Citation: *R.* v. *Ngeruka,* 2015 YKTC 10

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Docket: 12-00260A
12-00295
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

NAPOLEAN NGERUKA

Restriction on publication: Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 or 486.5 of the *Criminal Code*. Check with the court registry for details.

Appearances:
Bonnie MacDonald — Counsel for the Crown
Malcolm E. J. Campbell — Counsel for the Defence

REASONS FOR JUDGMENT

Overview

[1] Napolean Ngeruka has entered a guilty plea to having committed the offence of aggravated sexual assault contrary to s. 273(1) of the *Criminal Code.*

[2] The offence occurred between January 1, 2005 and July 1, 2009.

[3] It is not disputed that Mr. Ngeruka had sexual intercourse with L.S. several times within that period of time. It is also not disputed that he did so, knowing that he had

contracted the Human Immunodeficiency Virus ("HIV") and without communicating this fact to L.S.

[4] L.S. was subsequently diagnosed as having contracted HIV. Mr. Ngeruka disputes that L.S. contracted HIV as a result of their sexual relationship.

[5] The matter proceeded to a *Gardiner* hearing on June 3, 2014, with the hearing continuing on December 16, 2014, after written submissions were provided by counsel. (See: *R.* v. *Gardiner*, [1982] 2 S.C.R. 368).

[6] My decision as to whether L.S. contracted HIV as a result of her sexual contact with Mr. Ngeruka was reserved, ultimately, until today's date.

Evidence

Evidence of L.S.

[7] L.S. was married to E.S. from approximately 1982 to 1989, when he died of heart problems. She was then married to E.K. from 1996 to 1999 and lived in Victoria, British Columbia for the duration of the marriage.

[8] She moved to Whitehorse in March 1999. She was single for approximately two years before entering into a four-and-one-half year relationship with E.H. This relationship included unprotected vaginal, anal and oral sex.

[9] After this relationship concluded, L.S. remained single for approximately one year. She then entered into a relationship with G.S. This relationship lasted approximately eight months. She had vaginal sex with G.S. during the relationship.

[10] After this relationship concluded, L.S. remained single for approximately eight or nine months. She then entered into a relationship with L.J. This relationship lasted approximately one year on and off and included vaginal sex.

[11] E.H., G.S. and L.J. all have been tested for HIV and the test results were negative.

[12] In 2008 L.S. had unprotected sex with an individual named “Ken” on one occasion. She knew Ken’s place of employment and gave this information to Yukon Health after she had been diagnosed and she met with the Crown prosecutor. She had forgotten about Ken when she advised her nurses of her sexual contacts after she had been diagnosed with HIV.

[13] L.S. stated that she and Mr. Ngeruka had a sexual relationship in 2005 that lasted two or three months. In this time period they had sexual intercourse perhaps five times. This included unprotected vaginal and anal intercourse.

[14] L.S. and Mr. Ngeruka ended their relationship in 2005. However, the relationship resumed to some extent in 2009. She stated that she believed that upon resumption of the relationship she and Mr. Ngeruka had unprotected vaginal intercourse approximately three or four times over a period of a couple of weeks.

[15] L.S. testified that Mr. Ngeruka never told her that he was HIV-positive and that, had she known, she never would have had unprotected sex with him.

Evidence of Dr. Barbara Romanowski

[16] Dr. Romanowski is a specialist in infectious disease. She has been involved in HIV-care since 1985. She has been coming to the Yukon to provide on-site care for individuals with HIV since 2000. She now operates a one-week clinic six times per year. She believes that she sees all the HIV-positive individuals in the Yukon who have sought medical care. She stated that she is the only specialist who visits the Yukon to provide care for individuals infected with HIV. She stated that some HIV-infected individuals may not receive care in the Yukon but go to Vancouver instead.

[17] She testified that it is only when an individual who is HIV-positive develops an unusual infection, one that would not be expected to be seen in an individual with a normally functioning immune system, that the individual is diagnosed as having Acquired Immune Deficiency Syndrome, ("AIDS").

[18] Dr. Romanowski testified that receptive vaginal and receptive anal sex are the sexual acts with the highest risk of transmission of HIV. The risk of transmission of the virus through oral sex is "very, very, very small".

[19] She testified that the longer an individual has been infected with HIV, generally speaking, the lower their CD4 count will be. The CD4 count is a measurement of the immune system. The lower the CD4 count, the more the individual is at risk for opportunistic infections and a full progression to AIDS. The CD4 count usually indicates how long an individual has been infected and what their risk of becoming ill from HIV is.

[20] At times, although not always, a lower CD4 count is linked to a higher viral load. The viral load is a measurement of how much of the virus is in the individual's blood. The higher the viral load, the more infectious the individual is.

[21] As of the date of Dr. Romanowski's testimony, 62 individuals had received care through her Yukon clinic.

[22] Dr. Romanowski is the treating physician for both L.S. and Mr. Ngeruka. She stated that she has been treating Mr. Ngeruka since 2005 and he has been in her care continuously since then. She is aware that he was diagnosed as being HIV-positive in 1993 and, prior to 2005, had been receiving care in Vancouver.

[23] She testified that, to her knowledge, Mr. Ngeruka has never had an HIV-related illness. His CD4 count in 2005 was quite healthy, his viral load was relatively low by 2005 standards, and there were no indications that he required antiretroviral therapy. The common medical practice in 2005 was to wait until the individual's CD4 count fell into the 300 range, and the viral load rose to the 100,000 range, before initiating antiretroviral therapy. By today's standards, a viral load of 80,000 to 90,000 would be high for the purpose of starting treatment. Treatment will now also be started when an individual's CD4 count falls to the mid to low 300s.

[24] In 2005, Mr. Ngeruka's CD4 count was 550, which was in the normal range, and his viral load fluctuated between 9,000 and 19,000, which was relatively low. A fluctuating viral load within this range is not unusual.

[25] Dr. Romanowski testified that between 2005 and 2009, Mr. Ngeruka's CD4 count was in the high 400s to 600s, therefore quite normal. His viral load fluctuated from a low of 250 to a high of 20,000 in January 2007.

[26] Dr. Romanowski testified that it is possible to transmit HIV to a sexual partner with a viral load as low as 100. While the higher the viral load the higher the risk of transmission, so long as an individual is HIV-positive there is always a possibility of transmission of the virus. Dr. Romanowski was not prepared to answer the question as to the risk of transmission if the viral load is 100 versus the risk of transmission if the viral load is 20,000. She stated that it is unknown when an individual becomes a high risk to transmit HIV.

[27] Dr. Romanowski testified that L.S. became her patient in February 2010, shortly after her diagnosis in January 2010 as being HIV-positive. She was not able to say with any degree of certainty how long L.S. could have been infected with HIV before she was diagnosed.

[28] She stated that since 2010 L.S.' CD4 count has remained high, in the 900 to 1100 range, and her viral load has been low, in the 400 to 600 range.

[29] Dr. Romanowski testified that a "clade" is a strain of HIV. She noted that she is a physician, not a virologist or microbiologist. She stated that the clade is determined when the virus is tested for resistance to drugs. As only individuals who have a detectable virus can be resistance-tested, of the 62 HIV-positive individuals Dr. Romanowski has stated she has seen in the Yukon, only 30 have been resistance-tested. Of these 30 individuals, three are Clade A, 25 are Clade B and two are Clade C.

[30] Dr. Romanowski testified that both Mr. Ngeruka and L.S. have been resistance-tested. Mr. Ngeruka is Clade A (A-1) and L.S. is also Clade A. Dr. Romanowski testified, that to her knowledge, Clade A and Clade A-1 are very similar strains of the HIV virus, although she stated that she is not qualified to explain the difference between them.

Evidence of Dr. Mark Wainberg

[31] Dr. Wainberg was called by the Crown to provide expert evidence in the areas of microbiology and immunology. He holds a PH.D. in these areas. He is currently the director of the AIDS Centre at the Jewish General Hospital at McGill University. I understood that his qualifications as an expert in the fields of microbiology and immunology, with specific expertise regarding HIV and AIDS, and his ability to provide expert evidence in these fields, were agreed to by counsel.

[32] Dr. Wainberg testified that there are multiple members of the HIV family. The various viruses can be distinguished on the basis of the sequencing of the nucleic acids of the viruses themselves. The subtype the virus falls into can be determined with a fair degree of precision based on the sequences of the nucleotides that make up the DNA and RNA of the virus.

[33] Dr. Wainberg testified that HIV is a virus that will mutate all the time if it is given a chance to replicate. He stated that if one individual transmits HIV to a second individual, there is a very high likelihood that the virus from the individual who transmitted it will resemble the virus in the individual the virus is transmitted to.

[34] He testified that testing procedures could show if there is a strong degree of homology between the viruses in two individuals. If there is a strong degree of homology between the viruses in the two individuals, that would provide a high degree of proof that the viruses were of common origin. However, it cannot be stated with 100% certainty that one individual infected another. If one individual transmitted HIV to a second person, who then transmitted the virus to a third person, it would be likely that the virus of each of the three individuals would strongly resemble each other.

[35] Dr. Wainberg was provided sequences of the viruses that infected L.S. and Mr. Ngeruka. He concluded that the viruses present in L.S. and Mr. Ngeruka were most definitely related in terms of sequence homology. He stated that these viruses are very closely and strongly related to each other. He stated that, due to mutation of the virus, there is no such thing as 100 percent matching between two sequences. He stated that if blood samples are provided from two individuals within six months after the suspected date of transmission, there is a far better chance of documenting the homology between the nucleic acid sequences than if a period in excess of six months has elapsed, in particular with respect to the person the virus was transmitted to, as the extent of mutation might be so great that one would not be able to make the same types of conclusions based on nucleic acid sequences.

[36] Dr. Wainberg stated, based upon the analysis of the blood samples of N.S. and Mr. Ngeruka, transmission of the virus to L.S. would have occurred within a six month window prior to L.S. having provided a blood sample. He further stated that he cannot be precise as to the exact date on which transmission would have occurred or whether

Mr. Ngeruka infected L.S. or an intermediate individual or individuals in what could be called a transmission cluster or chain.

[37] In re-examination, Crown counsel provided dates on which blood samples were taken from Mr. Ngeruka and L.S. These dates were May 14, 2012 and December 20, 2012 respectively. Counsel asked Dr. Wainberg to assume that the blood samples had been taken in excess of two years after L.S. was infected. He stated that, beyond six months, the virus in each individual continues to replicate and mutate. However, if it can be shown that the sequences are very, very similar, that shows that there is a very high likelihood that the viruses in the two individuals were of common origin. Either the one individual infected the other or the one individual infected another person who in turn infected the second individual, all within a relatively short period of time.

Submissions of Counsel

Crown

[38] Counsel submits that the only logical conclusion that can be drawn is that Mr. Ngeruka transmitted HIV to L.S. Had she contracted the virus prior to coming to the Yukon, it is likely that one of the three individuals she had sexual relationships with (E.H., G.S. and L.J.), would also have contracted HIV. These individuals have all tested negative for HIV.

[39] Crown counsel points out that both Mr. Ngeruka and L.S. have the Clade A strain of the virus, which is not common in comparison to the Clade B strain of the virus in the Yukon.

[40] Counsel also notes that Dr. Wainberg provided his opinion that the HIV strain in Mr. Ngeruka and L.S. were most definitely and very closely and strongly related to each other.

Defence

[41] Counsel submits that based upon the evidence of Dr. Romanowski, L.S. could have contracted HIV at any time within the previous 20 years.

[42] He notes that Dr. Wainberg's opinion that, based upon the closeness in sequencing, the infection would have occurred within the previous six months of the blood sample being taken is clearly wrong.

[43] Counsel notes that, initially, L.S. did not report having had sexual relations with E.H. and Ken. He submits that L.S.' recollection of her prior sexual partners is compromised and is not reliable.

[44] He also notes that Ken was never tested for the HIV virus. Nor were E.S. and E.K. He submits that, as none of the three individuals mentioned above were tested for HIV, they cannot be ruled out as possible transmitters of the virus to L.S.

[45] He submits that the Crown has not proved, as they are required to do beyond a reasonable doubt, that Mr. Ngeruka transmitted HIV to L.S.

Analysis

[46] It is admitted that Mr. Ngeruka had sexual intercourse with L.S. without her consent, in that he failed to disclose to her that he had HIV, he failed to use a condom and he failed to take anti-retroviral drugs to maintain as low a viral load dose as possible. Thus L.S.' "consent" to have sexual relations with him was not valid.

[47] It is agreed that Mr. Ngeruka, in having sexual relations with L.S. while he was infected with HIV and without taking adequate safeguards to prevent L.S. from being placed at risk of contracting the virus, endangered her life and thus he has committed the offence of aggravated sexual assault.

[48] As it would be an aggravating factor of the offence that L.S. actually contracted the virus from Mr. Ngeruka, the Crown must prove, beyond a reasonable doubt, that this is in fact what occurred.

[49] The evidence that the Crown relies on from Dr. Romanski and Dr. Weinberg is that, in essence, the viruses infecting Mr. Ngeruka and L.S. are closely related and the strain is not a common strain in the Yukon. Crown counsel also relies on the testimony of L.S. that she has only had sexual relations with the individuals that she has testified to and that her evidence in this regard is reliable.

[50] Crown counsel would have me accept that the evidence can only lead to the conclusion that L.S. contracted the virus from Mr. Ngeruka and not from any of the other identified individuals with whom she has had sexual relations, given the passage of time

since her having sexual relationships with E.S. and E.K. prior to her coming to the Yukon, and the negative tests for the virus of E.H., G.S. and L.J.

[51] I agree that it is logical for me to conclude beyond a reasonable doubt that L.S. did not contract HIV from E.S., E.K., E.H. G.S. or L.J. I find that L.S. contracted the virus in the Yukon after she had concluded her sexual relationship with each of these individuals.

[52] The next question for me is whether L.S.' evidence should be believed with respect to the individuals she has had sexual relationships with. Defence counsel urges me to find her evidence unreliable in this regard.

[53] I am satisfied, having observed her provide her testimony and considering how the various names of prior sexual partners were disclosed, that L.S. is telling the truth. I find her evidence to be credible and reliable.

[54] This then leaves me with the possibility that L.S. contracted HIV from Ken in 2008. I find from the evidence of Dr. Romanowski and Dr. Weinberg that the strain of the virus that Mr. Ngeruka and L.S. have is so similar that there must, therefore, be a sexual connection between Mr. Ngeruka and L.S.

[55] Mr. Ngeruka was diagnosed in 1993 with having HIV. As I understand it, in order for L.S. to have contracted the virus from Ken, either Ken and Mr. Ngeruka would likely have had to have a prior sexual relationship with each other in which Mr. Ngeruka transmitted the virus to Ken who, in turn, transmitted it to L.S., or Mr. Ngeruka would

have had to have transmitted the virus to another individual who in turn transmitted the virus to Ken who then, in turn, transmitted it to L.S.

[56] I have no information as to whether Ken was ever tested for HIV. Had he been tested in the Yukon, I expect that Dr. Romanowski would have been aware of it. He may well, however, been tested outside of the Yukon, in which case this may not be information that Dr. Romanowski would have received.

[57] Is the fact that L.S. had this one brief sexual encounter with Ken sufficient to raise a reasonable doubt as to whether the virus was transmitted to L.S. by Mr. Ngeruka? I find that it is not. In all the circumstances, I find that this possibility is remote at best, and that the only reasonable explanation for how L.S. contracted HIV was through her sexual encounters with Mr. Ngeruka.

[58] As such I find that Mr. Ngeruka transmitted HIV to L.S. and this transmission of the virus resulted in L.S. contracting HIV.

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COZENS T.C.J.