



R. v. Hutchinson

2014 SCC 19

Country: Canada

Region: Americas

Year: 2014

Court: Supreme Court of Canada

Health Topics: Sexual and reproductive health, Violence

Human Rights: Right to bodily integrity

Facts

The complainant agreed to sexual activity with Mr. Hutchinson, and insisted on him using a condom to prevent her from getting pregnant. However, Mr. Hutchinson poked holes in the condom and the complainant became pregnant.

The complainant stated that she did not consent to unprotected sex. Mr. Hutchinson was charged with aggravated sexual assault. The trial judge concluded that the complainant did not voluntarily agree to unprotected sexual intercourse, her consent was based on the usage of contraception and found Mr. Hutchinson guilty of sexual assault. The Nova Scotia Court of Appeal upheld the conviction. The majority stated that the use of a condom was an essential feature of the sexual activity that the complainant consented to, and therefore she did not consent to the sexual activity in question. The dissenting judge found that there was consent to sexual activity and a new trial should be reordered to assess whether this consent was vitiated by fraud.

The Criminal Code of Canada sets out a two-step process for analyzing consent to sexual activity. The first step requires the court to determine whether there was "voluntary agreement of the complainant to engage in the sexual activity in question" (S. 273.1(1)). If the court finds there was consent, it then considers the possible presence of circumstances that would negate the consent (S. 265(3)(c))

The central issue before the Supreme Court of Canada was: did the act of sabotaging a condom result in there being no consent under S. 273.1(1) or should it be considered as a factor to vitiate consent under S. 265(3)(c).

Decision and Reasoning

The majority opinion (delivered by McLachlin C.J. and Cromwell J.) held that a finding of fraud under S. 265(3)(c) of the Criminal Code negated the complainant's consent, and therefore Mr. Hutchinson was guilty of sexual assault.

The Court held that the complainant did consent to the sexual activity as set out under s. 273.1(1). The Court considered two approaches to interpreting if there was consent to the "sexual activity in question." The first approach defined the "sexual activity in question" as including all of the consequences flowing from it, as long as they were "essential features" of the sexual activity or part of "how" the physical touching was carried out. The Court found that this approach created unclear guidelines about when consent existed and when it no longer did. The Court adopted the second approach, which defined the "sexual activity in question" narrowly as the basic physical act agreed to at the time, its sexual nature, and the identity of the partner. The Court found the complainant had agreed to all three of these criteria.

The Court held that the complainant's consent to the sexual activity however was negated by fraud under S. 265(3)(c) of the Criminal Code. The Court considered the two elements of fraud that are relevant to consent: dishonesty, and deprivation or risk of deprivation in the form of serious bodily harm, which results from the dishonesty. The Court found evidence of dishonesty in this case. Mr. Hutchinson received consent from the complainant only because he purposely failed to tell her that he sabotaged the condom. The Court held that the second element was also present. Mr. Hutchinson deprived the complainant of a choice that concerned her own body and the transformations that it would go through during pregnancy.

The dissenting opinion (delivered by Abella and Moldaver JJ.) held that the case should be covered under S.

273.1(1). It stated that the question is not whether the consent was vitiated by fraud but whether there was consent to sexual activity in the first place. It stated that consent not only covers consent to sexual activity but also the manner in which that sexual act is carried out.

Decision Excerpts

“Adopting the “essential features” or “how the physical act was carried out” approach would undermine important objectives achieved by the Court’s jurisprudence. These approaches re-introduce a vague and unclear test for consent and broaden the scope for criminalization, including for HIV non-disclosure, thus effectively reversing this Court’s efforts to restrain and clarify the scope of criminalization in those circumstances in *Cuerrier* and *Mabior*.” (para 42)

“The first question is whether the complainant voluntarily agreed to the “sexual activity in question”. On the approach we propose, the “sexual activity in question” was the sexual intercourse that took place in this case. Effective condom use is a method of contraception and protection against sexually transmitted disease; it is not a sex act.” (para 64)

“The concept of “harm” does not encompass only bodily harm in the traditional sense of that term; it includes at least the sorts of profound changes in a woman’s body “changes that may be welcomed or changes that a woman may choose not to accept” resulting from pregnancy. Depriving a woman of the choice whether to become pregnant or increasing the risk of pregnancy is equally serious as a “significant risk of serious bodily harm” within the meaning of *Cuerrier*, and therefore suffices to establish fraud vitiating consent under s. 265(3)(c).” (para 70)

“We conclude that where a complainant has chosen not to become pregnant, deceptions that deprive her of the benefit of that choice by making her pregnant, or exposing her to an increased risk of becoming pregnant by removing effective birth control, may constitute a sufficiently serious deprivation for the purposes of fraud vitiating consent under s. 265(3)(c).” (para 71)