WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

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.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION:R. v. Felix, 2013 ONCA 415
DATE: 20130621
DOCKET: C54210

Cronk, Epstein and Lauwers JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Lester Felix

Appellant

Vincenzo Rondinelli, for the appellant

Kim Crosbie, for the respondent

Heard: February 11, 2013

On appeal from the convictions entered by Justice Kelly Wright of the Ontario Court of Justice on July 14, 2010, and from the sentence imposed on December 1, 2010, with reasons reported at 2010 ONCJ 322 and 2010 ONCJ 654.

Cronk J.A.:

I. Introduction[1]

[1] The appellant, Lester Felix, was diagnosed with HIV in mid-September 2005. Shortly thereafter, he attended a counselling session where he was

---

[1] This appeal was heard together with companion appeals in *R. v. Mekonnen*, 2013 ONCA 414. This court's reasons in *Mekonnen* are being released contemporaneously with these reasons.

informed of his obligation to disclose his HIV–positive status to all his sexual partners.

[2] The appellant was subsequently charged on a multi-count information with seven counts of aggravated sexual assault involving three different complainants arising from his alleged failure to disclose his HIV–positive status to the complainants prior to engaging in sexual relations.

[3] On July 14, 2010, following a trial before Wright J. of the Ontario Court of Justice, the appellant was convicted of one count of aggravated sexual assault in relation to the complainant, N.S.(Count 1), four counts of aggravated sexual assault in respect of the complainant, M.F. (Counts 5, 6, 7 and 8), and two counts of breach of probation (Counts 2 and 3). He was acquitted of a fifth count of aggravated sexual assault pertaining to M.F. (Count 4), but convicted of the lesser and included offence of sexual assault. He was also acquitted of one count of aggravated sexual assault concerning a third complainant, D.H. (Count 9).[2]

[4] On December 1, 2010, the appellant was sentenced to a global sentence of five years' imprisonment, less two and one-half years' credit for pre-sentence custody. On his endorsement of the information against the appellant, the trial judge apportioned this sentence as follows: Count 1 – two and one-half years'

---

[2] The trial judge acquitted the appellant of the charge regarding D.H. due to concerns about her credibility and reliability.

imprisonment, plus credit for pre-sentence custody; Counts 2 and 3 – three months' imprisonment on each count, concurrent to Count 1; Count 4 (sexual assault) – two years' imprisonment, concurrent to Count 1; Count 5 – two and one-half years' imprisonment, concurrent to Count 1; and Counts 6, 7 and 8 – two and one-half years' imprisonment on each count, concurrent to Count 5. A lifetime weapons prohibition order, a lifetime order under the *Sex Offenders Information Registration Act*, S.C. 2004, c. 10, and a DNA data bank order were also imposed.

[5] The appellant appealed all his convictions on the ground that the verdicts were unreasonable. He also sought leave to appeal his sentence and, if granted, sought a reduction in his sentence.

[6] While the appellant's appeals were pending, the Supreme Court of Canada's decisions in *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, and *R. v. D.C.*, 2012 SCC 48, [2012] 2 S.C.R. 626, were released. In *Mabior*, the Supreme Court revisited and clarified the test set out in *R. v. Cuerrier*, [1998] 2 S.C.R. 371, for determining whether and in what circumstances the failure to discloseHIV–positive status prior to sexual activity may constitute fraud vitiating consent to sexual relations.

[7] *Mabior* holds, at paras. 104–105, that to obtain a conviction for aggravated sexual assault under the *Criminal Code*, R.S.C. 1985, c. C-46, the Crown must prove that a complainant's consent to sex was vitiated by the accused's fraud as

to his HIV status. The accused'sfailure to disclose his or her HIV–positive status constitutes fraud where the complainant would not have consented to sex if he or she had known that the accused was HIV–positive and where sexual contact poses a significant risk of, or causes actual, serious bodily harm.

[8] In this context, the Supreme Court held in *Mabior*, at para. 84, that a "significant risk of serious bodily harm" within the meaning of *Cuerrier* is established by showing "*a realistic possibility of transmission of HIV*" (emphasis in original).The court further held, at para. 101, that a "realistic possibility" of HIV transmission is negated by evidence that condom protection was used and that the accused's viral load was low at the time of intercourse.

[9] In this case, relying on *Mabior*, the Crown argues that: (1) the conviction appeal should be dismissed or, in the alternative, a new trial should be ordered regarding the appellant's convictions for aggravated sexual assault pertaining to N.S. and M.F.; and (2) the conviction appealin respect of the appellant's sexual assault conviction concerning M.F. should be allowed and a new trial ordered.The Crown does not appeal the acquittal entered in relation to the charge of aggravated sexual assault respecting D.H. The Crown, however, does resist the appellant's sentence appeal.

[10] For the reasons that follow, I would allow the appellant's appeal from his sexual assault conviction and direct a new trial on that charge (Count 4). In all other respects, I would dismiss the conviction appeal.In these circumstances, I

do not reach the appellant's sentence appeal on the sexual assault conviction. I would dismiss the appellant's sentence appeal in respect of his remaining convictions.

II. Background Facts

[11] At trial, there was no dispute that the appellant had sexual intercourse with each of the complainants at various times between August 2008 and August 2009. There was also no dispute that the appellant knew that he wasHIV–positive during this time period. It was also common ground that, at the time of his sexual encounters with N.S. and M.F., the appellant was subject to two separate probation orders requiring him to "keep the peace and be of good behaviour".

[12] The Crown called no evidence regarding the appellant's level of risk of HIV transmission, although it filed medical affidavits establishing the appellant's HIV–positive status. Each of the complainants testified that the appellant did not disclose to them that he wasHIV–positive prior to sexual relations. With the exception of one instance with M.F., they also said that no condom was used on any occasion when they had sexual intercourse with the appellant.

[13] The appellant was the only defence witness. He testified that he was never put on any medication for his HIV and that he had been informed that his viral loads were low. He said that he had disclosed hisHIV–positive status to each of the complainants prior to engaging in consensual sexual intercourse with

them. He also claimed that he used a condom each time he had sexual intercourse with the complainants.

[14] As I will elaborate later in these reasons, the trial judge rejected the appellant's evidence with respect to N.S. and M.F., concluding that it was replete with inconsistencies and fanciful answers and appeared as if it had been made up "with no regard for the truth".

(1) Allegation Regarding N.S.

[15] N.S., a transgender young woman, first came into contact with the appellant in 2005 on an Internet dating site. N.S. was then 16 years of age.

[16] Over the next several years, N.S. and the appellant communicated from time to time on Facebook. They eventually agreed to meet in person. As a result,on August 23, 2009, the appellant picked N.S. up with his vehicle and she accompanied him to his apartment. They spent the evening together watching television. Since the appellant had been drinking alcohol, they decided that he should not drive and that N.S. should stay the night.

[17] N.S. remained overnight in the appellant's apartment, sleeping with him in the same bed. N.S. testified that once in bed together, the appellant began to make sexual advances towards her. Despite initial reluctance, N.S. eventually masturbated the appellant and performed oral sex on him. The couple then engaged in anal intercourse. The appellant was the insertive partner, while N.S.

was the receptive partner. According to N.S., the anal sex lasted for about 15 minutes, whereupon the appellant pulled out and ejaculated on N.S.'s torso area.

[18] N.S. testified that the appellant did not disclose his HIV–positive status prior to engaging in sexual activity with her. She said that although condoms were visible and readily available in the appellant's apartment, the couple did not discuss using a condom and a condom was not in fact used when they had intercourse.

[19] The next morning, the appellant agreed to drive N.S. home before she went to work. Enroute, the appellant's vehicle was pulled over by the police. When this occurred, the appellant asked N.S. not to tell the police that they had engaged in sex. Notwithstanding this direction, when a police officer inquired if she and the appellant had engaged in sex, N.S. revealed that they had done so. The police officer then advised N.S. to go to the hospital for testing.

[20] N.S. went to the hospital, was tested for HIV, and undertook a 30–day cycle of anti–viral medication to reduce the chances of developing HIV. Eventually, after repeated testing, N.S. learned that she had not contracted HIV.

[21] The appellant testifiedthat he had disclosed hisHIV–positive status to N.S. in 2006, almost from the outset of their communications. In his examination-in-chief, he maintained that he had used a condom when he engaged in anal intercourse with N.S. during their first meeting in August of 2009. However, during cross-examination, he said that he was not sure that he had used a

condom and that either he or N.S. might have removed the condom before he ejaculated. On the appellant's version of events, he pulled out within minutes of the intercourse beginning, and began to rest on his back. N.S. then masturbated the appellant, causing him to ejaculate over his own stomach.

[22] The trial judge accepted N.S.'s version of events and rejected the appellant's evidence, finding that hedid not disclose his HIV–positive status to N.S. before they engaged in unprotected anal intercourse. The trial judge inferred from the whole of the evidence that if N.S. had known of the appellant's HIV status, she would not have engaged in sex with him. The trial judgeconvicted the appellant of one count of aggravated sexual assault (Count 1) pertaining to N.S.

(2) Allegations Regarding M.F.

[23] Like N.S., M.F. met the appellant on an online dating site, in 2009. As with N.S., the appellant and M.F. then began to communicate with each other on various social media for the next several months. On May 22, 2009, they met in person for the first time at a shopping mall. M.F. then accompanied the appellant to his apartment. While at the apartment, they watched a movie and then had vaginal intercourse. M.F. testified at trial that the appellant wore a condom and that he ejaculated into the condom.

[24] Over the next three months, M.F. and the appellant engaged in vaginalintercourse on four more occasions. According to M.F., the appellant did not use a condom during any of these sexual encounters.

[25] Thus, on M.F.'s account of events, she and the appellant engaged in sexual intercourse a total of five times. The appellant used a condom only on the first occasion.

[26] M.F. testified that at no time did the appellant disclose his HIV–positive status to her. She said that she first learned of the appellant's HIV–positive status from a television news report in late August 2009, about two weeks after they had last had sex. M.F. stated that she would not have had sex with the appellant – with or without condom use – if she had been aware of his HIV status.

[27] In his testimony, the appellant claimed that he told M.F. that he was HIV–positive on May 22, 2009, the first night that they were together in person, immediately before they were about to have sex. He also said that he used a condom on that occasion and during each of their subsequent sexual encounters.

[28] The trial judge accepted M.F.'s evidence in its entirety, finding that she was an "honest and reliable witness". She rejected the appellant's assertions that he had disclosed his HIV–positive status to M.F. before they engaged in any sex

and that their sexual contact from June 2009 to August 2009 had involved condom use.

[29] In respect of M.F.'s first sexual encounter with the appellant, when M.F. herself said that a condom was used, the Crown conceded at trial that the charge of aggravated sexual assault could not be proven to the requisite criminal standard of proof. The trial judge agreed, but accepted the Crown's submission that the lesser offence of sexual assault had been made out. In respect of this incident, the trial judge held, at para. 72, that the appellant's "lack of disclosure that he wasHIV–positive vitiated any consent that was obtained on this occasion".

[30] In the result, the trial judge found the appellant guilty of one count of sexual assault (Count 4) and four counts of aggravated sexual assault relating to M.F. (Counts 5, 6, 7 and 8). Since the appellant was admittedly bound by two separate probation orders at the time of the offences, he was also convicted of breaching those orders (Counts 2 and 3).

III. The Decisions in *Mabior* and *D.C.*

[31] In the seminal case of *Cuerrier*,*supra*, the Supreme Court held, at para. 124, that concealment of or the failure to disclose one'sHIV–positive status to a sexual partner may constitute fraud vitiating consent to sexual intercourse. The court emphasized that proof of the essential elements of fraud, (1) dishonesty

and (2) deprivation or risk of deprivation, is required for the Crown to establish that consent to sexual relations was displaced by fraud.

[32] Writing for a majority of the Supreme Court in *Cuerrier*, Cory J. held, at para. 126, that the first requirement of fraud (the dishonest act) may consist of "either deliberate deceit respecting HIV status or non-disclosure of that status".As for the second requirement of fraud (deprivation or risk of deprivation), Cory J. stated, at para. 128, that "the Crown will have to establish that the dishonest act (either falsehoods or failure to disclose) had the effect of exposing the person consenting to a *significant risk of serious bodily harm*" (emphasis added).

[33] As I have said, in *Mabior*, the Supreme Court revisited and clarified the *Cuerrier* significant risk test for establishing fraud vitiating consent to sexual relations. As relevant to this appeal, the *Mabior* court made the following five key findings:

> (1) since HIV poses a risk of serious bodily harm, the operative offence for failure to inform a sexual partner of one's HIV status is aggravated sexual assault (at para. 2);
>
> (2) the *Cuerrier* approach to consent, namely, a "significant risk of serious bodily harm", remains valid and accords the concept of consent meaningful scope (at para. 58);
>
> (3) a "significant risk of serious bodily harm" is established within the meaning of *Cuerrier* where there is a "*realistic possibility of transmission of HIV*" such that "the deprivation element of the *Cuerrier* test is met" (emphasis in original) (at para. 84);

(4) where a realistic possibility of transmission of HIV exists, disclosure of HIV status prior to sexual relations is required. Conversely, if no such realistic possibility exists, the failure to disclose one'sHIV–positive status will not constitute fraud vitiating consent to sexual relations (at para. 91); and

(5) as a general matter, "a realistic possibility of transmission of HIV is negated if (i) the accused's viral load at the time of the sexual relations was low, *and* (ii) condom protection was used" (emphasis in original) (at para. 94).

[34] Thus, under *Mabior*, and contrary to what many trial and provincial appellate courts in Canada had previously held in applying *Cuerrier*, proof of both a low viral load and condom use is required to negate a *prima facie* case of aggravated sexual assault for failure to disclose one'sHIV–positive status prior to sexual relations. This controlling principle was applied by the Supreme Court in the companion case of *D.C.*, released with *Mabior*.

[35] In a passage that is key to the issues raised on the appellant's conviction appeal, the Supreme Court also said in *Mabior*, at para. 105:

> The usual rules of evidence and proof apply. The Crown bears the burden of establishing the elements of the offence – a dishonest act and deprivation – beyond a reasonable doubt. Where the Crown has made a *prima facie* case of deception and deprivation as described in these reasons, a tactical burden may fall on the accused to raise a reasonable doubt, by calling evidence that he had a low viral load at the time and that condom protection was used.

I will return to this passage from *Mabior* in my discussion of the issues raised on appeal.

IV. Issues

[36] There are three issues on the conviction appeal:

> (1) Are the five verdicts of aggravated sexual assault in respect of N.S. and M.F. unreasonable?
>
> (2) Is the verdict of sexual assault in relation to M.F. also unreasonable?
>
> (3) Are the verdicts of breach of probation similarly unreasonable?

[37] The appellant raises one issue on his sentence appeal: Is the global sentence imposed harsh and excessive in the circumstances of this case?

V. Analysis

A. Conviction Appeal

(1) Aggravated Sexual Assault Convictions

[38] The appellant argues that the aggravated sexual assault convictions are unreasonable because the Crown failed to establish a *prima facie* case of a realistic possibility of HIV transmission within the meaning of *Mabior*. The appellant's argument proceeds in the following fashion.

[39] First,the appellant submits that there was no evidence at trial relating to the risk of HIV transmission, either generally or specifically, in relation to the alleged sexual acts at issue in this case. In the absence of such evidence, the appellant

says, the Crown failed to lead any case that required a response on the part of the defence.

[40] Next, the appellant contends that the trial judge proceeded from a finding of unprotected sex when the appellant wasHIV–positive to a finding that, in effect, concludes that unprotected sex with a person who is HIV–positive itself raises a realistic possibility of HIV transmission, such that the requirement of deprivation or risk of deprivation is made out. This conclusion, the appellant says, runs contrary to the Supreme Court's holdings in *Mabior*.

[41] I would reject these arguments on the facts of this case for the following reasons.

[42] It is true that where aggravated sexual assault is alleged in an HIV non-disclosure case, the Crown bears the burden of proving that fraud vitiated the complainant's consent to sexual relations. The Supreme Court said as much in *Mabior*, at para. 105, quoted above. To discharge this burden, the Crown is obliged to prove the essential elements ofa dishonest act and deprivation (or risk of deprivation), beyond a reasonable doubt. Only then may a tactical burden fall on the accused "to raise a reasonable doubt, by calling evidence that he had a low viral load at the time and that condom protection was used": *Mabior*, at para. 105.

[43] On the trial judge's uncontested factual findings in this case, there is no doubt that the Crown met its burden to establish a dishonest act. The trial judge

found that the appellant did not disclose to N.S. that he was HIV–positive before he had anal sex with her. Similarly, the trial judge found that the appellant did not disclose hisHIV–positive status to M.F. before having sexual intercourse with her on the four occasionsduring June to August 2009. As Cory J. observed in *Cuerrier*, at para. 126, the requisite “dishonest act” consists of either deliberate deceit respecting HIV status or non-disclosure of that status.

[44] *Mabior* clarifies, however, that sexual intercourse with anHIV–positive person poses a “significant risk of serious bodily harm” only where there is a “realistic possibility of transmission of HIV”. As I have said, in the absence of such a realistic possibility, the deprivation element of the *Cuerrier* test is not met: see *Mabior*, at paras. 84 and 91.

[45] In this case, the appellant essentially contends that since there was no medical or expert evidence regarding the degree of risk of HIV transmission posed by the appellant’s specific sexual acts with N.S. and M.F., the Crown failed to establish that the acts engaged in by the appellant gave rise to a realistic possibility of transmission of HIV.

[46] I disagree. In my opinion, this contention founders on the trial judge’s unchallenged factual findings. The trial judge foundthat the appellant did not use a condom on the one occasion when he engaged in anal intercourse with N.S. The trial judge similarly foundthat the appellant did not wear a condom on the four relevant occasions when he had vaginal intercourse with M.F. These

findings were amply supported by the evidentiary record. They are not challenged on appeal.

[47] Thus, on the evidence accepted by the trial judge, the Crown established that the appellant was HIV–positive, that he failed to disclose his HIV–positive status to N.S. prior to anal intercourse and to M.F. prior to vaginal intercourse, and that he failed to use a condom on any of the occasions in question.

[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 wasHIV–positive at the time of intercourse and he failed to use a condom.

[49] The Supreme Court made this pivotal finding in*Mabior*, at para. 94:

> [A]s 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 is low, *and* (ii) condom protection was used. [Emphasis in original.]

[50] Here, the appellant failed to use a condom when engaging in anal and vaginal intercourse at times when he wasHIV–positive. 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.

[51] The appellant argues that the above-quoted pivotal holding in *Mabior* was based on evidence in that case establishing a baseline risk of HIV transmission arising from vaginal intercourse. Similarly, the appellant says, there was an evidentiary basis in *D.C.* for a finding of a realistic possibility of HIV transmission, where the accused female engaged in unprotected vaginal intercourse with the male complainant.

[52] In contrast, in this case, there was no evidence of the degree of risk of HIV transmission posed by the appellant's unprotected anal intercourse with N.S. and his unprotected vaginal intercourse with M.F. Thus, the appellant submits, the Crown failed to establish a *prima facie* case of deprivation or risk of deprivation, namely, a realistic possibility of HIV transmission.

[53] In my view, this argument is unsustainable. On the appellant's reasoning, any case that differs from the precise factual makeup considered in *Mabior* would require expert evidence to establish a baseline infection risk. *Mabior* does not suggest that expert evidence of the basic risk of HIV transmission for intercourse will be required in every case to ground a conviction for aggravated sexual assault arising from unprotected acts of intercourse – anal or vaginal – with an HIV–positive partner. Rather, *Mabior* holds that a realistic possibility of transmission of HIV is negated by evidence that condom protection was used and the accused's viral load was low at the time of intercourse: see*Mabior* at para. 104.

[54] This standard, in my view, allows for the Crown to establish a realistic possibility of HIV transmission in various ways. On my reading of *Mabior*, proof of the fact of unprotected intercourse with anHIV–positive person is one of those ways. This is consistent with *Cuerrier*, in which Cory J., for the majority, observed at para. 128: "The risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet [the test of a significant risk of serious bodily harm]." *Mabior* clarifies what is required in order to negate the risk of HIV transmission from unprotected intercourse. However, it does nothing to suggest that Cory J.'s quoted observation is no longer valid.

[55] I find support for this conclusion in McLachlin C.J.'s rejection in *Mabior* of the suggestion that a "significant risk of serious bodily harm" must be established by medical evidence in each case. The respondent argued in *Mabior* that to establish whether a particular sexual act posed a significant risk of transmitting HIV would typically require the Crown "to call expert evidence as to the accused's viral count at the time of the offence as well as risks associated with any condom protection used": *Mabior*, at para. 68.

[56] Chief Justice McLachlin rejected this suggestion, holding, at para. 69, that this "case-by-case fact–based approach" would not remedy the problems of uncertainty and reach that make *Cuerrier* difficult to apply. To the contrary, it would lead to an onerous, medical evidence–based process with attendant lengthy proceedings, and enormous costs both for the prosecution and the

defence, among other matters. The "evolving common law approach" to the significant risk test adopted in *Mabior* expressly seeks to avoid these difficulties by recognizing that medical or expert evidence will not be required in every case in order for the Crown to establish a realistic possibility of HIV transmission. It also allows the common law to adapt to future advances in medical treatment for HIV and to circumstances of shifting risk factors for transmittal of the disease: see *Mabior*, at para. 95.

[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 hisHIV–positive status, and (4) the appellant failed to use a condomon 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.

[58] I therefore conclude that the appellant's appeal from his aggravated sexual assault convictions should be dismissed.

(2) Sexual Assault Conviction

[59] The trial judge acquitted the appellant of aggravated sexual assault regarding the incident of vaginal intercourse between the appellant and M.F. that occurred on May 22, 2009. He did so based on both M.F.'s and the appellant's evidence that condom protection was used and the appellant ejaculated into the condom.

[60] However, the trial judge convicted the appellant of the lesser offence of sexual assault on the basis that the appellant's lack of disclosure of his HIV–positive status to M.F. on this occasion vitiated her consent to intercourse. The Crown concedes that on the *Mabior* standard, this sexual assault conviction cannot stand.

[61] I agree. On the basis of *Mabior*, non-disclosure of HIV status is sufficient to establish the dishonest act requirement of fraud but it does not establish the requirement of deprivation or risk of deprivation. The trial judge's basis for conviction effectively eliminates the deprivation element of fraud and fails to recognize that disclosure ofHIV–positive status is not always required, as a matter of law. Only where there is a realistic possibility of HIV transmission is disclosure ofHIV–positive status obligatory: see*Mabior*, at paras. 66, 67 and 91.

[62] That said, I do not accept the appellant's claim that the sexual assault verdict was unreasonable. I again underscore that, on the holdings of the *Mabior* court, the negation of a realistic possibility of transmission of HIV requires proof

that the accused's viral load at the time of sexual relations was low *and* that condom protection was used. In this case, neither the Crown nor the defence led any evidence of the appellant's viral load at the time of the May 2009 incident of intercourse. Depending on evidence of the appellant's viral load at the time in question, the appellant could be convicted of aggravated sexual assault at a new trial.

[63] The Crown readily acknowledges that it did not appeal the appellant's acquittal of the charge of aggravated sexual assault in relation to this incident. As a result, the Crown submits that a new trial is required on the lesser and included charge of sexual assault relating to the May 2009 sexual encounter between the appellant and M.F. I agree.

(3) Breach of Probation Convictions

[64] The appellant's appeal of his breach of probation convictions rests on his success in appealing his convictions for aggravated sexual assault. As I would dismiss the appeal in respect of the latter convictions, it follows that I see no basis for appellate interference with the breach of probation convictions.

(4) Disposition of Conviction Appeal

[65] Accordingly, for the reasons given, I would allow the appellant's appeal from his sexual assault conviction and direct a new trial on the charge of sexual assault in relation to the May 22, 2009 incident involving M.F. In all other respects, I would dismiss the conviction appeal.

B. Sentence Appeal

[66] The appellant acknowledges that his global sentence of five years' imprisonment, less two and one-half years' credit for pre-sentence custody, is within the appropriate range.

[67] However, relying on the decision of this court in *R. v. McGregor*, 2008 ONCA 831, 94 O.R. (3d) 500,the appellant argues that the global sentence imposed was harsh and excessive in all the circumstances. He submits that 18 months' imprisonment would have been a fit sentence for his first aggravated sexual assault conviction, while 18 months' imprisonment for his remaining convictions was appropriate. This would result in a total sentence of 3 years' imprisonment, less credit for pre-sentence custody. In the result, the appellant contends that a sentence of time served should be imposed by this court.

[68] I would reject the proposition that a lengthy term of imprisonment, reflected by the appellant's global sentence of five years' imprisonment, is unfit for this offender in the circumstances of this case.

[69] The appellant's offences were very serious. They endangered the lives of both N.S. and M.F. and, based on the evidence at trial, led to devastating trauma for the complainants, both of whom were still relatively young women at the time of the offences,[3]with most of their lives still ahead of them.

---

[3] Both women were in their early 20's.

[70] As the trial judge emphasized, the appellant deliberately disregarded warnings from health care professionals of the need to disclose his HIV–positivestatus to his sexual partners. Instead, on the trial judge's findings, the appellant knowingly participated in unprotected sexual intercourse with both complainants without revealing his HIV status and manipulated both women for his own sexual gratification.

[71] The appellant's actions were callous and reflected a significant degree of indifference to the consequences of his actions for two women whom the trial judge found to be vulnerable, each in their own way. The fact that neither complainant actually contracted HIV is irrelevant. As Binnie J. aptly observed in *R. v. Williams*, 2003 SCC 41,[2003] 2 S.C.R. 134, at para. 19, "[t]he exposure of an unwitting sexual partner to the risk of HIV infection, through deliberate deception, is the stuff of nightmares." The appellant's multiple convictions for aggravated sexual assault, as well as breaches of probation, called out for a lengthy term of imprisonment.

[72] The appellant's reliance on *McGregor*,in aid of his argument that his sentence should be significantly reduced, is misplaced. *McGregor*is readily distinguishable from this case.

[73] In *McGregor*, the accused was convicted of one count of aggravated sexual assault arising from two instances of unprotected sexual intercourse with one complainant – his girlfriend – over the course of approximately an 18–month

relationship. On most of the many instances of sexual intercourse between the couple, the accused was careful to use a condom. He failed to do so on only two occasions, giving rise to the conviction in question. In those circumstances, this court set aside the conditional sentence imposed at trial and substituted a sentence of one-year of imprisonment, after six months' credit for pre-sentence custody and time served under the conditional sentence, plus three years' probation.As is evident, the facts of *McGregor* are a far cry from those of this case.

[74] On my proposed disposition of this case, the appellant's convictions for aggravated sexual assault and breaches of probation remain intact. The global sentence of five years' imprisonment, less two and one-half years' credit for pre-sentence custody, is a fit sentence for those offences in the circumstances. Since the sentence imposed by the trial judge on the sexual assault conviction was two years' imprisonment, concurrent, the appellant's success on appeal from this conviction has no effect on the overall global sentence imposed by the trial judge. Finally, as I would allow the conviction appeal on the appellant's sexual assault conviction and direct a new trial on that charge, I do not reach the sentence appeal in respect of that conviction.

VI. Disposition

[75] For the reasons given, I would allow the conviction appeal in respect of the appellant's sexual assault conviction and order a new trial on that charge. In all

other respects, I would dismiss the conviction appeal. I would also dismiss the appellant's sentence appeal.

Released:

"JUN 21 2013"	"E.A. Cronk J.A."
"EAC"	"I agree Gloria Epstein J.A."
	"I agree P. Lauwers J.A."