SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

JENNIFER MARIE MURPHY

* * * * *

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE JUSTICE G. MULLIGAN
On August 16, 2013 at Barrie, Ontario

* * * * *

INFORMATION CONTAINED HEREIN
IS PROHIBITED FROM PUBLICATION PURSUANT TO
The S. 486.4 ORDER OF JUSTICE G. MULLIGAN

* * * * *

APPEARANCES:

B. Bhangu — Counsel for the Crown

A. McLeod — Counsel for the Defence

PUBLICATION BAN

The court hearing this matter directs that the following notice should be attached to the file:

1. A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4 of the Criminal Code:

(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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

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.

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SUPERIOR COURT OF JUSTICE

T A B L E OF C O N T E N T S

TRANSCRIPT ORDERED.....August 16, 2013

TRANSCRIPT COMPLETED.....August 23, 2013

ORDERING COURT NOTIFIED.....August 23, 2013

August 16, 2013

R E A S O N S F O R S E N T E N C I N G

MULLIGAN, J. (Orally):

[1] Jennifer Marie Murphy is charged on a four count indictment. The time period for the counts in question is from the 18th day of August 2011 to the 13th day of September 2011. At the beginning of the trial, Jennifer Marie Murphy entered a plea of guilty to the first count of obstructing a peace officer. She entered a plea of not guilty to the remaining three counts.

[2] Count two relates to an allegation of aggravated sexual assault, the complainant is L.M. Count three relates to an allegation of aggravated sexual assault. The complainant is I.O. Count four relates to an allegation of aggravated sexual assault. The complainant is J.G.

[3] With respect to each count, the Crown is required to prove each of the essential elements of each offence beyond a reasonable doubt and this onus never shifts. The defence submits that the Crown has not met its onus with respect to each count and, therefore, a verdict of not guilty should be recorded for each count.

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[4] Evidence for the Crown consisted of the evidence of the complainants L.M., I.O. and J.G. The Crown filed an expert report from Dr. Irving Salit and Dr. Salit gave evidence at trial. In addition, the Crown introduced into evidence a voluntary statement of Ms. Murphy taken at the Barrie Police Station upon her arrest. A video of that interview and a transcript were filed as exhibits.

[5] As part of its evidence, the Crown sought to introduce evidence of prior discreditable conduct of the accused. That evidence consisted of a plea of guilty to a charge of aggravated assault in 2005. For reasons given at the conclusion of the Crown's case, the Crown's application was granted.

[6] The accused Jennifer Murphy chose not to give evidence.

[7] Crown and defence filed an Agreed Statement of Facts which was made an exhibit at trial. The following excerpts from the Agreed Statement of Facts will provide context for the discussion that follows:

> Jennifer Murphy contracted the Human Immunodeficiency Virus (HIV) in 1994.
>
> Jennifer Murphy began taking antiretroviral medication in 2001.

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Jennifer Murphy began taking new medication in 2005.

Jennifer Murphy's viral load count in September of 2005 was undetectable.

Jennifer Murphy's viral load count on September 13, 2011 was 39.

Jennifer Murphy's viral load count on September 22, 2011 was 40.

Jennifer Murphy's viral load count in June and July of 2012 was undetectable.

Jennifer Murphy did not disclose her HIV positive status to L.M., I.O. or J.G.

The Key Issue

[8] Given Ms. Murphy's acknowledged HIV status, the key issue in this case is whether or not, with respect to each count, Ms. Murphy had a duty to disclose to the complainants her HIV status if sexual activity took place without a condom or other protective barrier. The defence submits that given her acknowledged undetectable viral load no such duty exists.

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The defence submits that this position is supported by the evidence of the Crown's expert Dr. Salit who stated that because the possibility of infection is so low when there is an undetectable viral load there is no realistic possibility of infection. Both the defence and the Crown rely on the Supreme Court of Canada's discussion in *R. v. Mabior*, [2012] 2 S.C.R. 584. The Crown submits that the consequences of a person contracting HIV are serious, life altering, and require medical management and testing for a lifetime. The Crown contends that when that risk, even if slight, is weighed in the balance there is a significant risk of serious bodily harm thereby requiring disclosure. However, the Crown acknowledges that post *Mabior* no disclosure is required if the HIV positive person has a low viral count as a result of treatment and there is condom protection.

[9] Before reviewing the elements of the offences in counts two, three and four, I will begin by reviewing the Crown's evidence.

Count #2 – L.M.

[10] L.M. is the complainant with respect to count two. He is 62 years of age. He gave evidence about two sexual encounters he had

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with Jennifer Murphy. The second encounter occurred on September 13, 2011 at a parking lot in the City of Barrie. His evidence was that after he performed oral sex (cunnilingus) on Ms. Murphy the police arrived on the scene. The police did not detain him, but it became apparent to him that the police were detaining Ms. Murphy. At the end of that day, he gave a statement to Barrie Police. However, several months later he contacted the police to provide evidence about a similar encounter he had with Ms. Murphy about two weeks prior to this encounter. Mr. M. did not know Jennifer Murphy prior to their first meeting, although he may have seen her in the community in connection with his work as a cab driver. On the first occasion, he met her and they agreed to have coffee. They talked and she gave a different name. He acknowledged in testimony that his motive was that he was hoping for sexual activity with her. They drove to a remote parking spot in Barrie. They both agreed to some "fooling around" as described by Mr. M. He asked her if he could perform oral sex on her, cunnilingus, and she said yes. They were in his vehicle. He opened the passenger side door and performed cunnilingus on her. After a few minutes the activity stopped and he masturbated outside

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the car. There was no sexual intercourse. Ms. Murphy did not disclose her HIV status nor was there any barrier or protection used. Mr. M's evidence was that had he known her HIV status he would not have performed oral sex on her.

[11] There was no evidence that she requested money for the sexual activity but he gave her $20 or so, although it was not asked for. He has been tested for HIV and has not contracted HIV as a result of these encounters.

[12] The activity on the second occasion on September 13, 2011 was similar. They met, and drove to the same location. He asked if he could do the same thing and proceeded to perform oral sex on her, cunnilingus. There was no sexual intercourse. After he finished, he intended to masturbate but saw that officers from the Barrie Police Services had arrived on the scene. She did not disclose her HIV status on this second occasion either. He acknowledged that he intended to give her some money again but he did not do so because the police had arrived.

[13] Mr. M. identified Jennifer Murphy in court as the individual he performed oral sex on, on the two occasions.

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[14] His evidence was clear that he did not want sexual activity to progress beyond the cunnilingus he performed on her. His wishes were based on his apparent state of knowledge at the time that it was highly unlikely that he could get sexual transmitted diseases (STDs) from this activity. However, when police officers spoke to him about the risk of contracting HIV, he became concerned and sought testing. He has been tested and has not contracted HIV. In cross-examination, he acknowledged that his present opinion, that he would not have had oral sex with Ms. Murphy if he knew her HIV status, is based on hindsight. He acknowledged that he was naive and thought that a person who is HIV-positive would have disclosed this to him.

Count Three – I.O.

[15] I.O. is 56 years of age and resides near Barrie. On September 1 or 2, 2011 early in the morning, he was passing through Barrie to cost out a construction job north of Barrie. While travelling through Barrie, he pulled into a store on Bayfield Street. It was not open but Ms. Murphy was there and they struck up a conversation. He intended to buy some gum but the store was closed. The conversation lasted for about five to ten minutes and then he left and

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went to another store. However, he returned to the store about ten minutes later. Although Ms. Murphy was not there initially, she came back and talked to him at his vehicle. Mr. O. described the talk as flirting. She then got into his van. He said in his evidence that it was clear at that point that they were going to have sex. There was no discussion about money. They drove to a quiet location in a parking lot nearby. They climbed into the back of his panel van, took off their clothes and had vaginal sexual intercourse on the carpeted floor of the van. There was a brief discussion about condom use. He was not sure who brought up the topic but neither party had a condom and none was used. He got the impression that they did not need one. He did not ejaculate inside her but instead he ejaculated on the floor of the van. Afterwards he offered Ms. Murphy $20 which he had in his pocket. At first she refused but he insisted, and she ultimately took the money. His evidence was clear that she did not disclose her HIV status to him. He offered her money to make himself feel better. In cross-examination he indicated that he did not think she was a prostitute. He described her as clean looking and tidy.

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[16] On September 15, 2011 when he heard a media report about a woman with HIV having unprotected sex in the Barrie area, he reported this encounter to the Barrie Police Services. He saw her picture on the internet as posted by the Barrie Police Services and identified Ms. Murphy in the dock as the person he recognized from this encounter.

[17] After reporting the matter to the police, he was tested for HIV on the same day and eight weeks later. He has not contracted HIV as a result of this encounter.

Count Four – J.G.

[18] J.G. is 35 years of age and has resided in Barrie for six or seven years. He gave a statement to the police on September 20, 2011. Mr. G. acknowledged his criminal record which included theft under offences in 1997, sexual assault in 2002 and sexual interference in 2007. As a result of the convictions he is registered under the *Sex Offender Information Registration Act* S.C. 2004, c.10.

[19] Mr. G. gave evidence that when he met Ms. Murphy he was sitting on the front steps of the rooming house where he resides. He

was having a few beers with friends. Ms. Murphy came along and joined the conversation. He had bought two six-packs of beer earlier. After some time, he went to his room with Ms. Murphy and the two friends he was with. He continued drinking and marihuana was used, as well. She stayed overnight with him in his room and they had sexual intercourse twice. He stated that a condom was used on the first occasion. She had one in her purse. He thought it was her idea to use the condom. He gave evidence that there was a second occasion of sexual intercourse later that evening, but on this occasion his evidence was that no condom was used and that she asked that he not ejaculate inside her. He agreed.

[20] The next morning she left his residence but returned that evening. There was no sexual activity on that occasion. He learned of her HIV status through contact with the Barrie Police Services when they canvassed the rooming house that he managed. His evidence was that she did not disclose her HIV status at any time prior to sexual intercourse. He gave evidence that alcohol was a factor as well as marihuana with respect to his condition that night. He identified his impairment that night to be about eight on a scale of one to ten. He

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also said that marihuana affects him more when he is drinking. Although he was extremely confident that no condom was used on the second occasion, he did indicate that when drinking and smoking marihuana it is questionable as to whether or not he knows what he is doing. He also told the court that he has bad memory from head injuries, more than five concussions, as a result of numerous fights. He has not been diagnosed by a doctor about these head injuries.

[21] He told the court he does not have the best track record when it comes to the use of condoms. He did not ask Ms. Murphy about whether she has any sexually transmitted diseases or HIV nor did he disclose to her his previous criminal convictions. He told the court that she did not disclose her HIV status and he would not have had sexual intercourse with her if she had provided him with this information. Mr. G. identified Jennifer Murphy in the dock as the person he had sexual intercourse with in September of 2011.

Statement of Jennifer Murphy

[22] Jennifer Murphy gave a voluntary statement to Detective Constable Brooks of the Barrie Police Services which was videotaped and transcribed. This statement

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was in connection with her arrest on September 13, 2011 when she was found to be with Mr. M. at a park in Barrie. The following excerpts from the transcript are noteworthy:

- JM: (Jennifer Murphy): and my viral load is good, everything is good with me...

  JM: like the virus is dormant, I'm undetectable

[23] And later in the interview:

- DCB: [Detective Constable Brooks]: Right, under unprotected intercourse but when you have a partner you are obligated to tell them you have - -

  JM: Yes, I'm aware of that...

[24] And later:

- DCB: My question to you was is [sic] that you disclosed that you were with a woman for...six years...and you told her that you had HIV.

  JM: She was my goddamned psychiatrist actually, she was the most unethical person I've met in my life...

[25] And later:

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- DCB: Anyways you, you know that you have a legal obligation to disclose...when you have sexual contact with someone right?

  JM: Yes.

  DCB: Right?

  JM: I'm not denying that...

[26] And later:

- DCB: With this you didn't, you didn't tell him though?

  JM: Well you know what? He didn't ask.

Testimony of Dr. Irving Salit M.D.

[27] The Crown called Dr. Irving Salit to provide expert evidence in this case. Dr. Salit has been the Director of the Immunodeficiency (HIV) Clinic at Toronto General Hospital since 1989. He is a fellow of the Royal College of Physicians and Surgeons of Canada, a specialist in internal medicine and infectious diseases. Prior to trial Dr. Salit provided a written report to the Crown. Within that report Dr. Salit also provided answers to questions raised by defence counsel with respect to issues

bearing on this case. Dr. Salit was accepted as an expert on HIV on consent.

[28] Dr. Salit's clinic deals with approximately 1200 outpatients per year. The clinic is staffed by eight doctors, as well as nurses, a pharmacist and social workers. The clinic manages care for individuals who have HIV, in consultation with their family doctor. Patients who have HIV begin a medical regime which seeks to reduce their viral load. After an initial blood test they are followed up on every three months or so and subsequent blood tests measure their CD4 count. Dr. Salit explained that the CD4 count is a measurement of key cells in their white blood cells. It is an easy measurement of their immune system. A normal count would be about 500. A count of 300 would be moderate to low. A count of less than 200 would be severely abnormal. A person with a low CD4 count is more susceptible to shingles, herpes, TB and other rare infections that can attack their compromised immune system.

[29] A person with HIV will have a certain viral load or concentration of HIV in their blood. This measurement is expressed as "copies" and can range from millions of copies to levels that are undetectable by

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current science. A measurement of less than 40 copies is considered undetectable and it is the goal physicians strive for through antiretroviral therapy (ART).

[30] Dr. Salit indicated that a person can become infected by HIV through a number of methods including sexual contact with an HIV-positive person or contact with blood from an HIV infected person through contaminated needles. HIV is carried in the blood and in secretions including semen in men and cervical fluid in women. HIV is not contracted through hugging, kissing or touching objects used in common.

[31] If a person contracts HIV, their skin cells take up the virus and spread it throughout the body. Therefore, it becomes incorporated into a person's DNA. Under current medical technology, it is impossible to eliminate the virus but it can be managed through a medication regime and regular testing. If effectively managed, an HIV positive person can expect a normal lifespan provided they begin treatment before their CD4 count becomes dangerously low.

[32] Dr. Salit explained briefly the history of antiretroviral therapy (ART). In the 1980's a cocktail of drugs provided some limited benefits. In the 1990's more

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medications and combinations of these medications provided better results. Dr. Salit explained that by 1996 medical science entered the modern era of ART therapy. A previously complicated regime of taking different drugs at different times of the day has now been replaced, for most people, with a pill that may need to be taken only once a day. There is no evidence that the majority of patients show any resistance to this medication, and the result is that they can expect a normal lifespan if they maintain their ART regime and have periodic testing. The goal of ART therapy is to maintain a low viral load. A measurement of less than 40 copies is considered undetectable. If an individual stops taking their medication, the virus will then become detectable again within 30 to 60 days of the discontinuance of treatment because their viral load will begin to rise.

[33] In addition to testing and treatment, the clinic also provides education about safe sex practices to its patients. Studies have shown that on average a person with undetected HIV can pass on HIV during unprotected sexual intercourse for every 1 out of 1000 events. This average is affected by a person's age, their viral load and the presence of any other infections.

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[34] As part of its counselling, the clinic discusses the importance of disclosure of a person's HIV status to other partners and the issue of informed consent before sexual activity takes place.

[35] Dr. Salit also talked about the importance of barriers such as condoms, female condoms and dental dams. These products, as well as information sheets, are provided at his clinic by Toronto Public Health. Barriers prevent the spread of HIV as well as other sexually transmitted diseases.

[36] Dr. Salit's report, filed as an exhibit, indicates that he has reviewed the medical records of Jennifer Murphy, referred to current international literature on HIV and answered certain questions raised by defence counsel.

[37] In reviewing her medical records, Dr. Salit noted that Ms. Murphy began treatment with ART in 2001, but until April of 2005 she had high HIV viral loads and a low CD4 count. In 2005 her medication was changed, her viral load fell and her CD4 count began to rise. Six readings from September 2005 to July 2012 indicated undetectable viral loads. Her tests in August and September of 2011, proximate in time to the events in

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question, also indicate an undetectable viral load. As Dr. Salit noted, even if a person stops taking their medication their viral load could remain undetectable for 30 to 60 days before beginning to rise.

[38] In this case, Jennifer Murphy is HIV-positive, and the evidence indicates that she had a low, in fact, undetectable viral load at the time in question. The sexual practices under consideration in this case are two. First, vaginal sexual intercourse involving an HIV negative male with an otherwise healthy HIV-positive female taking medication and with an undetectable viral load. The second sexual practice being considered here is oral sex, cunnilingus, performed by an HIV-negative male on an HIV-positive female taking medication and with an undetectable viral load. In his report, certain questions were posed to Dr. Salit by defence counsel and he provided the following answers:

> 1. Q: In a heterosexual sexual interaction, where the female partner is HIV-positive, taking anti-viral medication, with a viral load of less than 50 copies, and is otherwise healthy, what is the risk of transmission to the male partner if the male partner

were to perform cunnilingus upon the female?

A: This risk is not defined in any studies but would seem to be much less likely than 1 chance in 25,000.

3. Q: In a heterosexual sexual interaction, where the female partner is HIV positive, taking anti-viral medication, with a viral load of less than 50 copies, and is otherwise healthy, what is the risk of transmission to the male partner if they engaged in vaginal intercourse with a condom?

A: The observed reduction in HIV transmission in a clinical trial setting demonstrates that successful ART use by the person who is HIV positive is as effective as consistent condom use in limiting viral transmission. The use of the condom to prevent HIV transmission in this setting adds so little that it is an un-measurable benefit.

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> 4. Q: In a heterosexual sexual interaction, where the female partner is HIV positive, taking anti-viral medication, with a viral load of less than 50 copies, and is otherwise healthy, what is the risk of transmission to the male partner if they engaged in vaginal intercourse without a condom?
>
> A: It is approximately 1 chance in 10,000-1:25,000 per sex act. However, some studies indicate that there may be no sexual transmission at all in the above circumstance.

[39] Dr. Salit noted in his report: "Reported condom use decreases HIV-1 infectivity by 78%." He went on to note "the observed reduction in HIV transmission in a clinical trial setting demonstrates that successful ART use by the person who is HIV-positive is as effective as consistent condom use in limiting viral transmissions." However, in his report Dr. Salit cautioned:

> "Despite the effectiveness of ARV's in suppressing blood HIV viral loads, there remains

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> evidence in men and women that at least intermittent shedding of HIV is present in sperm in men or vaginal fluid in women (Cu-Uvin). Thus, although effective in reducing the HIV in blood to undetectable levels and apparently preventing transmission, there remains some concern because HIV can be found in genital secretions and can theoretically be passed on sexually."

[40] In addition to sexual intercourse, Dr. Salit spoke in his report about other methods of transmission. He noted:

> "There have been very few reports of possible HIV transmission through cunnilingus (oral sex performed on a woman). It is biologically possible that HIV could be passed on through an HIV-negative person performing oral sex on a woman with HIV, but this is considered to be low risk.

He went on to say,

> "There have been no documented cases of someone being infected

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> with HIV through receiving cunnilingus from a woman with HIV."

[41] Dr. Salit concluded his report with the following summary:

> "If a woman is on ARV therapy and has an HIV viral load which is undetectable (<40 or <50) the likelihood of HIV sexual transmission is reduced by 96% and is approximately 1 chance in 10,000-1:25,000 per sex act. However, some studies indicate that there may be no sexual transmission at all in the above circumstance."

[42] In his testimony. Dr. Salit expanded on the issue of intermittent shedding of the HIV virus in semen or vaginal fluids for HIV-positive men or women who may otherwise have a low or undetectable viral load. Shedding may occur about 25% of the time for individuals in this category. Although Dr. Salit found this worrisome, he stated there has been no study linking this shedding to the transmission of HIV. Dr. Salit testified that he understood the state of the law in Canada. His clinic advocates

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that barrier protection such as condoms should be used even if there is a low risk of transmitting HIV. Dr. Salit was less certain about the importance of a barrier when oral sex, cunnilingus, was involved. His view was that it was more important for protection against other sexually transmitted diseases, the chance of contracting HIV being much more remote than through vaginal sexual intercourse. He testified that it would be rare if it even happens. Dr. Salit could not say that the chance was zero and could not say that it was not impossible but he provided numbers in the area of 1:50,000 or 1:100,000 per event.

[43] He was provided with a hypothetical question such as the situation involving Mr. M., a person who engaged in oral sex, cunnilingus, with a HIV positive woman. He said that the chance of contracting HIV was not zero but it was incredibly unlikely. As far as a recommendation for testing, Dr. Salit indicated the choice of a test would be up to the patient. Dr. Salit's concern would be minimal if there was no testing but testing would provide peace of mind to the patient. In addition, routine testing is part of the medical standard of care for persons consulting their physicians.

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[44] With respect to vaginal sexual intercourse, Dr. Salit's clinic's advice is that even if the risk of transmitting HIV is low there is a legal obligation to disclose HIV status unless a condom is used and the HIV-positive person has a low viral load. Dr. Salit indicated he would have more concern about the transmission of other sexually transmitted diseases if a condom was not worn when an individual's viral load was low.

Analysis

[45] The three counts in question involve a consideration of s. 273(1) of the *Criminal Code* (aggravated sexual assault). That section provides:

> "S. 273(1) Everyone commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant."

[46] The Crown alleges that the assaults on the three complainants were aggravated sexual assaults because the complaints' lives were endangered by acts of unprotected sex with the accused who is HIV positive.

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[47] Both Crown and defence relied on the recent Supreme Court of Canada decision in *R. v. Mabior* (supra). *Mabior* modified the previous Supreme Court of Canada decision in *R. v. Cuerrier*, [1998] 2 S.C.R. 371, which provided previous guidance with respect to HIV-positive persons having sexual intercourse without disclosing their status to complainants. Counsel also made reference to *R. v. D.C.*, [2012] 2 S.C.R., which was a companion to *Mabior* as well as the recent Ontario Court of Appeal case *R. v.* Felix, [2013] ONCA 415, which applied the *Mabior* test on the facts before it in that case.

[48] Section 265(1) of the *Criminal Code* indicates that one of the essential elements of an assault, or a sexual assault, is the application of force to the other person without consent. Section 265(3) provides:

> "For the purpose of this section, no consent is obtained where the complainant submits or does not resist by reason of...
> (c) fraud"

[49] In 1998 the Supreme Court of Canada in *Cuerrier* dealt with the issue of consent in such circumstances based on medical

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knowledge at the time. As Cory J. stated for the Court at para. 127:

> "Without disclosure of HIV status, there cannot be 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 on knowledge of the significant relevant factors is not a valid consent.

[50] In 2012 the Supreme Court of Canada reviewed and modified the test in *Cuerrier* based on an evolving common law approach to HIV-positive persons involved in sexual relations. Speaking for the Court, Chief Justice McLachlin in *Mabior* set out the test at para. 4:

> "I conclude that a person may be found guilty of aggravated sexual assault under s. 273 of the *Criminal Code* if he fails to disclose HIV-positive status before intercourse and there is a realistic possibility that HIV

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> will be transmitted. If the HIV-positive person has a low viral count as a result of treatment and there is condom protection, the threshold of a realistic possibility of transmission is not met, on the evidence before us."

[51] With respect to the possible transmission of HIV the Court noted at para. 18:

> "The uncertainty inherent in the concepts of significant risk and serious bodily harm is compounded by the fact that they are inter-related. The more serious the nature of the harm, the lower the probability of transmission need be to amount to a significant risk of serious bodily harm, it is argued. So it is not simply a matter of percentage of risk and seriousness of the potential disease. It is a matter of the two as they relate to each other.

[52] The Court reviewed the history of the law in this area and considered *Charter* values. The Court also discussed other jurisdictions where the mere risk of

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transmitting HIV does not draw criminal sanction. In determining a new test, the Court at para. 56 framed the question as follows: "When, precisely, should non-disclosure of HIV status amount to fraud vitiating consent under s. 265(3)(c)?"

[53] In coming to a conclusion in *Mabior*, the Court considered seven possible approaches as listed at para. 11:

(a) The active misrepresentation approach;

(b) The absolute disclosure approach;

(c) The case by case fact based approach;

(d) Judicial notice of the effect of condom use;

(e) Relationship based distinctions;

(f) Reasonable partner approach;

(g) Evolving common law approach.

[54] In settling on the evolving common law approach, the Court defined significant risk of serious bodily harm at para. 84:

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> "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. [Emphasis in original]

[55] The Court discussed a realistic possibility of HIV transmission at para. 93:

> "A review of the case law pertaining to fraud vitiating consent to sexual relations leads to the following general principle of law: the *Cuerrier* requirement of "significant risk of serious bodily harm" entails a *realistic possibility of transmission of HIV*. This applies to all cases where fraud vitiating consent to sexual relations is alleged on the basis of non-disclosure of HIV-positive status." [emphasis in original]

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[56] As to rebutting the realistic possibility of transmission of HIV, the Court provided the following guidance 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]

[57] In considering the seriousness of HIV the Court noted at para. 92:

> "It is enough to note that HIV is indisputably serious and life endangering. Although it can be controlled by medication, HIV remains an incurable chronic infection that, if untreated, can result in death."

[58] In reviewing the issue of low viral load versus undetectable viral load, the Supreme Court refused to draw a distinction. As the Court stated at para. 102:

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> "In reaching this conclusion, I use *low* viral load rather than *undetectable* viral load, as one of the factors for determining risk. This avoids the evidentiary difficulties associated with establishing an *undetectable* viral load. ...furthermore, detectability depends on the accuracy of ever-developing technology: a viral load that assays do not detect today, might very well be detectable by future assays." [Emphasis in original]

[59] In applying those principles to the factors before it, the Court set aside the conviction involving the complainant K.G. because the accused had a low viral load and a condom was used. However, the Court maintained the convictions against Mr. Mabior with respect to the complainants S.H., D.C.S. and D.H.

[60] It is relevant to examine the underlying trial judge's decision in *R. v. Mabior* from the Manitoba Queen's Bench trial[i] with respect to these three complaints.

[61] With respect to the complainant S.H., the trial judge found that the accused's

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viral load was suppressed and infectivity was low. As the trial judge noted at para. 134:

> "During those times when the viral load is undetectable in the blood, the risk of HIV transmission is reduced. However, the research has not proven that such a situation completely eliminates the risk of transmitting the virus. In such circumstances, I find that the risk constituted a significant risk of serious bodily harm."

[62] The trial judge came to a similar decision with respect to the complainant *D.C.S.* He stated at para. 139:

> "I am satisfied that instances of unprotected sexual intercourse transpired and even though the accused's viral load was undetectable, there was a significant risk of serious bodily harm."

[63] With respect to the complainant D.H., the trial judge found that there was protected sexual intercourse but on one occasion the condom was either removed or

had broken. The trial judge found that the viral load was undetectable and concluded at para. 147:

> "In those circumstances there remains a significant risk of serious bodily harm which is not in any way circumvented by a barrier".

[64] The Supreme Court of Canada in *Mabior* upheld the convictions of the accused in circumstances where the accused had a low viral load or an undetectable viral load and no barrier was worn.

[65] In *R. v. D.C.*, the Supreme Court of Canada, in a companion decision to *Mabior*, reviewed the *Mabior* principles in a case where the accused's viral load was undetectable. The trial judge had determined that there was significant risk of serious bodily harm.

[66] The live issue at trial in *R. v. D.C.* was whether or not a condom was worn.

[67] In applying the *Mabior* principles to the *D.C.* case, the Court stated at para. 29:

> "To convict, it was necessary to establish beyond a reasonable doubt that D.C. failed to disclose

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> her HIV status to the complainant, where there was significant risk of serious bodily harm. As discussed in *Mabior*, a significant risk of serious bodily harm, 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. Here low -- indeed undetectable -- viral load was established. The critical issue on the trial was therefore whether a condom was used on the single pre-disclosure act of sexual intercourse between the complainant and D.C."

[68] However, the Court set aside the conviction against D.C. There was a credibility issue as to whether or not a condom was used and the Court concluded that the prosecution failed to prove guilt beyond a reasonable doubt.

[69] The Ontario Court of Appeal recently applied the *Mabior* principles in *R. v. Felix*. The accused was HIV-positive. He testified that he was not any medication and that he had been informed that his viral

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loads were low. No medical evidence was called.

[70] The Court noted that the trial judge found that the accused was HIV positive, failed to disclose his status and failed to use a condom during sexual intercourse. As the Court stated at para. 48:

> "In these circumstances, the issues of the appellant's exact viral load at the time of his sexual encounters with N.S. and M.F., and the degree of risk of HIV transmission posed as a result of his viral load, are simply irrelevant. The nature of the appellant's viral load at the times in question cannot change the fact that, on the trial judge's findings, the appellant was HIV-positive at the time of intercourse and he failed to use a condom.

[71] The Court concluded at para. 57:

> It follows, in my opinion, that once it was established in this that: (1) the appellant was HIV-positive; (2) the appellant did not disclose his HIV-positive status prior to intercourse with

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> the appellants; (3) the complainants would not have engaged in sexual activity with the appellant had they known of his HIV-positive status, and (4) the appellant failed to use a condom on the relevant occasions of intercourse, the Crown has established a *prima facie* case of a realistic possibility of HIV transmission. On the *Mabior* standard, even if the evidence had established that the appellant had a low viral load at the time of intercourse of N.S. and M.F., a realistic possibility of HIV transmission would not have been negated.

[72] I will now review each of the counts.

Count Two – L.M.

[73] Count two alleges that Jennifer Murphy committed an aggravated sexual assault on L.M. His testimony spoke of two distinct occasions where he had oral sex, cunnilingus, with Jennifer Murphy. On both occasions, he drove her to a secluded location and performed oral sex on her. I accept his evidence that she did not disclose her HIV status, and indeed that has

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been acknowledged in the Agreed Statement of Facts.

[74] On the first occasion after completing oral sex, he masturbated himself on a blanket near the car. I accept his evidence that there was no sexual intercourse and no fellatio. On the second occasion, he also performed oral sex on her but his intention to masturbate was interrupted when the Barrie Police arrived on the scene.

[75] I accept his evidence that he did not turn his mind to her HIV status at the time. His evidence suggests that he had some limited knowledge of STDs. He may have thought that it was less likely that STDs could be transmitted by cunnilingus and that if transmitted were curable. With the benefit of hindsight, he indicated at trial that he would not have performed this activity had he known her HIV status. It is worth noting that this can only be viewed through hindsight. Foresight was not available because there was no disclosure by Jennifer Murphy.

[76] His evidence was clear that he did not wish to proceed to other sexual activities such as intercourse or fellatio. He indicated he would never have allowed her to perform fellatio on him, and by his logic

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sexual intercourse would dishonour a commitment to his wife. Mr. M's evidence was that he was not thinking about HIV and he told the court that he expected he would have been told. He acknowledged that he was naïve. He expected to pay for the sexual encounters that occurred. I accept his evidence that no barriers such as dental dams or female condoms were discussed or used.

[77] I am satisfied that the Crown has proven several of the essential elements of aggravated sexual assault. There was touching in circumstances of a sexual nature. But there was on the surface an apparent consent between the parties. However, Parliament has made it clear that consent can be vitiated by fraud. The key elements of s. 273(1) bear repeating:

> "Everyone commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant."

[78] Although the Supreme Court decisions in *Cuerrier and Mabior* dealt primarily with sexual intercourse, I am satisfied that the principles have application to other sexual practices including oral sex, cunnilingus.

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The question advanced in *Mabior* remains to be answered in this case - "When do sexual relations with and HIV-positive person pose a 'significant risk of serious bodily harm'?"

[79] As the Court noted in *Mabior* at para. 84, a significant risk can be found between the extremes of no risk and high risk:

> "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."

[80] As the Court further stated at para. 89:

> "A standard of any risk, however small, would arguably set the threshold for criminal conduct too low."

From a policy prospective the Court noted in the same para.:

> "Drawing the line between criminal and non-criminal conduct at a realistic possibility of transmission arguably strikes an appropriate balance between the

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> complainant's interest in autonomy and equality and the need to prevent overextension of criminal sanctions."

[81] *Mabior* indicates that a realistic possibility of transmission of HIV can be negated if a condom is used and the accused person's viral load was low at the time of sexual relations. However, in my view, before that test is applied, the court must determine on a factual basis whether there is any realistic possibility of transmission in the first place. In this case, the court heard scientific evidence offered by the independent expert Dr. Salit. In his written report, he indicated that the risk of transmission of HIV when a female partner is HIV-positive, on antiretroviral medication, and with a low viral load, where a male partner performs cunnilingus is "much less likely than 1 chance in 25,000". In his evidence at trial, he indicated that the transmission of HIV from such sexual practices is a negligible risk, but it is not zero. He put the number at 1:50,000 to 1:100,000 per event. He acknowledged it was not impossible but he indicated it was very rare, if it ever happens. Dr. Salit indicated that he would be more concerned about the transmission of other sexually

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transmitted diseases if protection was not worn. He would not be concerned if a male partner was not tested after such activity but acknowledged that testing may give that person peace of mind and it would be standard practice to do testing if a person reported this to their doctor.

[82] In my view, the Supreme Court of Canada in *Mabior* has moved away from an absolute disclosure approach and signalled that not every risk of transmission of HIV constitutes a significant risk of serious bodily harm. Dr. Salit's evidence at trial was that the risk was 1:50,000 or possibly 1:100,000. The medical evidence in this case indicates that the risk of transmission was so low that it does not give rise to a realistic possibility of transmission of HIV and therefore there was no significant risk of serious bodily harm.

[83] As the Supreme Court stated in *Mabior* at para 85:

> "Significant risk of serious bodily harm" cannot mean any risk, however small. That would come down to adopting the absolute disclosure approach, with its numerous shortcomings, and would effectively read the word

> "significant" out of the *Currier* test."

[84] In this case, absent a realistic possibility of transmission of HIV, the Crown has failed to prove a significant risk of serious bodily harm. The conduct of Ms. Murphy did not rise to the level of fraud because there was no realistic possibility of transmission of HIV. Therefore, I find that the activity engaged in, oral sex, cunnilingus, was consensual. The consent given was not vitiated by fraud. I therefore record a verdict of not guilty with respect to count two. For the same reasons, I find Ms. Murphy not guilty of the lesser and included offence of sexual assault *simpliciter*.

Count Three – I.O.

[85] I.O. gave evidence about a single act of sexual intercourse between him and Ms. Murphy. On September 15, 2011, he learned of a media release about Ms. Murphy and her HIV status. He reported this incident to the police. Approximately two weeks before that date, he met Ms. Murphy in a parking lot, had a chat with her and returned a short time later, and after a brief discussion it was clear that they both came to a tacit understanding about sexual

relations. They drove to a remote parking lot a short distance away and had unprotected vaginal sexual intercourse in the rear of his van. There may have been some discussion about a condom but none was worn. He did not have one with him. He got the impression that none was needed. He did not ejaculate inside her, instead he ejaculated on the floor of his van. Afterwards he took her back and gave her $20.

[86] Subsequent testing indicated he was not HIV-positive. He indicated in his evidence that he would not have had sexual intercourse with her if he was told that she was HIV-positive. According to his evidence, he was not thinking about any other sexually transmitted diseases at the time. When he offered her money, she initially said no but he insisted. His evidence was that there was no discussion of money prior to the sexual intercourse. Also his evidence indicated that he did not think of her as a prostitute. He described her as tidy and clean looking.

[87] In his evidence he stated that he would not have had sex with her if he had known of her HIV status. He indicated he would have just talked to her. He acknowledged that this was after the fact reasoning. However,

it should be noted that he was not given the opportunity to decide prior to sexual intercourse because there was no disclosure by Ms. Murphy about her HIV status. I accept Mr. O's evidence as truthful.

[88] I am satisfied on the evidence before me that Ms. Murphy did not disclose her HIV status and no condom was worn during vaginal sexual intercourse. Therefore, I am satisfied that the Crown has proven several of the key elements of aggravated sexual assault, including intentionally touching in circumstances of a sexual nature. The facts indicate that there was apparent consent to the sexual activity that took place. However, Parliament has made it clear that consent can be vitiated by fraud. In this case the allegation of fraud, the failure to disclose HIV status, can vitiate an otherwise consensual activity.

[89] The Supreme Court of Canada in *Cuerrier* has made it clear that the endangerment of life of a complainant can occur if there is a significant risk of serious bodily harm if an accused with a positive HIV status has sexual intercourse.

[90] The Supreme Court of Canada reviewed the *Cuerrier* test in *Mabior* and defined the question as: "When do sexual relations with

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an HIV-positive person pose a 'significant risk of serious bodily harm'?"

[91] The Court provided further guidance as to what is a significant risk by stating in *Mabior* 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." [emphasis in original]

[92] The Supreme Court did not define in mathematical numbers a standard for a realistic possibility of transmission of HIV but noted at para. 88:

> "A realistic possibility of transmission arguably strikes the right balance for a disease with the life altering consequences of HIV".

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[93] The Supreme Court in *Mabior* established a new test as an alternative to disclosure when a realistic possibility of transmissions exists. As the Court stated at para 94:

> "This leaves the question of when there is realistic possibility of transmission of HIV. 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]

[94] I am satisfied that on the facts of this incident of vaginal sexual intercourse with Mr. O. no condom was used. Therefore, the Supreme Court of Canada's alternative test is of no assistance to the accused. However, it remains to be determined if, on the facts of this case, there was a realistic possibility of transmission of HIV. In order to make a determination, I will review the expert opinion evidence of Dr. Salit, the Supreme Court of Canada's guidance in *Mabior*, and in *R. v. D.C.*, and the Ontario Court of Appeal's decision in

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Felix which applied the *Mabior* test on the facts before it. I will also consider the evidence of Ms. Murphy in her voluntary statement to the police upon her arrest. Although the Crown was successful in its application to introduce the prior discreditable conduct of Ms. Murphy, I put very little weight on it. The medical evidence indicates that her viral load was not low at that time. She subsequently began new medication and her viral load became low if not undetectable thereafter. Clearly, such prior discreditable conduct cannot be used for purposes of moral prejudice or reasoning prejudice against the accused.

[95] Dr. Salit gave expert evidence at trial. His written report answered a question about vaginal sexual intercourse whereby the female partner is HIV-positive and on medication with a low or undetectable viral load. As to the risk of transmission Dr. Salit noted:

> "It is approximately one chance in 10,000 – 1:25,000 per sex act. However some studies indicated that there may be no sexual transmission at all in the above circumstance."

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[96] In his oral testimony, Dr. Salit noted that the risk could be 1:10,000 or 1:20,000. Even though the risk is extremely low, he would recommend protection because there is always concern about other sexually transmitted diseases in such circumstances. The transmission of HIV would be the least of his concern. Dr. Salit's evidence was based on his experience and review of the literature. One of the studies he cited in his report was a 2011 study by M.S. Cohen. The Supreme Court of Canada referred to this study in *Mabior* and stated at para 101:

> "The most recent wide-scale study on this issue, relied on by a number of interveners, concludes that the risk of HIV transmission is reduced by 89 to 96% when the HIV-positive partner is treated with antiretrovirals irrespective of whether the viral load is low or undetectable: M.S. Cohen, et al, "Prevention of HIV-1 Infection with Early Antiretroviral Therapy" (2011), 365 *New Eng. J. Med.* 493. This evidence indicates that antiretroviral therapy, alone, still exposes a sexual partner to a realistic possibility of transmission. However, on the

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> evidence before us, the ultimate percentage 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." [Emphasis in original]

[97] Dr. Salit was aware of the *Mabior* case and the necessity of counselling people on the need for condom use even if the risk was low. He also noted a sound of caution about intermittent shedding of HIV cells in semen or vaginal fluids for those that are HIV-positive. Although he found this worrisome, he could not cite any studies indicating any connection with shedding and the possibility of transmission of HIV. He noted that about 25% of people with HIV could be shedding at any given time if samples were taken.

[98] The Supreme Court next applied *Mabior* principles in *R. v. D.C.* In that case, D.C.'s viral load was undetectable. The Court reframed the test as follows at para 29:

> "To convict, it was necessary to establish beyond a reasonable doubt that D.C. failed to disclose

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> her HIV status to the complainant, where there was a significant risk of serious bodily harm. As discussed in *Mabior* a significant risk of serious bodily harm, 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. Here low -- indeed undetectable -- viral load was established.

[99] The clear message in *Mabior,* as further applied in *D.C.*, is that even an undetectable viral load raises the realistic possibility of transmission. As noted previously, the Supreme Court relied on the 2011 Cohen study indicating that antiretroviral therapy alone still exposes a sexual partner to a realistic possibility of transmission.

[100] In *Mabior* the Supreme Court upheld convictions against the accused with respect to the complainants S.H., D.C.S. and D.H. In the underlying trial decision, the trial judge noted that the accused's infectivity rate was low or undetectable. The trial judge also noted at paragraph. 137 that the accused knew or ought to have known that

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condom use was necessary. The trial judge concluded with respect to the complainant S.H.:

> "I am satisfied, based on the evidence before me, that there was a significant risk of serious bodily harm in that HIV could have been passed onto S.H. in those circumstances when the accused had an undetectable viral load and engaged in unprotected sexual contact."

[101] The trial judge came to a similar conclusion with respect to the complainant D.C.S., finding that even though the accused's viral load was undetectable, there was a significant risk of serious bodily harm when unprotected intercourse took place.

[102] The trial judge came to a similar decision with respect to the complainant D.H. The accused's viral load was undetectable but a condom was not used or had broken.

[103] In *Felix*, the Ontario Court of Appeal had an opportunity to apply the *Mabior* test on the facts before it. The Court reviewed the principles in *Cuerrier*, as revisited and

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clarified by the Supreme Court of Canada in *Mabior*.

[104] The Court noted that Mr. Felix was HIV-positive, failed to disclose his HIV-positive status and failed to use a condom. As the Court noted at para. 48:

> "In these circumstances, the issues of the appellant's exact viral load at the time of his sexual encounters with N.S. and M.F. and the degree of risk of HIV transmission posed as a result of his viral load, are simply irrelevant.

[105] After reviewing the Supreme Court's test in *Mabior*, the Court stated at para. 50:

> On the *Mabior* standard therefore a realistic possibility of transmission of HIV was not negated, regardless of whether the appellant's viral load was low when he engaged in sexual activity with N.S. and M.F.

[106] In my view the Ontario Court of Appeal has established a framework to assist trial

judges in situations such as this. As the Court stated at para 57:

> "It follows, in my opinion, that once it was established in this case that: (1) the appellant was HIV-positive; (2) the appellant did not disclose his HIV-positive status prior to intercourse with the appellants; (3) the complainants would not have engaged in sexual activity with the appellant had they known of HIV-positive status, and (4) the appellant failed to use a condom on the relevant occasions of intercourse, the Crown had established a *prima facie* case of a realistic possibility of HIV transmission. On the *Mabior* standard, even if the evidence had established that the appellant had a low viral load at the time of intercourse with N.S. and M.F., a realistic possibility of HIV transmission would not have been negated."

[107] Jennifer Murphy gave a statement to the police upon her arrest after an incident involving Mr. M., which involved oral sex,

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cunnilingus, not sexual intercourse. She told the officers that her viral load was good, it was dormant, and undetectable. She acknowledged her HIV status and indicated she had some knowledge in the area. She stated:

> "I am an A -- ... HIV aids educator, I am an addictions counsellor, that's what I do with my life. I don't spread HIV alright."

[108] She was asked if she knew that she had a legal obligation to disclose when she is having sexual contact. She answered "Yes, I'm not denying that." She acknowledged living with another man, not one of the complainants. She was asked:

> "Q: But you slept with him and you disclosed to him that you had HIV right?
> A: Yes."

And she later stated "And the sex I have with [name deleted] obviously was with condoms, you can call and ask."

[109] On the facts before me, I am satisfied that no condom was worn and Mr. O. would not have consented to sexual intercourse had he

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been aware of Ms. Murphy's HIV-positive status. Further, I am satisfied that although her viral count was low, indeed undetectable under the current science testing regime, there existed a realistic possibility of transmission of HIV when sexual intercourse occurs. I therefore find that Ms. Murphy's fraud, her failure to disclose her HIV status negates the consent otherwise given to the sexual intercourse that took place. Mr. O. was therefore exposed to a significant risk of the transmission of HIV and that risk endangered his life. I therefore record a verdict of guilty with respect to this count of aggravated sexual assault.

Count Four – Mr. J.G.

[110] Mr. G. gave evidence about two acts of vaginal sexual intercourse with Ms. Murphy while she stayed with him for a couple of nights at his residence. His evidence was that a condom was used on the first occasion. That condom was proffered by Ms. Murphy. His further evidence was that no condom was used for the second act of sexual intercourse, and at no time did Ms. Murphy disclose to him that she was HIV-positive. He also gave evidence that he would not have engaged in sexual intercourse if he had known of Ms. Murphy's HIV-positive status.

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[111] This charge involves aggravated sexual assault. That charge has serious penal consequences for an accused person if convicted. Therefore, on the facts of this case, the credibility of J.G. requires close scrutiny. He has criminal record dating from 1997 where he had three convictions for theft-under. In 2002, he was convicted of a sexual assault and received a jail term. In 2007, he was convicted of sexual interference and received another jail term. He is registered under the *Sex Offenders Information Registration Act*. He reported his sexual activity with Ms. Murphy to the police when they knocked on his door canvassing the rooming house that he was managing. He acknowledged that he had been drinking heavily on the night in question. He had purchased two six-packs of beer, mostly consumed by him. He and his friends were drinking on the stairs of the rooming house. Ms. Murphy joined them and they moved inside to continue drinking and to smoke marihuana. He acknowledged that, as to his impairment, on a scale of one to ten, he was at an eight. He said it was questionable as to whether he knew what he was doing. He told the court that he had bad memory from possibly more than five concussions.

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[112] If this was a jury trial, the evidence of Mr. G. would require a *Vetrovec*[ii] like caution given his record. I give myself the same caution and find that it would be dangerous to convict on such uncorroborated evidence, evidence which is crucial to the Crown's case. His admitted level of impairment that evening and his memory issues only compound my concern about his credibility.

[113] With respect to the first incident of sexual intercourse, the use of a condom would comply with the consent requirements in *Mabior* because Ms. Murphy had a low, if not undetectable, viral count and a condom was used.

[114] The same test would apply with respect to the second incident. If a condom was used, there would be no offence committed. Although Mr. G. testified that there was no condom used for the second act of sexual intercourse, I am not satisfied beyond a reasonable doubt about his truthfulness that a condom was not worn based on my assessment of his credibility about this key issue. The police interview with Ms. Murphy assists her with respect to this count because that interview can fairly be interpreted as to her knowledge about HIV and the importance of the use of a condom when she spoke about

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sexual intercourse with another man. The Crown has not proven this element of the offence beyond a reasonable doubt. I therefore record a verdict of not guilty with respect to count four. For the same reasons, I find her not guilty of sexual assault *simpliciter*.

[115] I therefore summarize the verdicts as follows:

- Count One – plea of guilty previously entered;

- Count Two – not guilty of aggravated sexual assault, not guilty of common sexual assault;

- Count Three – guilty of aggravated sexual assault;

- Count Four – not guilty of aggravated sexual assault, not guilty of sexual assault

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CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))
EVIDENCE ACT

I, Debra Byrne, certify that this document is a true and accurate transcript in the recording of R. v. Jennifer Marie Murphy in the Superior Court of Justice, held at Courtroom No. 1, Barrie Courthouse, 75 Mulcaster Street, Barrie, Ontario, taken from Recordings 3811-01-20130816, which has been certified in Form 1.

August 23, 2013

Debra Byrne,
Certified Court Reporter

[1] R. v. Mabior [2012] 2 S.C.R. 584
[2] *R. v. Cuerrier* [1998] 2 S.C.R. 371
[3] *R. v. D.C.* [2012] 2 S.C.R. 626
[4] *R. v. Felix* [2013] ONCA 415
[5] *R. v. Mabior* [2008] MBQB 201
[6] *R. v. Vetrovec* [1982] 1 S.C.R. 811

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