IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. J.T.C., 2013 NSPC 105

Date: November 8, 2013
Docket: 2608453, 2608454
Registry: Halifax

Her Majesty the Queen

v.

J.T.C., a young person

DECISION

Judge:	The Honourable Judge Jamie S. Campbell
Heard:	October 28, 29, November 5, 6, 2013
Decision:	November 8, 2013
Charge:	CC 273(2)(b), YCJA 137
Counsel:	Tanya Carter - Crown Attorney Megan Longley - Defence Counsel Karlan Modeste - Articled Clerk

By the Court:

1. This case deals with the legal issues surrounding the non-disclosure of a person's HIV positive status to a sexual partner. It involves the consideration of consent based on a misrepresentation and the retroactive erasing of that consent based on a misunderstanding.

2. J.T.C. has been charged with aggravated sexual assault. It has been alleged that he had sexual intercourse with S.N. without telling her that he was HIV positive. The sexual activity itself was, at the time that it took place, consensual. The Crown contends that her consent was obtained by fraud. That means that had she known that he was HIV positive she would not have consented.

The Relationship

3. At least some of the young people who come into contact with the youth criminal justice system appear to inhabit a different moral universe. That is especially true when it comes to sometimes fleeting relationships that quickly become intensely sexual. All too frequently those "hook ups" result in immature couples becoming parents well before they are capable of exercising the kinds of judgement, personal restraint and sacrifice that are fundamental to parenthood. Seeing how their lives have been shaped, it is little wonder.

4. J.T.C.'s life story is marked by profound tragedy. At the age of 3 or 4 he was sexually assaulted by his mother's then partner. As a result of that contact he contracted HIV. His mother died soon after that horrible incident. He went to live with a great aunt and uncle just outside Halifax. He described them as an older couple having perhaps "not the best parenting skills". He was taken into care of the Department of Community Services and lived in various group homes in the system.

5. It was in that system that he came into contact with S.N., who is older by only a few months. He says that he had always sort of liked her "in that way". One day she disappeared from the group home. He had no idea where she had gone. He said that he "kind of forgot about her". She was still a "friend" on Facebook, a social media site that first turned "friend" into a verb and then appears to have ground the word into meaningless dust.

6. Then one day in April of 2012, when they were both 17 years old, he saw her on the bus with her baby daughter. He sat with her and they "reconnected". He messaged her a few days later. That message was dated 10 April 2012. By the next day, there was already some flirting going on. She made reference to making an effort to look better the next time they met. By 14 April, three days after they reconnected, S.N. began referring to J.T.C. as "my sexy husband" and he referred to her as "my sexy wife". On 18 April, a week after the meeting on the bus, the

expressions of love became more intense and the flirting became more overtly sexual. On 19 April the two start talking about having sex. The flirting morphed into more explicit talk about how each wanted to be having sex with the other. Over the next few days the sexual banter back and forth was relentlessly and almost numbingly graphic.

7. Sometime just before 27 April the couple met up at the Zeller's store in MicMac Mall. S.N. took J.T.C. by the hand and led him into the public washroom in the store. There they made out and eventually had intercourse. He used a condom.

8. After that incident, there appears to have been a bit of a rough patch in the relationship. J.T.C. told some of the others at his group home about having had sex in the public washroom at Zellers. S.N. overheard one of them talking about it. J.T.C. confessed to having told the other residents. His message of 27 April 2012 begins as follows:

> *Im soooooo sorry I couldn't lie to you and I wouldn't of said anything if I knew u would get this mad … I know I fucked up that by telling him but please forgive me and … I grew a brain now so please call me back…(*emphasis added)[1]

[1] Facebook messages have been quoted verbatim without making note of spelling irregularities because of the fluid spelling conventions in that and other forms of electronic communication

9. By the next day the two were back on the same terms as before. S.N. talked in the next few days about why she had been so upset about the sex in the Zeller's bathroom.

> *the reason being is because you brought a condom with you, thinking In your head we were obviously were going to have sex, then I totally felt nasty about myself for just "doing it" in the mall ….I was caught up in the moment and clearly WASN'T thinking….I'm a mother now and I have to think through my choices before I do things… Especially things like that… I feel if you had any respect for me,,, then you would've waited …And you wouldn't have told anyone about it. That's PRIVATE business….That's my problem…*

10. She said that she was caught up in the moment.

> *"I feel I fucked up because YOU allowed that to happen, you dident stop it, you dident ask me if I was ready ,you just allowed me to make decisions based on a feeling, I was not emotionally ready, my body was just running on a feeling and that wasent fair of you to do that to me!!!!*

11. In this exchange she said that they had not talked about the rumour that he had "aids". Her statement however wasn't only about AIDS.

> *Well you have never told me about having any STI's or any kind of infections, you weren't worried about how you having sex with me was going to effect me, not completely your fault because I have a mind of my own, but if you had any respect for women you wouldn't have even suggested it…. We haven't even suggested it. ….We haven't talked about the rumour about you having "aids"….Weather it's true or not… I still have NO idea….*

12. His response was a full denial.

> Y*eeesss that's it I have aids woooow..because id go around doing all the stuff that I do… no if I had aids id be staying home minding my own business enjoying every bit of time I had left but you a gonna belive what you want I guess just kknow that I was inlove with you truely. Nd that I fucked up yes I know but this is just ridiculous but I don't wanna fight with you.*

13. She replied later in that chain or messages,

> *And than I hear that u had aids and I nearly threw up. Because if I got some shit from you I can tell you it won't be good!*

14. His denial is then made even more firm.

> *I can tell you 1 thing about this that I am 100% sure I dont got no aids.*

15. Despite having used a condom she was concerned about the transmission of AIDS. Ms. Longley as his counsel has argued that the denial was true. He did not have AIDS at that time, does not have AIDS now and in fact has never had AIDS. His comment on the rumour was entirely accurate.

16. J.T.C.'s response was a clever piece of specious or over-subtle semantics. The precise answer to the precise question of whether he had AIDS is indeed no.

But the answer, precise and correct as it is, isn't really fair. She mentioned the rumour about AIDS and he addressed it in a manner that suggested that nothing could be more ridiculous. It was clearly meant to provide reassurance. But her concern wasn't just about AIDS. She prefaced her comments with a reference to STI's or sexually transmitted infections. She was worried about catching something from him. His precise answer was in effect a deceitful one. By acknowledging the inquiry and limiting it to AIDS he avoided the more complicated question about his HIV status. J.T.C. was fully aware that S.N. was concerned generally about what she might contract from sexual activity. He was aware of his low viral load and of the very low risk of spreading any infection especially when using a condom. He decided that that was information that she did not need to know. He not only failed to disclose that he had HIV but actively denied having any form of sexually transmitted disease.

17. The parties had two more sexual encounters within the next couple of weeks. The first was on the couch at a friend's place. They had been visiting S.B.. He was J.T.C.'s best friend and also a former sexual partner of S.N.. That made things awkward but as events will later show, not that awkward. S.B., for whatever reason, did not want them to be having sex in his apartment while he was not there.

When leaving them alone there one day, while he went out, he told them not to be up to anything while he was away.

18. As soon as he left, they began having sex. J.T.C. used a condom for the intercourse but it was interrupted when they thought they heard S.B. returning. J.T.C. took the condom off and they quickly got dressed.

19. The third time the parties had sex was also at the apartment of S.B.. This is the only time that S.N. says that a condom was not used. J.T.C. was equally adamant that a condom was used for the entire event.

20. What is said to have taken place that night, on any interpretation, and using either version is strange, to use a word that is less pejorative than some that might have been chosen. S.N. and J.T.C. went to S.B.'s apartment. He was there with his girlfriend. They were drinking and smoking marijuana. There were somewhat different interpretations of just how drunk everyone was, but suffice it to say, they were drunk. The young men were playing Call of Duty on the Xbox and things seemed to be going reasonably well.

21. J.T.C. said that S.N. took what he described as a "French maid outfit" out of her purse, went into the bathroom and put it on. She then came out where the other three could see her. He says she then took his hand and led him into the bathroom.

This display in front of his best friend and her former boyfriend “kind of” made him “mad”. He recalled his face getting red. He remembered that she was “acting drunk”. In her evidence on direct examination the French maid outfit or costume did not figure at all in the narrative. She agreed on cross examination that she had brought it but that she only put it on once they had gone into the bathroom together.

22. She turned the lights off and the couple had sex in the bathroom. The bathroom is the only bathroom in a one bedroom apartment and is close to where both the living area and kitchen are located.

23. As S.N. recalled it, they started out using a condom. They stopped the sexual activity when she became tired and hot. She needed to get a drink. She wrapped herself in a towel and went out into the kitchen. This initial period of sexual activity in her estimation took a couple of hours. When challenged on that she maintained that the two were in the bathroom, having sex for what she said was “a good hour and a half, two hours.” She came back into the bathroom. She said that the sexual activity in the bathroom resumed for another 45 minutes to an hour. She was asked whether this seemed a bit unrealistic, that the couple would be in the only bathroom in the apartment, with two other people outside but nearby, and not happy with the situation, for close to three hours. She said that it was not.

24. She said that when the sex resumed in the darkened bathroom, the condom that J.T.C. was using was broken. They both knew that. They continued having unprotected sex.

25. J.T.C.'s version of events is very substantially different. He said that the sex in the bathroom took in total about 45 minutes, not almost three hours. He said that he used a condom and did not ejaculate. The sex stopped when the bathroom door came open. He believed that she had opened it intentionally, apparently to tantalize S.B. who could clearly see them from where he was sitting.

26. S.N. agreed that the door came open but that they closed it and resumed having sex. J.T.C. said that once that happened the sexual activity stopped. He knew that his friend was upset by the display. He got dressed and went out to talk with him and calm him down while S.N. remained in the bathroom. When he came back she asked him to perform oral sex on her and he refused. He said that they came out of the bathroom having had no sexual activity without a condom.

27. Then they all smoked a joint and no one mentioned what had just happened.

28. As the narrative develops, J.T.C. told of how he had been contacted by the Department of Community Services. S.N.'s social worker had told his social worker that the couple were involved sexually. His social worker knew of his HIV

positive status and called to tell him that he needed to disclose to her right away or that they would do so to protect her. He got in touch with S.N. and broke the news to her over the telephone. She was so extremely distraught that she threw up.

29. That marked the end of the couple's relationship on 1 June 2012. J.T.C. went on to form a relationship with another young woman who is now the mother of his child. She incidentally was a close friend of S.N.. S.N. rekindled her relationship with the father of her child and they have remained together.

30. A year after they first met, J.T.C. messaged S.N. again on Facebook.

> *Listen all I want to say is im sorry for what I did and it wasn't right that is all.*

31. He went on to say,

> *We are telling u the truth and u have nothing to worry about I swear and I hate that I did that an yes we hate each other but u can move on with your life with […] or wtv and have nothing to worry about.*

The condom issue

32. The issue of condom use is relevant to the legal issues involved. As in any case in which two versions of events are put forward the matter is not resolved as a contest of credibility. It is not simply a matter of choosing one version as being more credible or reliable than the other. The issue is whether the version presented by J.T.C. raises a reasonable doubt, when assessed for its internal logical consistency and the extent to which it comports with common sense, and in the context of the other evidence, including that of S.N..

33. When J.T.C. was interviewed by the police he denied ever having had sexual contact with S.N.. He was lying about that. There was no evidence to confirm it so he was simply prepared to throw her under the bus. He deceived her first about his HIV status then tried to make her out to the police as a liar who had just made up a story. He compounded his own betrayal of her.

34. So now, having first denied sexual contact, he is prepared to admit to it, but admits that it took place only when wearing a condom, which if true would get him out of this bind. He told the police she was lying about the sex and now says she is lying about the use of a condom in that incident in the bathroom.

35. S.N.'s testimony showed a level of almost disarming frankness. She was willing to talk about intimate sexual details without reservation. Her assertion that the couple spent close to three hours having sex in the bathroom hints at some level of exaggeration. It is however in the context of an event in which inhibitions were thrown to the wind, even if pared down to those elements upon which the parties agree and disregarding the more prurient details which do not bear repeating.

36. Her response to the question of whether she would have had sex with him had she known of his status was once again disarmingly frank. She said that if he had told her then that he was HIV positive she would not have consented to unprotected sex. It gets more complicated than that though. If she could have protected herself she would have. She was then asked if she now knows that having sex with J.T.C. without a condom did not involve any real risk of contracting HIV. Her answer was that she did indeed understand that to be the case. She was asked whether if she had known that fact at the time she have had unprotected sex with him. Her answer was yes.

37. S.N. told of one incident in which a condom was not used. There were three incidents of sexual activity. She made no effort at all to broaden the scope of the story to allege sexual contact without a condom in either of the first two incidents.

Her evidence was in all relevant respects consistent from her taped video testimony to her evidence in court.

38. Those were not the answers of a person engaged in a vendetta or of one who is furthering some plan to have a former lover punished. Had she been inclined to lie, she could have. She didn't.

39. J.T.C. struggled with the issue of why he had lied to the police. People do lie to the police and then tell the truth in court. That happens. There can be reasonable explanations for it.

40. At first J.T.C. said that he couldn't remember the interview at all. He was reminded of the details and of his denials of sexual activity. He said that perhaps his mind at that time of the interview had erased the memory of it from his "database."

41. He then said that he was definitely not "emotionally alright" that day. He said that he kept asking if he could go home afterward and just wanted to get out of the interview room. He said that he wasn't thinking straight that day.

42. J.T.C.'s explanation later in his cross examination was that he had entered into a relationship with the woman who is now the mother of his child and was the best friend of S.N.. He was afraid that any statement in which he admitted to

intimate sexual contact with S.N. would get back to his current girlfriend. He worried that they might someday be reading a crown disclosure package and she would see the details about the French maid outfit.

43. The fact is that she already knew that J.T.C. and S.N. were in a relationship of some kind. She had, on J.T.C.'s evidence, been trying to break them up. The manner in which he dealt with the false statement suggested a degree of glib disregard for the truth. He appeared to be traversing explanations looking for one that would stick. His explanation for the denial went from being a memory issue, to not thinking straight to a deliberate plan to keep the information from his current girlfriend. His subtle manipulation of words in telling an intimate partner that he did not have "AIDS" is consistent with his less subtle manipulation of the circumstances surrounding the police statement.

44. His "apology" provided over Facebook is not consistent with a situation in which he had used a condom. He said that he was sorry for what he had done. He assured S.N. that there was no risk of her contracting HIV. Had all of the intercourse been protected sex with a condom, all he had to do was to remind her of that. He didn't.

45. I find that J.T.C.'s evidence does not raise a reasonable doubt as to whether he was wearing a condom when he had intercourse with S.N. for the last time.

While I do not accept her evidence that the sexual activity took place over three hours, that piece of information is not particularly relevant and carries with it no intent to deceive. I accept her evidence as being true that the parties had intercourse on that last occasion without using a condom.

46. The evidence then establishes that the couple had sexual intercourse without a condom. It also establishes that J.T.C. not only failed to disclose but actively concealed from S.N. the fact that he is HIV positive.

Ejaculation

47. The issue of whether J.T.C. ejaculated during that third sexual encounter is also relevant. He says that he did not. S.N.'s evidence in that regard is equivocal. She quite fairly said that she wasn't sure. She found what appeared to be ejaculatory fluid on her inner thigh, but allowed that it might have been dampness from her own body. She described sounds and behaviours that would be consistent with an orgasm. She could not say however, as a fact, that he had ejaculated.

48. Proof in a criminal trial is not by way of suppositions. J.T.C. testified that he did not ejaculate. S.N.'s testimony does not contradict his in a direct way. It is equivocal. I conclude that he did not ejaculate on that occasion.

Expert Evidence

49. Dr. Walter Schlech was qualified as an expert to give opinion evidence on infectious diseases, the epidemiology of HIV including the transmission of the HIV virus and treatment and prognosis of those diagnosed as HIV-positive.

50. Dr. Schlech could fairly be described as not only an expert but a preeminent expert in the field. He is a professor of medicine at Dalhousie Medical School and does his clinic practice at the Queen Elizabeth II Health Sciences Centre in Halifax. His specialty is in infectious diseases and he has spent much of his career both in Canada and in Africa dealing with HIV and AIDS. He has been involved in the study and treatment of HIV since the first case in Nova Scotia was identified in 1983. He has written prolifically in both peer reviewed and non-peer review journals and spoken extensively on the topic. His work has had local, national and international dimensions. He now does much of his clinic work in Uganda and has

helped to establish AIDS clinics in South Africa and Nigeria. Dr. Schlech was intimately aware of each of the studies put to him on cross examination to the point that in some cases at least, he knew the researchers personally.

51. The opinions of Dr. Walter Schlech on matters pertaining to HIV and AIDS have to be taken very, very seriously. Dr. Schlech's expert opinion in this case is direct, clear and unequivocal. "I should state at the beginning that I do not believe that there was a risk of transmission in this case." In his testimony he did not alter that statement. Nothing the Crown put to him changed that view. There was no expert evidence to suggest that Dr. Schlech was underestimating the potential for transmission and nothing in either his direct or cross examination that would reasonably allow that inference to be made.

52. Dr. Schlech did not personally treat or examine J.T.C.. He reviewed the medical files and tests performed over the course of years. His opinion is about this person, this case and the risk in this case. Dr. Schlech noted that J.T.C.'s mother was HIV positive at the time of his birth. The medical records suggest that he escaped infection at that time only to be infected at some time between 1995 and 2000. In his report dated 28 May 2012 Dr. Schlech reviewed the results of J.T.C.'s blood tests. He also reviewed the tests done since his report was completed. He confirmed that his opinion would not change. In his opinion J.T.C.'s immune

system has been controlling the virus extremely well. As he said, “This is quite remarkable”.

53. An average person with HIV would have a viral load of about 30,000 copies per ml of blood. The highest viral load J.T.C. has shown was 1990 in March 2000. That is still a very low level of the virus. From September 2006 until September 2012 his viral load remained undetectable, under either 400 or under 50 copies per ml. He went off his medications from September 2012 until Match 2013. The two tests done during that period, found viral loads of 114 and 473 copies per ml. They helped to confirm to Dr. Schlech that J.T.C.’s own immune system was controlling the virus very well on its own.

54. In his report Dr. Schlech suggested that J.T.C. might be what he called an “elite controller”. Those are people who have immune systems that continue to maintain control over the HIV virus. The small increase in viral load during a period without medications might mean that J.T.C. may be closer to what Dr. Schlech called a “long term non-progressor.” Those are people who have HIV over an extended period of time without proceeding to AIDS.

55. When asked whether there was any realistic possibility that J.T.C. could have transmitted the virus through sexual activity in the period from January 2012 to September 2012, Dr. Schlech said that he was confident in saying that he could

not. Dr. Schlech concluded that in an act of sexual intercourse someone with an undetectable viral load such as J.T.C. had a one in one million chance of transmitting the virus. That might be as a high as one in 500,000 considering the latest test results. In either case he did not believe that there was really any risk at all.

56. J.T.C. is HIV positive but the risk of his transmitting HIV through sexual activity without a condom was for any practical purposes non-existent. Dr. Schlech, as a scientist, said that he was reluctant to use the term "zero risk", but for all practical purposes there was no risk. In his report he referred to it as an "almost infinitesimally small risk" and that he did not believe that there was "*any* risk of transmission". He used the italics to stress the word "any".

57. When asked about the benefits of condom use Dr. Schlech drew a distinction between public health concerns and actual risk of transmission of HIV. Public health authorities are properly reluctant to send mixed messages about the use of condoms and encourage their use for a number of reasons. When properly used they provide protection against unwanted pregnancy and protect against various sexually transmitted infections. In J.T.C.'s case, where the risk of HIV transmission is so very close to zero, the use of a condom provides little additional protection against that transmission. Dr. Schlech would still recommend condom

use but with regard to HIV transmission a condom provides almost nothing by way of incremental protection. Similarly, given the extremely low risk in the first place, the failure to transfer fluid through ejaculation really doesn't decrease the risk in any real way, because it is so close to zero the begin with.

58. I accept Dr. Schlech's opinion as being an accurate reflection of the current scientific thinking.

Summary of Findings of Fact

59. It is important to distinguish findings of fact based on evidence from legal conclusions and mixed findings of fact and law.

60. It is a fact that J.T.C. is HIV positive and that he had sexual intercourse with S.N. on one occasion while not wearing a condom.

61. I have found, as a fact, that he did not ejaculate on that occasion.

62. It is a fact that he did not disclose his HIV positive status to her and actively misled her in that regard.

63. I have found as a fact, based on expert testimony, that the chance of a person contacting HIV from J.T.C. through sexual intercourse during the time when sexual intercourse took place here can be expressed as approaching zero, for practical purposes zero or infinitesimally small.

64. The issue then is what legal conclusions flow from those evidentiary findings.

Consent and Vitiated Consent

65. Justice Farrar in R. v. Hutchinson[2] explained the important distinction between consent that is void *ab initio* and consent that is vitiated. Consent that is void *ab initio* never existed in the first place. It was null from the beginning. "Consent is vitiated where it appears to exist from the beginning but something happened later that retroactively erased it." [3]

[2] [2013] N.S.J. No. 1, 2013 NSCA 1, 274 C.R.R. (2d) 245, 325 N.S.R. (2d) 95, 296 C.C.C. (3d) 22, 105 W.C.B. (2d) 806, 1 C.R.(7th) 1, 2013 CarswellNS 22, 1031 A.P.R. 95

[3] Para. 114

66. Consent to sexual activity means consent, in the mind of the person considered subjectively. It is determined "with reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred."[4]

67. Vitiated consent requires the matter to be looked at from a somewhat different perspective. The complainant's state of mind at the time was influenced by other factors. Those factors are of a kind that means that the consent should not be considered valid. It is a value laden judgement at that point. Precisely what factors will erase that consent retroactively?

68. People lie to their sexual partners. Those lies are sometimes in the context of the sexual activity itself. Sometimes the partner would have engaged in the sexual activity anyway, regardless of the deception. The consent was then not based on the lie. But consent to sexual activity can be based on a lie. That lie may be a profession of undying love made for the singular purpose of achieving a sexual goal. That lie may involve false pretenses pertaining to wealth or marital status. In the Victorian age, the only kind of deceit that would vitiate consent was that which went to the nature of the act of intercourse or the identity of the partner. A deception that involved a fake medical procedure would vitiate consent. A deception as to the identity of the other person would vitiate consent. If the victim

[4] R. v. Ewanchuck [1999] 1 S.C.R. 330 para. 25-26

knew that the act was sexual and knew who the partner was she could not complain that she had been deceived.

69. Thankfully, things have changed. The law has developed in a way that recognizes the value of human dignity and the right of a person to have control over his or her own body. A narrow view of consent has been replaced. In an age where sexual assault is seen as the wrongful exploitation of another human being the difficult legal question is how far the law should go to criminalize behaviours that amount to exploitation.

70. If a person consents to sexual activity based on a false assurance that his or her sexual partner is not married that is a reprehensible act that is contemptuously exploitative. It is however not criminal. There has to be line drawn between exploitative behaviour that should be regarded as wrong and exploitative behaviour that is subject to the sanctions of the criminal law. The line has been drawn at deceptions that place the deceived partner at significant risk of serious bodily harm.

71. S.N. said that had she known the fact that he was HIV positive, she would not have had unprotected sex with J.T.C.. But had she known that his risk of transmitting HIV was virtually non-existent she would have consented. Based on Dr. Schlech’s opinion, that is the true state of affairs. At the time, S.N. consented.

Knowing what she knows now, she would have consented. Based on her misunderstanding of the facts about the risk of transmission of HIV at the time, she would not have consented. Her initial consent was based on a false assurance and her later concern was based on a false understanding. S.N.'s position has an elegant logic to it. The only reason why she would not have consented was because she thought there was a risk. If there were no real risk she would have consented.

72. Consent is based on the state of mind of the person at the time of the act of intercourse. Consent in the hours before the sexual act does not matter if the person does not consent at the time. Similarly, consent at the time cannot be taken away by a change of heart or regret after the fact. Vitiated consent is another matter. It involves not only the state of mind at the time but the state of knowledge of relevant facts.

73. Ms. Carter, on behalf of the Crown, argued that J.T.C.'s dishonesty removed S.N.'s freedom of choice which lies at the very heart of consent. She had the right to decide whether she would have had unprotected sex with a person infected with HIV and by his deceit he deprived her of that choice. Consent must be unequivocal and unconditional. The Crown asserts here that S.N.'s agreement that she would have consented had she known that the risk of transmission was so extremely low amounts to a kind of conditional consent. On the Crown's

argument, the statement that she would not have consented had she known he had HIV is all that is required. The summary of the law contained in *R..v Mabior*[5] is that the failure to disclose is fraud where the complainant would not have consented "had he or she known that the accused was HIV positive" . It is argued the analysis ends right there.

74. S.N. of course had the right and the opportunity to say that she would have refused to assume any risk however infinitesimally small of contracting HIV through unprotected sex with J.T.C.. When dealing with consent *ab initio* the only relevant time period is when the sexual act took place. When dealing with vitiated consent that necessarily changes. As Justice Farrar noted it is about whether something has happened that retroactively erases that consent. It involves an analysis of the context in which consent was ostensibly given.

75. The fact of J.T.C.'s deceit is part of that context. The fact that there was negligible risk of contracting HIV from him is part of that context. The fact of S.N.'s statement that she would not have consented had she known that he had HIV is part of that context. And, the fact of her statement that had she known the extremely low degree of risk she would have consented is part of the context. The

[5] Infra. Note 6.

last part cannot be artificially and arbitrarily separated from the rest as being somehow irrelevant.

76. To ignore S.N.'s acknowledgement that with full knowledge of the facts she would have had unprotected sex with J.T.C. would amount to a strange privileging of half-truth, deception and misconception over truth. The truth is that she would have had unprotected sex with him had she known the facts. My conclusion is that her consent was not vitiated by the deception.

77. That could end the matter with a not guilty finding on that basis. Counsel have presented a number of extensive alternative arguments with comprehensive briefs and in fairness those should be addressed.

R. v. Mabior and *R. v. D.C.*

78. In *R. v. Mabior* and *R. v. D.C.* [6] the Supreme Court of Canada dealt specifically with the issue of the proof required for a conviction of aggravated

[6] R. v. Mabior, [2012] S.C.J. No. 47,[2012] A.C.S. no.47, 2012 SCC 47, [2012]2 S.C.R. 584,[2012]2 R.C.S. 584, 268 C.R.R.(2d) 39, 96 C.R. (6th) 1, 434 N.R. 341, 284 Man. R. (2d) 114, [2012] 11 W.W.R. 213, 290 C.C.C. (3d) 32; R. v. D.C., [2012] S.C.J. No. 48, [212]A.C.S. no. 48, 2012 SCC 48, [2012] 2 S.C.R. 626, [2012] 2 R.C.S. 626, 96 C.R.(6th) 39, 435 N.R. 118, 290 C.C.C. (3d) 64, 352 D.L.R. (4th) 652, 103 W.C.B. (2d) 483

sexual assault in the case of non-disclosure of HIV positive status. A failure to disclose amounts to a fraud where the complainant would not have consented had he or she known that the accused person was HIV positive and where sexual contact poses a significant risk of serious bodily harm. A significant risk of serious bodily harm is established by a "realistic possibility of transmission of HIV."[7]

79. The Supreme Court commented on the history of fraud vitiating consent and noted that this standard was consistent with the view that only "serious deceptions with serious consequences" are capable of vitiating consent. [8] The court went on to state that the law must strike a balance between the values of autonomy and equality that respect the interest of a person to choose not to consent to have sex and the need to confine the criminal law to serious wrongs and serious harms. Deception that leads to consent may be morally wrong or it may also attract the sanctions criminal law. The involvement of the criminal law requires that the deception lead to significant risk of serious bodily harm.[9] The criminal law does not become involved in the absence of that kind of risk.

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[7] Mabior para. 104

[8] Para. 88

[9] *R. v. Cuerrier, (1998) ,162 D.L.R.(4th) 513,127 C.C.C. (3d) 1, [1999] 4 W.W.R. 1, 57 B.C.L.R. (3d) 42, 1998 CarswellBC 1773, 229 N.R.279, 18 C.R. (5th) 1, 111 B.C.A.C. 1, 181 W.A.C. 1, 1998 CarswellBC 1772, [1998] 2 S.C.R. 371*

80. The court expressed concern about the lack of certainty in the law surrounding the concept of significant risk as it relates to the non-disclosure of HIV and considered a number of alternative approaches. The absolute disclosure approach, which was favoured by the Crown in *R. v. Mabior* was seen as casting the net of the criminal law too broadly. The court was of course highly attuned to the concern about stigmatizing those with HIV.

> *Moreover, this approach seems to expand fraud vitiating consent in s. 265(3)(c) further than necessary, by defining it as simple dishonesty and effectively eliminating the deprivation element of fraud. Finally, this absolute approach is arguably unfair and stigmatising to people with HIV, an already vulnerable group. Provided people so afflicted act responsibly and pose no risk of harm to others, they should not be put to the choice of disclosing their disease or facing criminalization.*(emphasis added)[10]

81. The Court also considered a case by case approach and as Ms. Carter noted, specifically rejected it. Chief Justice McLachlin was concerned that if the significant risk of bodily harm were required to be established by expert evidence in each case as to the viral load of the accused person at the time of the offence, that process would be too onerous. Trial judges would have to assess the risk in each case and there would be a risk of conflicting judgments that could render the

[10] *R. .v Mabior* para. 67

process unfair from a "systemic standpoint".[11] Courts would be left determining what viral load for example, constituted a significant risk of serious bodily harm. To resolve that problem the court adopted a test that requires a "realistic possibility of transmission of HIV". The test is not a case by case analysis of significant risk of bodily harm with the attendant requirement that the Crown prove it in each case. The test is whether there was a realistic possibility of transmission. This test is noted as applying to all cases where fraud vitiating consent is alleged based on non-disclosure of HIV-positive status.

82. The court in *R .v Mabior* set that as the test to be applied. It follows that if there is a finding of fact that there is no realistic possibility of transmission, the test has not been met. There would be no reason to clearly state such a test if there was no intention that it be applied. That is not to embark on the case by case analysis that the Supreme Court expressly rejected. It does not involve the Crown calling expert evidence in each case to establish the risk or disputes about what viral load constitutes a significant risk. It does however permit the negating of that risk by defence evidence. The court stated that as **a general matter**, a realistic possibility of transmission of HIV is negated if the accused's viral load was low **and** a condom protection was used. That conclusion was noted as "flowing from the

[11] *R. v. Mabior* para. 69

evidence" in that case. [12] A low viral load combined with the use of a condom reduced the risk of transmission to a "speculative possibility rather than a realistic possibility."[13] In other words, if the risk of transmission is a speculative possibility and not a real possibility, the HIV positive person should not be convicted of aggravated sexual assault based only on her or his deceit.

83. In Mabior's case his viral load was noted as being low. The evidence before the court was that the baseline risk of transmission of HIV per act of vaginal intercourse with an infected male partner having a normal unreduced viral load varied from study to study. One report put the risk at 1 in 2000 and another at 1 in 1000. A meta-analysis of 43 publications put the risk at 1 in 1250. The court noted a number of times in the course of the decision that the conclusions were based, "on the evidence before us"[14] or on the "evidence in this case"[15] . It is also a far cry from one in a million or one in 500,000.The court did not preclude trial judges considering expert evidence to establish whether the risk of transmission in any given case was a speculative possibility rather than a realistic possibility.

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[12] *R. v. Mabior* para. 95

[13] *R. v.Mabior* para. 101

[14] *R. v. Mabior* para. 4,101, 103, 104

[15] *R. v. Mabior* 95

Otherwise there would be no need for that principled test. The combination of low viral load and condom use would be the only test to be applied.

84. The court reached the same conclusion in *R. v. D.C.*. In that case the accused's viral load was undetectable. The trial judge found that no condom had been used. The Quebec Court of Appeal set aside the convictions on the ground that even without a condom the requirement for significant risk of serious bodily harm had not been met. D.C. was treated with anti-retrovirals and that resulted in her having an undetectable viral load. The evidence was that engaging in vaginal intercourse carried with it a basic infection risk of 0.1%, noted as being similar to that in *R. v.Mabior*. The case is for the most part about the inferences to be drawn from various pieces of evidence about the use of a condom. The Supreme Court of Canada noted that to convict it would be necessary to establish beyond a reasonable doubt that D.C. failed to disclose her HIV positive status to the complainant where there was a significant risk of bodily harm. A significant risk, in the case of HIV, "is found in the presence of a realistic possibility of transmission and is negated by both low viral load and condom protection".[16] In that case a low, in fact undetectable viral load was established. The critical issue

[16] *R. v. D.C.* para 29

was whether a condom had been used. On the facts of that case, condom use was required to preclude the realistic possibility of HIV transmission.

85. There must be a realistic possibility of transmission. It is negated by a low viral load and the use of a condom. The court does not state that that is the only way in which it can be negated. It does not state that an expert opinion which establishes that the risk of transmission in a particular case is effectively zero is irrelevant. That would be tantamount to saying that the facts just don't matter and that a person with HIV is presumed to be infectious despite the facts.

86. In a decision released on 7 October 2013 my colleague Judge Derrick dealt with an allegation against J.T.C. also involving the non-disclosure of his HIV status. That matter involved entirely different circumstances. She outlined the law as it relates to the charge of aggravated sexual assault in these circumstances and reviewed the recent Supreme Court of Canada judgments dealing with the issue. [17]

87. She noted in *R. v. J.T.C.* that the Supreme Court of Canada had criminalized unprotected sex where the HIV-positive non-disclosing partner has an undetectable viral load and does not disclose that to a sexual partner. She has expressed concern about the reasoning of the Supreme Court of Canada is those decisions. She noted that it is unclear how a viral load that is undetectable rates a risk assessment greater

[17] R. v. J.T.C. [2013]N.S.J. No. 525, 2013 NSPC 88

than speculation.[18] Judge Derrick notes that the result of those decisions is the increased criminalization of persons living with HIV.

88. The reasons for concern as expressed in *R. v. J.T.C.* are in my view entirely well founded. If the risk of transmission of the virus, as established through expert evidence specific to the accused, is effectively zero, a person with the HIV virus is no different from anyone else in the population. He or she becomes subject to the sanctions of the criminal law for engaging in a deception that is in reality no more dangerous than the kinds of deceptions that the law has not criminalized. A segment of the population that has been marginalized and discriminated against since the early 1980's would be treated more harshly by operation of law and not based on scientific evidence about the risk posed by the individual. I differ with my colleague only in the sense that in my view the decisions of Supreme Court of Canada should not be read as producing this result. The decisions can and should be interpreted in a way that is not incompatible with an approach that respects both the scientific evidence in each case and the fact finding role of trial courts.

89. The issue is whether a low viral load and condom use are **both** required to negate that risk in every case. The Supreme Court of Canada did not in those cases,

[18] R. v .J.T.C. para. 14

make factual findings that are binding on trial courts and that would in any event contradict clear, compelling and precise evidence from an expert.

90. Two cases from the Ontario Court of Appeal require very close reading. The Crown contends that in *R. v. Felix* [19] and *R. v. Mekonnen*[20] that court interpreted the Supreme Court of Canada in *R. v.Mabior* and *R. v. D.C.* as establishing that the only way in which a prima facie case of aggravated sexual assault in these circumstances could be negated would be with evidence of both a low viral load and the use of a condom.

91. In *R. v. Felix* the accused was HIV positive and had unprotected sex without disclosing his condition. It is significant however that the Crown called no evidence in that case regarding his level of risk. The court stated that contrary to what many trial and appellate courts across the country had previously held proof of both a low viral load and condom use was required to negate a prima facie case of aggravated sexual assault for failure to disclose one's HIV positive status. The court quoted from *R. v. Mabior*;

[19] [2013] O.J. No. 2857, 2013 ONCA 415, 307 O.A.C. 248, 298 C.C.C. (3d) 121, 3 C.R. (7th) 223, 107 W.C.B. (2d) 734, 2013 CarswellOnt 8407

[20] [2013] O.J. No. 2856, 2013 ONCA 414 , 307 O.A.C. 238, 299 C.C.C. (3d) 134, 3 C.R. (7th) 241, 108 W.C.B. (2d) 707, 2013 CarswellOnt 8405

> *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 and that condom protection was used.* [21]

92. The accused in *R. v. Feli*x argued that since there was no medical or expert evidence regarding the degree of risk of HIV transmission the Crown had failed to establish that the acts engaged in by the accused gave rise to a realistic possibility of transmission of HIV. The court held that in those circumstances his exact viral load and the degree of risk were "simply irrelevant". His viral load, in the court's view, would not change the fact that he was HIV positive, did not disclose that fact and failed to use a condom.

> *On the appellant's reasoning, any case that differs from the precise factual makeup considered in Mabior would require expert evidence to establish a baseline infection risk. Mabior does not suggest that expert evidence of the basic risk of HIV transmission from intercourse will be required in every case to ground a conviction for aggravated sexual assault arising from unprotected acts of intercourse – anal or vaginal- with an HIV-positive partner. Rather, Mabior holds that a realistic possibility of transmission of HIV is negated by evidence that condom protection as used and the accused's viral load was low at the time of the intercourse* [22]

[21] R. .v Mabior para. 105

[22] R. v. Felix para. 53

93. The concern was with the requirement that the Crown would have to establish, by medical evidence in each case, that there was a significant risk of serious bodily harm. The Ontario Court of Appeal held that the Crown had only to prove that the appellant was HIV positive, did not disclose that status, and that the complainants would not have engaged in that activity had they known and that a condom was not used. There was no requirement for the Crown to offer proof of the level of risk. That is the reasoning of the case.

94. The court went on to speculate that "even if" the evidence had established that the appellant had a low viral load, a realistic possibility of HIV transmission would not have been negated. [23]The court did not go further to discuss what level of evidence beyond that of a low viral load would have been sufficient. That issue was simply not addressed. The court certainly did not have an expert opinion that described the risk as being essentially zero.

95. *R. v. Mekonnen* was a companion appeal released by the Ontario Court of Appeal at the same time. The reasoning in the two cases should be considered together. Mekonnen was HIV positive and did not disclose that status prior to engaging in sexual activity with the complainants. Once again, no medical

[23] R. v. Felix para 57

evidence was called by the Crown as to the specific level of risk associated with unprotected sex or the reduction of that risk to be gained by the use of a condom. Mekonnen's doctor's notes indicated that his viral load was "low". The issue of his viral load was not really addressed at the trial.

96. In one of the trial convictions the trial judge did not make a finding about whether a condom was actually used. The court noted the importance of that fact but also acknowledged that different cases may involve other considerations.

> *However, under the Mabior standard, proof of condom use, <u>while not always essential</u>, may be highly material to the demonstration of a realistic possibility of transmission of HIV.*[24](emphasis added)

97. That suggests that in both *R. v.Felix* and *R. v.Mekonnen* the Ontario Court of Appeal indeed was acknowledging that there may be cases when the prima facie case can be negated with expert medical evidence establishing the level of risk. The Crown is not obliged to present evidence to prove the risk. In the case of a person with HIV there is presumed to be a risk without further proof. Defence evidence merely of a low or even undetectable viral load may not be enough to negate that prima facie case. Neither the Supreme Court of Canada nor the Ontario Court of Appeal were suggesting that in the face of defence evidence establishing a

[24] R. v. Mekonnen para. 49

risk of transmission that was so negligible as to approach zero, that a risk could be legally deemed to exist sufficient to meet the test of real possibility.

98. It doesn't change the moral equation. A sexual partner should not be deprived of the right of choice about assuming risk. But when the risk is described as zero, it seems somewhat strange that the sanctions of the criminal law would be invoked.

99. In my view the Supreme Court of Canada did not intend in *R. v. Mabior* and *R. v. D.C.* to impose evidentiary findings on trial courts that are incompatible with the evidence actually before those courts. The expert evidence in this case establishes very clearly that unprotected sex with this young man would not involve **any** risk of transmission. That is a finding of fact, specific to this case. The legal conclusion arising from that fact is that there was no realistic possibility of the transmission of HIV and that any risk beyond zero was a speculative possibility. If a zero risk, or an infinitesimally small risk doesn't qualify as speculative, it's hard to imagine what would.

100. It would be a strange outcome indeed if the law required that there be a significant risk of bodily harm established by the realistic possibility of transmission of HIV and the unchallenged and accepted expert testimony in the case confirmed that such a realistic possibility was not present, yet a conviction

was entered because the accused was not wearing a condom. That would be particularly the case when, as here, the accepted expert evidence is that the use of a condom would provide virtually nothing by way of incremental protection against the transmission of HIV. The only way that that could logically happen would be if the Supreme Court of Canada decisions were to be seen as imposing a factual finding on a trial court that would apply almost as a deemed finding of fact to apply notwithstanding the actual evidence. It would be even more unusual if the result would be to impose criminal sanctions for aggravated sexual assault on an already marginalized group as a penalty for deceit in the absence of a significant risk of harm, when deceit in the same context by others does not attract those sanctions.

Conclusions:

101. The first part of the test as set out in *R. v. Mabior* and *R. v. D.C.* has not been met here. This is not a case in which consent would not have been given had the complainant known the facts. I find J.T.C. not guilty.

102. Furthermore had S.N. not said that, and instead asserted that regardless of the low risk she would not have consented, that raises the issue of the scope of the Supreme Court of Canada decisions in *R. v. Mabior* and *R. v. D.C.*. Those decisions were, in my view, not intended to substitute scientific facts with legal conclusions. The test is whether there was a realistic possibility of the transmission of HIV. The evidence in this matter confirms that even in the absence of a condom the possibility of transmission of the virus was not realistic. That is another route to my conclusion that J.T.C. is not guilty of aggravated sexual assault.