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Does Consent to Sexual Intercourse Imply Consent to Inflict Sexually Transmitted Diseases? : An Assessment under English Law

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Abstract: *In criminal law "consent" can be applied for accepting an excuse and precluding the defendant from holding legally obliged and responsible for what was caused by him. The law of crime has discussed the matter of non-disclosure of the status of HIV-positive to the partners in involving sex in two perspectives: 1) rape and 2) inflicting grievous bodily harm. However, the modern law has refused to accept or acknowledge it in the perspective of rape but has integrated it under s. 20 the Offences against the Person Act 1861. The difficulty has invariably been to determine at what point the victim's consent turns unsuccessful. In England it has been proposed that those with an imperceptible viral load would not be regarded reckless though this matter is not made clear. The courts in England have not considered the issue whether a low or undetectable viral load can act as a defence. Even though the persons with special knowledge accept the complication of affording an accurate or delimited evaluation of the danger of transmitting HIV by sexual means; however, it is admitted that a number of actions bear a reduced amount of danger than others. If someone is HIV+ and does not communicate his HIV status to his partner at the time of sexual intercourse he ought to be liable for rape. Moreover, for someone to consent to becoming infected by HIV by way of sexual intercourse his or her consent ought to be communicated and the defendant in a criminal proceeding must have a genuine belief in such consent. As a defence of consent, the knowledge of the victim is an inherent part.*

Key Words: Consent, Sexually transmitted diseases, Rape, OAPA, Criminal law
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1. INTRODUCTION

In criminal law "consent" can be applied for accepting an excuse and precluding the defendant from holding legally obliged and responsible for what was caused by him. A protection in contrast to criminal obligation may come into existence while a defendant will be able to present reasons and arguments that there was no criminal offence as a result of consent. However, public policy necessitates the courts to establish restriction on the scope to which peoples are permitted to consent or are to be obliged by way of apparent consent.

The law of crime has discussed the matter of non-disclosure of the status of HIV-positive to the partners in involving sex in two perspectives: 1) rape and 2) inflicting grievous bodily harm. However, the modern law has refused to accept or acknowledge it in the perspective of rape but has integrated it under s. 20 of OAPA (the Offences Against the Person Act 1861).

2. THE CRIME OF RAPE AND OAPA

The established contextual definition of rape is to be found in the Sexual Offences Act 2003 (SOA-03). S. 1 of which provides its *actus reus*, "an act of non-consensual penetration by the penis of the vagina, anus or mouth"; the difficulty is where the defendant fail to reveal HIV-positive condition; does it nullify consent to that sexual intercourse? Since for the connotation of consent in that situation ss. 74 and 76(2) (a) of the Sexual Offences Act 2003 are the significant stipulated conditions. S. 74 of SOA-03 provides a central or dominant theoretical explanation of consent, as per which consent is valid when an individual "agrees by choice, and has the freedom and capacity to make that choice". Therefore, the failure by the defendant to inform HIV-positive condition debatably might vitiate the choice or freedom in certain situations. S. 76(2) (a) of SOA provides a conclusive presumption opposed to the existence of consent when the "defendant intentionally deceived the complainant as to the nature or purpose" of the act of sexual intercourse. This stipulated condition is debatably applicable if the defendant's HIV-positive condition changes the 'nature' of the sexual intercourse or if being engaged in sex with an individual not having HIV, able to signify the 'purpose' for which the sexual intercourse occurred.

3. IS CONSENT A DEFENCE?

The difficulty has invariably been to determine at what point the victim's consent turns unsuccessful. Swift J in *R v Donovan* provided the comprehensive principle that: "No person can license another to commit a crime, if (the jury) were satisfied that the blows struck ... were likely or intended to do bodily harm ... they ought to convict ... only if they were not so satisfied (was it) necessary to consider the further question whether the prosecution had negatived consent".

In *R v Clarence* the defendant was aware that he was going through a venereal illness. However, he had sexual intercourse and informed about the disease to his wife. If she was aware she would not have accepted the sexual intercourse as inevitable. Under s. 20 of the Offences Against the Person Act 1861 (OAPA) the defendant was convicted for inflicting grievous bodily harm to the victim. His conviction under s.20 of OAPA was quashed on appeal. However, Mr. Justice Willis explicitly stated: "...that consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law".

Moreover, at p. 44 Mr. Justice Stephens had stated that, "...the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. Consent in such cases does not exist at all because the act consented to is not the act done".

A consultation paper entitled *"Violence: Reforming the Offences Against the Person Act 1861"* was issued by the Home Office in 1998 by rejecting the Law Commission's proposals that, there should be separate crimes for the intentional or reckless transmission of sexually transmitted disease. The Government "[was] particularly concerned that the law should not seem to discriminate against those who are HIV positive, have AIDS or viral Hepatitis or who carry any kind of disease".

In the UK a person, who is HIV+ and had unsafe sexual intercourse with another individual with consent, can be charged under s. 20 of the OAPA. The person will be Responsible for or chargeable with a reprehensible act if he transmits HIV to an unsuspicious plaintiff in a reckless manner. If the plaintiff has awareness about the defendant's HIV

condition and consents to unsafe sexual intercourse; therefore, the defendant will be able to prevent legal obligation since it will act as a defence. The statistical possibility of transmission via risk free sexual intercourse, the gradual improvement of anti-retroviral medical treatment, and the nature of sexual intercourse denotes that there are various important occasions where the defendant ought not to be liable to account for his actions. Whether use of condom, viral load and particular kind of sexual behaviour will deviate act or recklessness as a protection from harm is open to doubt or debate, nevertheless for the demonstrated reasons it is recommended that it will be a defence, and the defendant might be exempted if he contained the lessen danger and did so with absolutely essential consciousness.

In the UK *obiter* remarks have been laid down and some scholars suggest that it can be a defence for using condoms at the time of sexual intercourse. While the defendant's viral load is not in so extreme degree that it is barely able to be perceived, the studies regarding this matter have demonstrated that it is highly doubtful that the defendant will transfer the virus to another. Some person with special knowledge also express that some kinds of sexual practice are less risky than some kinds of safe sexual intercourse. These situations have not been come in consideration of English court and there has not been much argument within this jurisdiction about the types of sexual activity and viral load. Hughes in the article namely 'Condom Use, Viral Load and the Type of Sexual Activity as Defences to the Sexual Transmission of HIV' stated that, the rationale of the article is to assess several current legal evolutions in Canada where the virus is not to be transferred to another for liability. Cases had attempted to make it clear that using condoms, the viral load and some particular types of sexual activity would convey a meaning that the suspect did not have a requirement for disclosing his HIV condition and therefore be able to act as a defence. Nonetheless, recently in *R v Mabior* the Supreme Court has demonstrated that using condom or the viral load is not to be expended as defences in separation. For escaping legal responsibility, and to stay away from exposing ones HIV condition, low viral load and using condom must be present together. The judgment further makes the issue more intense without clearing up the situation.

4. THE PREVENTIVE MEASURE DEBATE

In a sexual transmission of HIV case, other than consent, common law and statute do not provide any defence to be raised. Judge LJ stated in *R v Dica* that, levels of preventative measures may lead to a protection from harm and that it might be allowed for the jury to evaluate whether such safeguard would be satisfactory. Additional statements appeared to circuitously suggest that it could be a defence to use condoms. This is capable of being seen or noticed when Judge LJ talked about why consent to carrying the danger of getting contaminated with a disease should not be deprived of legal force as it would put down by force or authority some peoples who desire to take part in sexual relationships. Judge LJ gave particular proposition to various instances. One Catholic couples who may get contaminated with a disease by the other are not able to use preventative measures due to their strong belief in religion. This argument seems to derive that using condom may be applied as the danger of transferring to another is extensively decreased and the use of preventative measures in such situations could be exempted. Special importance or significance was also produced for using condom when concerning casual encounters. Advance confirmation for this suggestion can be acquired from CPS (Crown Prosecution Service) guiding principles where it is recognized that preventive actions may indicate that no criminal prosecution could ensue as it might be difficult to demonstrate that the individual using the precautionary measure was being

reckless. The CPS gives a certain impression to admit that a suspect's activities might be exempted. However, it was stressed that it is the obligation on the contaminated human being to assure that safety measures are taken. The CPS guiding principles also make clear that it is the public policy to assure that criminal liabilities will not occur when safety measures have been applied. The answer of Judge LJ and the CPS guiding principles are rational suggestions as a human being would behave in a responsible manner and by acting in a responsible manner his actions might be exempted.

In England it has been proposed that those with an imperceptible viral load would not be regarded reckless though this matter is not made clear. The courts in England have not considered the issue whether a low or undetectable viral load can act as a defence. *R v Konzani* was centered on the issue of consent and unprotected sexual intercourse. If the defendant has a low level of viral load, it is stated that for being able use it as a defence he would require to be conscious of its level. Smith affirmed this suggestion and confronted that putting trust in medical advice with confidence it must render capable the defendant to avoid obligation. The WHO (World Health Organisation) provides that one of the highest dangers in carrying the disease to some other individual is level of a person's viral load and that one of the successful means of decreasing the possible action of transmitting HIV can be made by diluting the load. By taking ART (antiretroviral treatment) viral load can be diluted. Moreover, regular use of the drug can alter the load to an indiscernible amount.

Even though the persons with special knowledge accept the complication of affording an accurate or delimited evaluation of the danger of transmitting HIV by sexual means; however, it is admitted that a number of actions bear a reduced amount of danger than others. Though there is no accurate procedure for evaluating the jeopardy it is capable of being seen or noticed that some kinds of sexual behaviour can dilute the danger of the transmission of the virus. Since the danger of an incident in which an infectious disease is transmitted, if it changes within the sorts of behavior Bennett *et al.* suggest that if a person involves in less risky activities than normal in degree these do not necessitate a obligation to communicate to another individual of his HIV condition as the danger is decreased and consequently he is behaving in 'a responsible and morally justifiable way'. The nature of action is significant in evaluating the probability of transferring virus to another as it is generally approved that where the insertive partner is HIV+ it is a major insecure action to have unsafe anal sexual intercourse. When it concerns male to female transmission system, unsafe penetration to the vagina constitutes less danger. When it covers possible transmission system from unsafe female to male vaginal sexual intercourse, the danger is invariability more decreased. If the use of condom can be raised as a defence as public health promotes using condoms, then some kinds of sexual conduct ought also to be enclosed in the same envelope or package.

5. CONCLUSION

In conclusion it can be determined that if someone is HIV+ and does not communicate his HIV status to his partner at the time of sexual intercourse he ought to be liable for rape. Moreover, for someone to consent to becoming infected by HIV by way of sexual intercourse his or her consent ought to be communicated and the defendant in a criminal proceeding must have a genuine belief in such consent. As a defence of consent, the knowledge of the victim is an inherent part.

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