

REPUBLIC AND CANTON OF GENEVA

JUDICIARY

ACJP

**ORDER  
OF THE COURT OF JUSTICE**

**Penal Division**

**Hearing of Monday, February 23, 2009**

Between

Mr. S, currently in custody, appearing through Olivier Cramer, lawyer, of rampe de la Treille 5, 1204 Geneva, Appellant of a judgment rendered by the Police Court on November 25, 2008,

And

Mr. S2<sup>1</sup> and Ms. R, both appearing through Leila Roussianos, lawyer, place Bel-Air 1, P.O. Box 6868, 1002 Lausanne, at whose office they elect domicile, civil parties,

**ATTORNEY GENERAL** of the Republic and Canton of Geneva, at the Prosecutor's Department, Court House, place du Bourg-de-Four, Geneva, Respondent.

This order will be sent to the parties by registered mail on February 23, 2009.

Copy to the OCP [Office Cantonale de la Population – Population Office of the Canton]

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<sup>1</sup> Translator's note: The number 2 has been inserted by hand to distinguish the two individuals with the same initials.

### THE FACTS

A. Pursuant to a judgment rendered on November 25, 2008, served on December 1, 2008, the Police Court found S guilty of attempted spread of a human disease (section 22(1) and 231 ch. 1 – Penal Code) and attempted serious bodily harm (section 22(1) and 122 ch. 1 – Penal Code). He was sentenced to a custodial sentence of 18 months less pre-judgment time already served, and it was stated that said sentence was partially secondary to the one rendered on August 21, 2006, by the Court of Penal Cassation of the Canton of Vaud. It further reserved the rights of the civil parties, sentenced him to pay the costs of S2 and of R, and ordered him to pay the court costs amounting to 1,985.10 Swiss francs, including a judgment fee of 200 Swiss francs.

According to the cover sheet of October 21, 2008, S was charged with having agreed to transmit the AIDS virus to his successive partners R, in May and June 2008, and S2, in July 2008, and with not having taken any measure to prevent the transmission of this virus to the aforementioned and to C from January to June 2008.

B. In proceedings of December 2, 2008, S appealed the above judgment.

At the hearing on January 27, 2009, he was acquitted of all the counts, and the resulting sentence was reviewed.

The public prosecution acquitted the appellant of the counts of attempted spread of a human disease and serious bodily harm, upheld the guilty verdict and the ordering of a six-month custodial sentence, partially secondary to the sentence imposed by the judicial authority of Vaud.

The civil parties upheld the judgment rendered, with fees and costs.

C. The following material facts emerge from the proceedings:

a. The appellant admits the facts for which he is being reproached.

b. S has been aware of his AIDS contamination since 1998. He states that he has been undergoing treatment since then, in particular four-drug therapy since 2006. His doctors assured him that there was no risk of contamination.

Since at least the beginning of 2008, according to the report of the Centre universitaire romand de médecine légale [University Centre for Forensic Medicine], he has been undergoing regular treatment at the Consultation de médecine du CHUV [University Hospital Centre of Vaud Medical Office]. His viremia has been undetectable since then. He does not have hepatitis B or C, syphilis, chlamydia or herpes.

c. From January to the summer of 2008, he was in a relationship with C, whom he had informed that he was HIV-positive. According to her, they did have unprotected sexual relations a few times, which the Appellant does not dispute.

d. In May and June 2008, he was in a relationship with R. According to the latter, S, whom she was unaware was HIV-positive, did not always wear a condom during their sexual relations, despite her request. The Appellant disputes this, stating that he never intentionally removed a condom, but that he did occasionally lose one during intercourse. He maintains that his partner was aware that he was HIV-positive.

R filed a complaint on August 18, 2008.

e. In July 2008, according to S2, the Appellant had unprotected sexual intercourse three times with her. The Appellant disputes this, stating that they only engaged in sexual play, which could not lead to transmission of the HIV virus.

S2 filed a complaint for these facts on August 29, 2008, after learning that the Appellant was HIV-positive.

f.

D. During the Police Court hearing, the medical examiner declared that a risk of contamination remained in a context of undetectable viremia.

During the hearing of the Appeal Division, Professor Bernard Hirschel, summoned by the Public Prosecutor, specified that according to current scientific research, the risk of contamination presented by a patient undergoing AIDS treatment, whose viremia is undetectable, and who does not have any other infections, is too low to be scientifically quantified. The patient was informed that if he is diligent in his treatment and does not have any other disease, there is no risk of contamination. Wearing a condom is recommended to prevent the transmission of diseases other than HIV.

E.

**ISSUES OF LAW**

1. The appeal is allowed as it was filed in the form and by the deadline prescribed (sections 241 and 242 of the Code of Penal Procedure).
- 2.
3. He maintains, however, that he should be acquitted of the detentions for attempted spread of a human disease and serious bodily harm on the grounds that it has not been established that he had unprotected relations with the intention of transmitting the HIV virus to the civil parties, that said parties were consenting, even jointly responsible, that he based his decision on information received from doctors, according to whom he was unable to transmit the disease, and that, finally, given his undetectable viremia, there was no risk of contamination.

On this last point, his theory is upheld by the Public Prosecution, which raises that progress has been made in medical science recently that was unknown to it at the time of the penal action, and which leads it to consider that, in the case of a patient such as the Appellant, sections 122 and 231 of the Penal Code do not apply.

In its authorities (ATF 125 IV 242ss; ATF 131 IV 1ss and ATF 134 IV 193ss), the Federal Court has held that infection with the AIDS virus constituted, objectively and in itself, serious, life-threatening bodily harm, as well as a dangerous and transmissible human disease. On the subjective level, a person who, knowing he/she was HIV-positive and knowing the risk of contamination, does not reveal this information to his/her partner, and has unprotected sexual relations with said partner, is guilty, at the very least by possible deceit, of the offences under sections 122(1) and 231 ch. 1(1) of the Penal Code. There is concurrence within the meaning of section 49(1) of the Penal Code.

When a party who is aware of his/her partner's infection and the risks of transmission freely consents to having unprotected sexual relations with him/her, there cannot be conviction for violating section 122 of the Penal Code. However, the victim's consent does not preclude the violation of section 231 of the Penal Code, since the latter provision protects public health. The most recent medical doctrine considers that a contaminated person not suffering from any other sexually transmissible disease and adhering to antiretroviral drug treatment to the letter, enabling him/her to have an undetectable viremia, does not transmit the virus through sexual contact (VERNAZZA/BERNASCONI/HIRSCHEL/FLEPP). HIV-positive individuals not suffering from any other STD and adhering to effective antiretroviral treatment do not transmit HIV sexually, according to an article published on January 28, 2008, in the Bulletin des médecins suisses [Bulletin of Swiss Doctors] I-2008, p. 165ss).

In this case, it has been established that the Appellant has been regularly monitored since early 2008, i.e., prior to the facts for which he is being reproached, has been receiving proper antiretroviral treatment, has an undetectable viremia and does not have any other infections. During his Appeal Division hearing, Professor Hirschel confirmed that, in this case, there is no risk of contamination.

Accordingly, sections 122 and 231 of the Penal Code cannot apply.

The Appellant will therefore be acquitted of these counts.

**NOW, THEREFORE,**

**THE COURT:**

**On form:**

Allows the appeal launched by S against the Police Court judgment (Division 2) rendered on November 25, 2008, by the Police Court in the case.

**On the merits:**

Quashes this judgment.

**And, adjudicating once again:**

Acquits S of the charges of attempted serious bodily harm and spread of a human disease.