

# Supreme Court of the Netherlands, Criminal Division (Hoge Raad der Nederlanden, Strafkamer)

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## HIV Transmission: Criminalisation

*Judgment of 25 March 2003, Case No. LJN AE9049*

*Judgment of 18 January 2005, Case No. LJN AR1860*

The defendant was convicted of co-perpetration of rape and attempted manslaughter. Proceedings started in Leeuwarden, where the public prosecutor instituted criminal proceedings for those offences against a man, aged 50, who allegedly—joined by a co-perpetrator in one case—had unprotected oral and anal sex with two minors, aged 13 and 16, with the use of force on one occasion, while being infected with HIV and, according to his own statements, aware of his infection and the risks concerned when having unprotected sex.

The case, consisting of multiple decisions by various courts including two judgments of the Supreme Court (*Hoge Raad*), concerns the establishment of the ‘conditional intent’ to commit a crime with regard to the transmission of HIV, i.e. the criminal liability of an HIV-infected person in respect of unsafe sexual contact. (Article 82 of the Dutch Criminal Code brings HIV transmission within the meaning of Articles 300–303 concerning abuse and the (intentional) infliction of grievously bodily harm, while Article 45 penalises the ‘criminal attempt’. This means that actual transmission does not need to occur for HIV-risk behaviour to fall under the scope of the Criminal Code.) Conditional intent (*voorwaardelijke opzet*) can be established when the defendant exposes himself willingly and knowingly to the ‘considerable chance’ (*aanmerkelijke kans*) that a certain consequence will result from his actions. Conditional intent consists of three elements: first, the offender has to be aware of the possible consequence; secondly, there is a ‘considerable chance’ that this consequence will occur; thirdly, the offender acknowledged the chance of occurrence of that consequence willingly and knowingly. One of the elements of conditional intent, the concept of ‘considerable chance’, was heavily debated by the different courts involved.

At first instance, the defence stated that a ‘considerable chance’ that certain consequences would occur could not be derived from the acts of the accused, because of the small possibility—based on statistical research—of contracting HIV when having unprotected sex, and after infection with HIV, with AIDS. However, the Court of First Instance in Leeuwarden ruled that the idea of ‘considerable chance’ is not merely an objective notion, settled by statistics, but a concept to be determined by the extent of social permissibility of the consequences that may result from performing certain acts. The Court of Appeal in Leeuwarden concurred with the establishment of conditional intent by the Court of

First Instance and followed the judicial normative interpretation of 'considerable chance', in which more factors than just the calculation of a probability should be considered. According to the Court of Appeal, which based its findings on the expert opinion of Professor Danner, conditional intent could be established because there is a 'considerable chance' that the particular type of sexual contact of this case (unprotected anal penetration) will lead to infection with HIV; and although an infection with HIV does not necessarily result in death, it creates the risk of getting AIDS, which—according to the court—at that time still had to be considered lethal.

The defence appealed in cassation against the judgment of the Court of Appeal in Leeuwarden, claiming that the law had been infringed because the necessary intent of the suspect to commit the crime could not be derived from the evidence used by the prosecution.

**HELD, REVERSING THE JUDGMENT**, the Supreme Court stated that there can only be sufficient grounds to establish the conditional intent for a certain consequence to occur—in this case the death of the victims—if the defendant exposes himself willingly and knowingly to the 'considerable chance' of the occurrence of this consequence. Whether an act creates the 'considerable chance' that a certain consequence will occur, depends on the particular circumstances of each case. The Supreme Court considered that there was no sufficient ground to make the substance of the notion of 'considerable chance' dependent on the nature of the possible consequences. In each and every single case this chance will have to be taken into account by the court as 'possibly considerable' according to general empirical rules. The Supreme Court further found that the act of exposing somebody to possible HIV infection, in principle, will have to be considered as attempted aggravated assault (inflicting grievous bodily harm) and not as an act of attempted manslaughter. The case was referred back to the Court of Appeal in Arnhem to be retried.

This court subsequently acquitted the defendant, quoting the expert Professor Danner in the reasoning for its decision. Professor Danner had stated that the risk of dying from complications related to the infection with HIV is decreasing due to rapid developments in medical science, implying that not everyone infected with HIV will consequently die of it. The court therefore considered, in short, that there was an insufficient basis to establish a causal connection between the sexual acts of the suspect and the possible death of the victim, and thus no conditional intent to commit attempted manslaughter. The Court of Appeal did hold, however, that the suspect had exposed himself willingly and knowingly to the 'considerable chance' that the victim would suffer from a severe physical injury by his actions, even though he claimed not to have known at the time that HIV could be transmitted by having anal or oral unprotected sex. An irreversible infection with HIV had to be viewed, according to the court, as grievous bodily harm, and the suspect was convicted consequently of aggravated assault.

Again, the defence appealed in cassation.

**HELD**, in the second appeal, the Supreme Court considered that the reasoning of the Court of Appeal in Arnhem on the issue of the conditional intent of the suspect to commit aggravated assault was inadequate, and stated that a 'considerable chance' for the consequences to occur could not be derived from the evidence presented in this case. Although having unprotected sex while being infected with HIV has to be considered hazardous, this act alone cannot lead to the conclusion reached by the Court of Appeal, namely that the sexual actions of the accused created such a chance of inflicting an infection with HIV—and accordingly attempted aggravated assault—that this chance can be qualified as 'considerable' according to general empiric rules, although this may be different under certain, risk-inducing circumstances, which however were not mentioned or specified by the Court of Appeal. The Supreme Court subsequently observed that the question of whether criminal protection should be in place, i.e. if the transmission of HIV should be criminalised, is a matter for legislation. To answer this question an evaluation of all relevant factors, including the general interests of public health, is demanded. The Supreme Court referred the case back to the Court of Appeal in 's-Hertogenbosch.

Eventually, this court acquitted the defendant of the charges of attempted manslaughter and attempted aggravated assault. The court examined whether risk-inducing circumstances, as a result of which the chance of transferring HIV could have been viewed as 'considerable', were present. In judging whether there were any risk-inducing circumstances present, the court considered that significance has to be given to, *inter alia*, the viral load in the defendant's blood, the nature of the sexual contact, the presence of other sexual transferable diseases, and the number of sexual contacts the person infected with HIV had with the same partner. The court took into account that the defendant had started anti-viral therapy after he discovered that he was infected with HIV. The court deduced from the statements of the expert Professor Danner that successful therapy leads to a decline of the viral load, which gives an important indication that the defendant was, at the time that the sexual contacts took place, not 'infectious enough' to cause the 'considerable chance' that he would infect another when having unprotected sex. Therefore, the court would not attend to any of the other risk-inducing circumstances mentioned above, and it acquitted the suspect of all charges, except for the co-perpetration of rape.

#### COMMENTARY

The Dutch Supreme Court took a more restricted view with regard to the prosecution of HIV-positive defendants and to criminal liability for the transmission of HIV when having unprotected sex than it has in the past. Its earlier decisions indicated that although unsafe sexual actions by an HIV-infected person could not constitute attempted manslaughter, they might very well be regarded as (attempted) aggravated assault, even though none of the victims were actually infected. Its last decision, however, showed that having unprotected sex while being HIV-infected

could rarely constitute a crime if the victim/partner has not been subsequently infected with the virus (see C. J. van der Wilt, 'Een apart delict voor onveilige seksuele contacten?', *Delikt en Delinkwent* 2005, 62). The Supreme Court invited the legislator to amend present legislation if it felt that was needed.

Why did the Supreme Court, over the course of its two judgments in this case, feel it had to change its approach to the exact same facts? In its first judgment in 2003, the court appeared to be of the opinion that it had been established that the defendant under the circumstances as proven by the prosecution had exposed himself to the 'considerable chance' that his victims would be infected with HIV as a result of his actions, and therefore he had inflicted grievous bodily harm. However, the court modified its position in 2005 by noting that having unprotected sex while being infected with HIV does not create a considerable chance of inflicting an infection with HIV—and accordingly does not create a considerable chance to commit the offence of attempted aggravated assault. The chance can be described as considerable in itself according to general empiric rules, although this may be different under certain, risk-inducing circumstances. So what happened in those two years? The answer may be found in the words 'general empiric rules' and the statistical approach it implies which may not have been decisive in this particular case, but is surely significant (see W. Jebbink, 'HIV: Strafrechtelijke bescherming gewenst?', *Advocatenblad*, nr 7, 13 May 2005, 348–52; see also the many quotations from Professor Daddens the Supreme Court uses in its judgments). The chance of infliction in the particular circumstances of this case would have to be estimated at about 1 in 500, which cannot be seen as a particularly 'considerable chance'.

The Supreme Court pointed to the legislative power to pass new legislation if it was felt necessary to criminalise the transmission of HIV through having unprotected sexual contacts. An example of a country which criminalised the intentional or reckless infection with HIV is the USA, where many states have made it a crime for HIV-positive people to have sex without first disclosing their status, regardless of condom use or whether transmission occurred. Other countries, including the UK, charge under existing laws (see *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257; *R v Konzani* [2005] EWCA Crim 706, (2005) 69 JCL 389, in respect of the use of s. 20 of the Offences against the Person Act 1861 to criminalise HIV transmission). Section 20 of the 1861 Act states, 'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence] . . .'. The legal situation in other countries, and jurisdictions within those countries, varies significantly (see the comparative 'quick scan' of GNP+, the Global Network of People living with HIV/AIDS (*Criminalisation of HIV transmission in Europe; A rapid scan of the laws and rates of prosecution for HIV transmission within signatory States of the European Convention of Human Rights*) at [www.gnpplus.net/criminalisation/intro.shtml](http://www.gnpplus.net/criminalisation/intro.shtml), accessed 13 September 2006). In most signatory states of the European Convention on Human Rights it is considered a crime to expose another person to the

risk of HIV transmission, whether or not transmission has occurred. The Dutch House of Representatives asked the Ministers of Justice, Public Health and Administrative Reform to have a look at the possible criminalisation of intentional infection with HIV; they replied in June 2005. The Government concluded that additional legislation is possible; however, this additional legislation would be mainly symbolic due to, *inter alia*, law enforcement problems. In addition, this symbolism would conflict with the present policy of prevention and information. Moreover, an important disadvantage of criminalisation would be the negative impulse to take an HIV test, while the willingness of people to get themselves tested is far more profitable with regards to public health purposes (see House of Representatives (*Tweede Kamer*), vergaderjaar 2004–2005, 29 800 VI, nr 157).

The Dutch Government prefers to keep the attention of the general public focused on the prevention of new HIV infections instead of criminalising the transmission of the virus, a view that appears to be shared by the Supreme Court and is encouraged by most non-governmental organisations active in the HIV/AIDS-related field and by UNAIDS. Still, it has to be noticed that attention to the dangers involved seems to have diminished in recent years, possibly as a consequence of rapid developments in medical science; HIV no longer immediately constitutes a death sentence in most Western countries.

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