

Summary of *R. v. R.*, 2022 ONCA 694

On October 13, 2022, the Court of Appeal for Ontario released its decision in the case of *R. v. R.*, 2022 ONCA 694. The appellant in this case appealed his conviction of aggravated sexual assault in relation to HIV non-disclosure. The Court of Appeal for Ontario allowed the appeal, set aside the conviction, and ordered an acquittal.

Based on fresh evidence before the Court, the Court of Appeal for Ontario decided that the risk of transmission associated with sex with an undetectable viral load is negligible and thus does not meet the “realistic possibility” test. This remains true whether the accused is an “elite controller” or has achieved a very low to undetectable viral load because of efficient treatment.

The case

The appellant in this case was convicted of aggravated sexual assault for not disclosing his HIV-positive status before having multiple encounters of condomless vaginal and oral sex with one complainant back in 2013.¹ The complainant never got HIV. While the appellant was not on antiretroviral treatment at the time, his viral load never exceeded 143 copies/m. The appellant is an “elite controller,” meaning he maintains an undetectable viral load naturally without the help of antiretroviral therapy.

At trial, a medical expert described the risk of transmission as “incredibly low” and testified that “it would be extremely unlikely that transmission occurs” given the accused’s viral load at the time. The expert explained that “viral load trumps everything” but because elite controllers are quite rare, they are “not well studied” and the expert was not able to cite a study on this specific scenario.² As a result, the trial judge refused to admit that the accused did not pose a “realistic possibility” of transmission based on his viral load alone and convicted the accused. The trial judge had agreed with defense counsel that “there indeed may be cases where having a low viral load alone may be one way to negate a realistic possibility of transmission of HIV” but he was not ready to accept that this may be the case when an accused has achieved an undetectable viral load naturally and is not on treatment.³

¹ Some instances involved vaginal bleeding and ejaculation. *R. v. R.* (19 November 2016, Toronto, Court File No. 15-30000192-000 (S.C.J., Brown M.))

² *Ibid.*

³ The Supreme Court of Canada had ruled in *R. v. Mabior* that a low or undetectable viral load combined with the use of a condom negates a realistic possibility of transmission and thus precludes criminal liability in case of HIV non-disclosure. [R. v. Mabior](#), 2012 SCC 47

Fresh evidence was admitted on appeal, including studies published after the trial that identified more precisely the risk of transmission associated in cases of elite controllers. The opinion of that second medical expert was that:

While controllers have been subject of less study, in my opinion based on a review of the literature that the risk of transmission from a controller with a viral load under 200 would be the same as a person who achieves that viral load due to ART. That is, the risk is negligible.⁴

Conclusion

Given the evidence regarding elite controllers and their viral loads, in addition to the fact the appellant's viral load, at all material times, never exceeded 143 copies/mL, the Court concluded that the evidence supported an acquittal.⁵ The risk of transmission by the appellant was negligible and thus did not meet the *Mabior* realistic possibility test.

⁴ *R. v. R.*, 2022 ONCA 694 at para. 11.

⁵ *Ibid* at para 13.