with the virus. Rice testified that it was unnecessary to take six to twelve tests to establish a baseline. I do not accept the complainant's explanation that he took these tests to establish a baseline. A more likely scenario is that the complainant took

numerous CD4 tests, notwithstanding he had an abnormal fear of needles, because he was aware of the risks of contracting the virus. As mentioned, NB was articulate and knowledgeable about AIDS.

[16] At trial, the complainant offered a different explanation for taking multiple CD4 tests. NB testified that he took the CD4 tests because he suffered from hypoglycemia. Rice testified that CD4 tests were not related to hypoglycemia.

[17] NB testified at the preliminary hearing that Rice did not participate in the sexual activity. At trial, NB testified that Rice participated in the sexual activity with himself and Pottelberg and that on two occasions Rice watched while he and Pottelberg engaged in sexual activity. Rice denied being involved beyond the introduction and provision of condoms.

[18] On the evening of December 29, 2007, NB told Rice that he had engaged in sexual activity the previous evening with three unknown men in a car in a Kitchener parking lot. He implied that the intercourse was unprotected. At the preliminary hearing, NB said he lied about this incident, but that he had engaged in unprotected anal intercourse with a person whom he had known. At the preliminary hearing, NB was unable to explain why he lied to Rice.

[19] NB provided an explanation of this lie at trial. NB testified that he wanted Rice, and Pottelberg through Rice, to believe that he was open to a variety of homosexual sexual practices outside the norm.

[20] NB testified that there is a difference between engaging in unprotected anal intercourse on the understanding between the parties that there is no risk and engaging in this act with someone who is unknown and whose HIV status is unknown. He testified that engaging in the act “without even asking, would not be a practice that I would have practiced.” However, the complainant acknowledged aggressively engaging in unprotected anal intercourse with a stranger who showed recognized signs of suffering from AIDS.

[21] I am not satisfied beyond a reasonable doubt that NB would have refused to engage in unprotected anal intercourse with Pottelberg if he had been informed by Pottelberg that he was HIV positive. Accordingly, I acquit the accused because I have a reasonable doubt of his guilt.

"Justice A.W. Bryant"

Mr. Justice A.W. Bryant

Released: December 17, 2010

CITATION: R. v. Pottelberg, 2010 ONSC 5756
COURT FILE NO.: 10628
DATE: 2010/12/17

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

-and-

PATRICK R. POTTELBERG

REASONS FOR DECISION

BRYANT J.

Released: December 17, 2010