[2016]JMFC Full 3

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**
**IN THE FULL COURT**
**CLAIM NO. 2014 HCV 04232**

**BEFORE:** **The Hon. Ms. Justice Christine McDonald**
**The Hon. Mrs. Justice Sarah Thompson-James**
**The Hon. Mr. Justice Kissock Laing**

**IN THE MATTER OF** an application by **GEORGE FLOWERS** for a Writ of Habeas Corpus Ad Subjiciendum

**AND**

**IN THE MATTER OF** a request for the extradition of **GEORGE FLOWERS made by the GOVERNMENT OF CANADA**

**AND**

**IN THE MATTER** OF the **EXTRADITION ACT**

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|---|---|---|
| **BETWEEN** | **GEORGE FLOWERS** | **APPLICANT** |
| **AND** | **THE DIRECTOR OF PUBLIC PROSECUTIONS FOR AND ON BEHALF OF THE GOVERNMENT OF CANADA** | **1ST RESPONDENT** |
| **AND** | **THE COMMISSIONER OF CORRECTIONAL SERVICES** | **2nd RESPONDENT** |
| **AND** | **THE ATTORNEY GENERAL OF JAMAICA** | **3rd RESPONDENT** |

**IN OPEN COURT**

**Mr. Don Foote for the Applicant**
**Mr. Jeremy Taylor and Ms. Annette Austin instructed by The Director of Public Prosecutions for the 1st Respondent**
**Ms. Althea Jarrett instructed by the Director of State Proceedings for the 2nd Respondent**

**Extradition – Writ of habeas corpus –Meaning of 'Extradition Offence' – Principle of dual criminality - Whether conduct test or offence test to be applied – Whether the transmission of HIV virus is capable of amounting to a crime in Jamaica – whether putting an individual at risk of HIV is capable of amounting to a crime in Jamaica – Infliction of grievous bodily harm – sections 20 and 22 of the Offences Against the Persons Act – sections 5, 6, 10, 11 of Extradition Act – Aggravated Sexual Assault contrary to section 273 of the Criminal Code of Canada**

**Heard: January 11th and 12th 2016 and June 30th 2016**

**McDONALD J.**

**[1]** I have read the draft judgments of my learned colleagues Mrs. Justice Sarah Thompson-James and Mr. Justice Kissock Laing and I agree with their reasons and conclusions.

**THOMPSON-JAMES J.**

**Introduction**

**[2]** This is an application by George Flowers for a Writ of Habeas Corpus pursuant to section 11 of the *Extradition Act* of Jamaica, following his committal to custody August 22, 2015 by a Resident Magistrate for the parish of St. Andrew, pursuant to Section 10(5) of the Extradition Act. The extradition is being sought by the government of Canada for the applicant to face charges of aggravated sexual assault in respect of acts alleged to have been committed by him in Canada against four (4) different complainants.

**Background**

*The Extradition Request*

**[3]** A warrant was issued in Canada for the arrest of the Applicant for twelve (12) counts of aggravated sexual assault alleged to have been committed in Canada against four (4) different complainants, including his wife. The allegations being that the Applicant engaged in unprotected sexual intercourse with these women knowing that he was HIV positive and without informing them of his HIV positive status. Three (3) of the four (4) complainants subsequently contracted HIV, and all complainants swore to affidavits that they would not have had sexual intercourse with him had they known he was HIV positive. March 21, 2013, the government of Canada sought from the government of Jamaica, extradition of the Applicant who had since fled to Jamaica, in order that he be returned to Canada to face the charges against him.

**[4]** Initially, extradition was sought in respect of (12) counts of aggravated sexual assault contrary to *section 273(1)* and *(2)(b)* of the *Criminal Code of Canada (Revised Statutes of Canada) 1985* as amended (hereinafter referred to as "*the Criminal Code*"), the details of which are set out in the affidavit of Ms. Janet Gallin, Attorney-at-Law for the Ministry of the Attorney General for the province of Ontario, Canada, who provided evidence in support of the extradition request.

**[5]** The Minister of Justice, the Honourable Mr. Mark Golding, June 3, 2013, issued Authority to Proceed in respect of three (3) counts. The Government of Canada subsequently submitted a supplemental extradition request for a single count of aggravated sexual assault against Mr. Flowers, to which the Minister issued Authority to proceed September 9, 2013. An extradition warrant was issued for the arrest of the Applicant. The Applicant was arrested, and Committal Proceedings were conducted before Resident Magistrate for the parish of St. Andrew, Simone Wolfe Reece, who, on August 22, 2015, ordered that the Applicant be committed to custody pending his extradition to Canada. The

Resident Magistrate advised the Applicant of his right to challenge the order of committal and to apply for his release by way of a Habeas Corpus Application, of which he now avails himself.

*The Habeas Corpus Application*

**[6]** September 26, 2014, the Applicant filed this application by way of Fixed Date Claim Form, seeking a writ of Habeas Corpus pursuant to section 11 of the Extradition Act.

**[7]** The initial Application relied on several grounds, however, at the hearing January 12, 2016 his Attorney-at-Law, Mr. Don Foote, relied on the sole ground that "there is no corresponding offence in Jamaica to the offence of aggravated sexual assault for which the Applicant's extradition is being sought".

**LAW & ANALYSIS**

The Extradition Act and the Nature of Extradition

**[8]** The nature of the extradition process and the role of the courts therein, was aptly outlined by my learned brother Sykes J in **Martin Giguere v Government of the United States of America and the Commissioner of Correctional Services** [2012] JMSC Full 4, at paragraphs 12 and 13 as follows:

> *"[12] As is well known, extradition is a primarily political process where the executive of one state agrees with the executive of another state that each will surrender to the other, persons within its borders who are sought by the other state. The courts are interposed to answer the purely legal questions and thereafter, if the courts decide that extradition is legally permissible in any given case, then it is for the executive branch of government of the requested state to decide whether the person will be surrendered to the requesting state.*
>
> *[13] However, the fact that it is ultimately a political decision does not mean that the role of the courts is that of a rubber stamp. McLachlin CJ of the Canadian Supreme Court in* ***United States of America v Ferras; United States of America v Latty*** *268 DLR (4th) 1, held that extradition law requires that the basic demands of justice be met in these types of proceedings. Her Ladyship insisted that a person cannot be sent away on a mere demand or surmise'. Her Ladyship also held that 'it must be*

> *shown that there are reasonable grounds to send the person to trial' and that a 'prima facie case for conviction must be established through a meaningful judicial process'. According to the very learned Chief Justice, a meaningful judicial process…involves three related requirements; a separate and independent judicial phase; an impartial judge or magistrate; and a fair and meaningful hearing'. It was emphasised by her Ladyship that the 'judicial aspect of the process provides a check against state excess by protecting the integrity of the proceedings and the interests of the 'named person' in relation to the state process'. The judicial phase 'must not play a supportive or subservient role to the executive. It must provide real protection against extradition in the absence of an adequate case against the person sought'."*

**[9]** Extradition in Jamaica is governed primarily by the Extradition Act of Jamaica which provides safeguards to ensure the 'balanced and meaningful judicial process' as mentioned above, with the additional and overarching protection of section 14(1)(i)(ii) of the Charter of Fundamental Rights and Freedoms, which reads:

> *"14.-(1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances—*
>
> *(i) the arrest or detention of a person –*
>
> *(ii) against whom action is being taken with a view to deportation or extradition or other lawful removal or the taking of proceedings relating thereto.*

**[10]** Section 11 of the **Extradition Act** through which the Applicant now applies for Habeas Corpus, provides circumstances in which the Supreme Court on such an application may release the prisoner if said circumstances have been proven (section 11(3)). Section 7 also provides several circumstances under which an accused person should not be extradited. None of these circumstances appear in this case. This position is not challenged. It seems to me that from the wording of s11(3) that the powers of the Supreme Court are expansive, so that, even if the circumstances listed are not met, the Court can, by virtue of its inherent jurisdiction, find that, the prisoner, in the interests of justice should be released.

The role of the Supreme Court is essentially to ensure that the provisions of the Act are being or have been carried out in accordance with the intention of the Legislature, whilst at the same time, protecting the constitutional rights of the accused. The Court must balance the rights of the accused against those of the public, as well as its international obligations, the interests of comity between nations, and the overall interests of justice.

**[11]** Sections 6 and 10(5) of the **Extradition Act** make it clear that for a person to be subject to extradition, that person must have been accused of or convicted of an extradition offence. Section 6 reads:

> *"Subject to the provisions of this Act, a person found in Jamaica who is accused of an extradition offence in any approved State or who is alleged to be unlawfully at large after conviction of such an offence in any such State, may after conviction of such an offence in any such State, may be arrested and returned to that State as provided by this Act."*

**[12]** Section 10(5) through which the Applicant was committed in the Resident Magistrate's Court reads:

> *"Where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the extradition of that person or on behalf of that person, that the offence to which the authority relates is an extradition offence and is further satisfied –*
>
> *a) Where the person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if the offence had been committed in Jamaica; or*
>
> *b) Where the person is alleged to be unlawfully at large after conviction for the offence, that he has been so convicted and appears to be so at large,*
>
> *the court of committal shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his extradition under this Act; but if the court of committal is not so satisfied or if the committal of that person is so prohibited, the court of committal shall discharge him from custody.*

**[13]** The Act defines 'extradition offence' in **section 5** as follows:

> *"--(1) For the purposes of this Act, any offence of which a person is accused or has been convicted in an approved State is an extradition offence, if –*
>
> *a) In the case of an offence against the law of a designated Commonwealth State—*
>
> *i. it is an offence which is punishable under that law with imprisonment for a term of two years or any greater punishment; and*
>
> *ii. the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Jamaica if it took place within Jamaica (or in the case of an extra-territorial offence, in corresponding circumstances outside Jamaica) and would be punishable under the law of Jamaica with imprisonment for a term of two years or any greater punishment;*
>
> *..."*

**[14]** Canada became a designated Commonwealth State by virtue of **The Extradition (Designated Commonwealth States) Order, 1991,** therefore part (1)(a) of section 5 applies in the circumstances. This was not challenged by the Applicant. The fulfilment of requirement 5(1)(a)(i) was also not challenged, presumably since the relevant charge, aggravated sexual assault, is punishable by imprisonment for a term of two years or greater under Canadian law.

**[15]** Where the parties diverge however, is whether, pursuant to section 5(1)(a)(ii), there is a corresponding offence in Jamaica to the offence of aggravated sexual assault for which the Applicant's extradition is being sought. This provision encapsulates the principle of *dual/double criminality* that has been a longstanding feature of extradition within the common law and within state practice across the world.

**ISSUE**

**[16]** The only issue to be decided by the Court at this time is whether there is a corresponding offence in Jamaica to the offence of aggravated sexual assault for which the Applicant's extradition is being sought.

The Principle of Dual/Double Criminality

**[17]** Issue has been raised in this matter as to how section 5(1)(a)(ii) of the Extradition Act is to be applied, particularly, how it is that the Court should determine what is a "corresponding offence" so as to properly fall within this section as an 'extradition offence'. In putting forward their submissions, both counsel for the Respondents made issue of whether a "corresponding offence" is to be determined by way of a comparison of the offences in the requesting state and the state from which the extradition is sought (offence test), or, whether it is the conduct of the accused in the requesting state that should be compared with the legality of the same/similar conduct in the state from which the extradition is sought (conduct test).

**[18]** Mr. Taylor for the 1st Respondent relied on the dicta of Lord Diplock in Re Nielsen1984 AC 606 in submitting that the principle of dual criminality does not demand that the laws of the requesting state be carbon copies of one another, and that the crime need not be identical. He also cited Lebert Ramcharan and Donovon Williams v CCS and DPP (2007) 73 WIR at p. 380 per Harris J in support of the submission that it is unnecessary that an offence should correspond exactly.

Further, Mr. Taylor submitted, there is no requirement under the Extradition Act for the Minister, in his authority to proceed, to translate the offences framed in terms of foreign law in a requesting state's indictment/warrant in terms of Jamaican law [Shervin Emmanuel v CCS and DPP (2007) 73 WIR 291 at pg. 309].

**[19]** On the question of whether the relevant test ought to be the offence test or the conduct test, Mr. Taylor submitted that the dicta in *Ramcharan*, although not specifically referring to either test, based on the language used and how the judgment was framed, indicates that the conduct test is the appropriate test to be

applied. Mr. Taylor also relied on the case of Norris v Government of the United States of America and others [2008] UKHL 16.

**[20]** Ms. Jarrett for the 2nd Respondent, in relation to the same issue, also referred to the cases of *Norris* and *Nielsen*, but additionally relied on an excerpt from *Jones on Extradition and Mutual Assistance*[1] in which the learned author discusses the evolution of the competing tests in England, Canada, and the Caribbean, and, which according to Counsel, indicates that the English Courts were prepared to adopt the conduct test.It was also submitted that, having regard to the dicta of Harris J in *Ramcharan*, it would appear that our Court of Appeal has 'warmed itself' to the conduct test rather than the offence test.Ms. Jarrett further relied on the Privy Council case of Rey v Government of Switzerland [1999] 1 A.C. 54 in which the Court found that a broad conduct approach was to be used in interpreting the provisions of the Bahamian Extradition Act. She referred the Court to the analysis of Rey's case in Jones on Extradition at page 50, wherein the author points out the similarities of the Bahamian Extradition Act to the Jamaican Act.

In any event, she argued, even if the offence test were to be applied in accordance with how it is to be applied based on case law, the elements of the Jamaican offence could be found in the elements of the relevant Canadian offence.

**[21]** In **Norris v Government of the United States of America and Others** [2008] 2 ALL ER 103; UKHL 16, the Committee per Lord Bingham of Cornhill in discussing the principle of dual criminality and what it requires stated at paragraph [65]:

> *"It is possible to define the crimes for which extradition is to be sought and ordered (extradition crimes) in terms of either conduct or*

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[1]Jones, Alun Q.C. London: Sweet & Maxwell, 2001

> *of the elements of the foreign offence. That is the fundamental choice. The court can be required to make the comparison and to look for the necessary correspondence either between the offence abroad (for which the accused's extraditionis sought) and an offence here. For convenience these may be called respectively the offence test and the conduct test. It need hardly be pointed out that if the offence test is adopted the requested state will invariably have to examine the legal ingredients of the foreign offence to ensure that there is no mismatch between it and the supposedly corresponding domestic offence. If, however, the conduct test is adopted, it will be necessary to decide, as a subsidiary question, where, within the documents emanating from the requesting state, the description of the relevant conduct is to be found."*

**[22]** In finding that the conduct test ought to apply to extradition matters in England, the Court cited **Re Ismail** [1998] 3 ALL ER 1007 at 1011, for the proposition that a broad and generous construction should be given to extradition statues with the intent to serve the purpose of bringing to justice those accused of serious crimes. The achievement of this aim was described as a transnational interest. The court in **Norris** also noted that adopting a wider construction accords with the underlying rationale of the double criminality rule, which is that a person's liberty is not to be restricted as a consequence of offences not recognised as criminal by the requested state [para. 88]. Further, the Court was of the view that the wider construction would "avoid the need always to investigate the legal ingredients of the foreign offence, a problem long since identified as complicating and delaying the extradition process..."[para.89].

Finally, the Court noted [at para. 90] that "the broad conduct approach – the examination of all the conduct on which the requesting state relies – is that almost universally followed". It 'would place the United Kingdom's extradition law on the same footing as the law in most of the rest of the common law world' [para. 90].

**[23]** It is important to point out, however, that the wording in section 2(1) of the 1989 Extradition Act of UK that was being examined in ***Norris***, describes 'extradition crime' (except in schedule A) as *"(a) conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with a term of twelve months...".* The wording of the Fugitive Offenders Act 1967 on which the court in cases such as **Government of Canada v Aronson**[1989] 1 A.C. 579, decided the offence approach was to be followed, is more similar to the Jamaican Extradition Act. That is, it required that it be shown that the "act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of the United Kingdom...".

**[24]** In **Rey v Government of Switzerland** [1998] 3WLR 1 the Privy Council examined, inter alia, the meaning of "extradition crime" within the Extradition Act of Bahamas 1994, finding that the statute enacted a broad conduct approach. Ms. Jarrett relied on the analysis of Alun Jones Q.C. In ***Jones on Extradition*** in which the Author states at page 50 (2-026) as follows:

> *"This statute is in all essential respects identical to the Jamaican Extradition Act 1991. Each distinguishes between Commonwealth countries and foreign states, but each defines "extradition crime" as one that is punishable in the jurisdiction of the requesting state by two years' imprisonment or more, and each contains the same definition set out in section 3(1)(c) of the U.K. Fugitive Offenders Act 1967, cited above. Neither statute, however, contains a section equivalent to section 3(2) of the 1967 Act. Lord Steyn, giving the judgment of the Board, construed the Bahamian provision in the context of other provisions of the same act, and concluded purposively that the statute in fact enacted a broad conduct approach. He held that it was not necessary that the elements of the Swiss offence should be identical or similar to those of the Bahamian offences put before the magistrate for the purposes of determining sufficiency of evidence."*

Section 3(2) of the UK 1967 Act referred to by **Jones** required:

> *"In determining for the purposes of this section whether an offence against the law of a designated Commonwealth country falls within a description set out in the said Schedule 1, any special intent or state of mind or special circumstances of aggravation which may be necessary to constitute that offence under the law shall be disregarded."*

**[25]** In **Rey's** case, the Board specifically dealt with the issue of what was meant by the words "the act or omission constituting the offence", the same words the meaning of which pose a challenge in the case at hand. As pointed out by **Jones,** the provisions of section 5 of the Extradition Act of the Bahamas are almost identical to section 5 of our Extradition Act, however, the specific provision that was applicable in ***Reys*** differs from the one applicable at bar, since in that case, a treaty state [s5(b)(ii)] was involved,whilst here, it is the law of a designated commonwealth state [s5(a)(ii)]. Despite this, it is my view that this difference is immaterial, as both provisions require that 'the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law' of the relevant country.

**[26]** The Respondents in ***Reys*** relied on the case of ***Aronson***, submitting that the words" *act or omission constituting the offence*" required a comparison of ingredients of the offence under the legal systems of the requesting state and requested state, as was held by the majority in ***Aronson*** upon examining the same words under section 3 of the (UK) Fugitive Offenders Act 1967. Whilst, conversely, the Applicants submitted that the words refer in a broad sense to the conduct of the accused. Their Lordships in ***Rey*** however found that section 5(1)(b)(ii) of the Bahamian Act 'is contained in a new and differently worded statute", and that the right course was to examine and ascertain the best interpretation of the 'critical words' in view of their context.

At page 8, the Court stated:

> *"Taken in isolation the words "the act or omission constituting the offence" are capable of accommodating either meaning. But the purpose of the process of interpretation is to find the appropriate contextual meaning. There are a number of indications which support a broad conduct test. The two supplementary subsections which follow upon section 5(1), viz. 5(2) and 5(3), respectively speak of an offence constituted by an "act " and an offence ... constituted by "acts. " These two provisions are inconsistent with an ingredient test, and support a broad conduct test. This view is supported by the explanatory memorandum to the statute, which under the heading Objects and Reasons" states that an extraditable offence is one whose acts constituting the offence would be an offence under the law of "The Bahamas." Section 8(2) requires particulars of the person whose extradition is requested, and of the facts upon which ... he is accused." The reference to facts as particulars which must be furnished in all cases, including those where extradition is sought after conviction, is consistent with a conduct test. These are indications of some weight. And there are no contrary indications of substance in the Act of 1994.*

**[27]** The Court further expressed the rationale in favour of adopting a broad conduct test:

> *It is now necessary to consider the question from the broader perspective of the undoubted purpose of the Act of 1994, viz. to facilitate the extradition of persons accused of serious crimes. Two factors are of special importance. First, the ingredients test would often require a magistrate to hear and rule on evidence of foreign law. This consequence of the ingredients test complicates rather than facilitates extradition. Secondly, it must be taken into account that there are divergences in the definition of crimes between different national systems. Certainly, there are such divergences between the common law system in The Bahamas and the civil law system in Switzerland. A result of the strict application of an ingredients test*

> *would be that extradition would sometimes be refused despite the fact that the conduct of an accused amounts to an offence not only in the requesting state (Switzerland) but also in the state from which extradition is sought (The Bahamas). In any event, there can be no doubt that the adoption of the conduct test facilitates extradition. And it is not unfair since an accused can only be extradited if his conduct amounts to an offence in the state from which extradition is sought. No doubt these are the considerations which lead to the unambiguous adoption by Parliament of the conduct test in England: see section 2 of the Extradition Act 1989. If the point were untrammelled by authority, their Lordships would have had no difficulty in concluding that section 5(1)(b )(ii) of the Act of 1994 imposes a broad conduct test in order to determine what is an extraditable offence.*

**[28]** Though the Privy Council was of the view that ***Aronson*** was of high authority (despite being non-binding), particularly due to the 'critical words' being construed, it found that there were material differences, that taken cumulatively, justified the conclusion that the legislative context in ***Rey's*** case was materially different from that in ***Aronson***, and hence justified a departure from the conclusion in **Aronson** and the adoption of the broad conduct test [page 8].

**[29]** I consider the reasoning and decision in ***Reys*** to be sound and very persuasive, particularly given the similarities in wording of the provisions in both the Jamaican and Bahamian Extradition Acts. Also, one of the distinguishing features referred to by the Board, that was found to be in keeping with the broad conduct test, vis a vis the reference to 'act' and 'acts' in the Bahamian provision is also present in the Jamaican provision, with the minute difference that there is no 's' on 'act'. Further, I am in agreement, for all the reasons explained above, that the rationale and purpose of extradition, and the achievement of justice for all involved, is better served by the application of the conduct test rather than the offence test.

**Application of the Conduct Test**

**[30]** In ***Norris***, the Court found favour with the interpretation and application of the conduct test as formulated and applied by Duff J in the Canadian case of **Re Collins(No.3)** (1905)10 CCC 80 [para 99].At paragraph 100-101 of ***Re Collins*** (as cited in Norris at para 97), Duff J stated:

> *"...the treaty itself, which, after all, is the controlling document in the case, speaks not of the acts of the accused, but of the evidence of "criminality," and it seems to me that the fair and natural way to apply that is this – **you are to fasten your attention** not upon the adventitious circumstances connected with the conduct of the accused, but upon **the essence of his acts**, **in their bearing upon the charge in question**. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with. To illustrate, I apprehend that in the case of perjury, the accused cannot be heard to say, "the oath on which the charge is based was administered by A.B., an officer who had no authority to administer oaths in Canada (although duly authorized in the place where the oath was taken); and, consequently, if I had done here the identical thing I did there (viz.: the taking of an oath before A.B.), perjury could not have been successfully charged against me." The substance of the criminality charged against the accused is not that he took a false oath before A.B., but that he took a false oath before an officer who was authorized to administer the oath. Any other view would, I conceive, simply make nonsense of the treaty." [**emphasis mine**]*

**[31]** The Court in ***Norris*** further cited Duff J (para. 103) as follows:

> *"if you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include so far as relevant, the local institutions of the demanding country, the laws effecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged."*

**[32]** The Court also noted (para. 98) that the same general approach has been adopted in Australia wherein the legislation defines 'extradition offence' in terms of 'any equivalent act or omission' (as in our Act). The case of **Riley v Commonwealth of Australia** (1985) 159 CLR 1 was cited, in which that Court stated:

> *"The reference in the sub-section to an 'equivalent act or omission is to an act or omission which would be the same as the act or omission which is an element of the offence against the law of the foreign state were it not for the fact that the law of the foreign state requires (whether or not for reasons of jurisdiction) that the act or omission should have occurred in or in relation to some place or thing in or connected with the foreign state. For example, the act of importing narcotics into Australia is an "equivalent act" to the act of importing narcotics into the United States."*

**[33]** Essentially, in applying the conduct test, this court would be required to identify the essence of the act that forms the basis of the relevant offence Mr. Flowers is charged with in Canada, and determine, whether, if he were to be transplanted in Jamaica and to have done exactly what he did in Canada here, that conduct would constitute an offence under the laws of Jamaica.

***The Charges against Mr. Flowers and the Canadian Criminal Code***

**[34]** The charges against Mr. Flowers and the relevant Canadian law in support of the extradition request are outlined in the affidavit of Janet Gallin, Counsel in the Crown Law Office – Criminal (a branch of the Criminal Law Division of the Ministry of the Attorney General, Canada), who, based on her legal training, holds herself out as an expert in the criminal laws and procedure of Canada.

**[35]** Ms. Gallin avers that the charges are grounded in the *Criminal Code of Canada*, Revised Statutes of Canada, 1985, Chapter C-46, as amended, particularly sections 265 and 273.

> ***Assault***
>
> *265. (1) Aperson commits an assault when*
>
> > *(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;*
> >
> > *(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, presentability to effect his purposes; or*

*(c)While openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.*

***Application***

*(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.*

*(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of*

*(a) the application of force to the complainant or to a person other than the complainant;*

*(b)threats or fear of the application of force to the complainant or to a person other than the complainant;*

*(c) fraud; or*

*(d) the exercise of authority*

***Accused's belief as to consent***

*(4) where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.*

*.R.S.C. 1970, c. C-34, s. 244; S.C. 1974 -75-76, c.93, s.21; S.C. 1980-81-82-83, c. 125, s.19.*

*Between January 1, 1996 and April 30, 2008, the offence of Aggravated Sexual Assault read as follows:*

***Aggravated sexual assault***

273. (*1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.*

> *(2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable*
>
> > *(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and*
> >
> > *(b) in any other case, to imprisonment for life.*

*Since April 30, 2008, s.273(2)(a) of the criminal Code has changed several times, but only with respect to the applicable penalty if the offence is committed using a firearm. Since Mr. Flowers is not alleged to have used a firearm, the changes in the legislation do not affect him. Section 273(1) and (2)(b) have remained the same throughout the time Mr. Flowers is alleged to have committed the offences and remain in force now.*

**[36]** At paragraph 10 of her affidavit, Ms. Gallin states that Canadian case law establishes that there are circumstances in which 'engaging in sexual activity while HIV positive can constitute the offence of aggravated assault, the leading case of which is **R v Mabior** 2012 SCC 47. The findings of the Supreme Court of Canada in ***Mabior***, are accurately stated in the head note of that Judgment as follows:

> *"...a person who was HIV-positive was under a duty to disclose to those with whom he had sexual intercourse that there was a realistic possibility of transmission of HIV if that was in fact the case and a failure to make such disclosure amounted to fraud under s 265(3)(c), which vitiated any consent given by the complainant, since it deprived her of knowledge which would have caused her to refuse sexual relations that exposed her to a significant risk of serious bodily harm.*
>
> *However, there was no duty of disclosure if the accused had a low viral load and used condom protection, since the combination of the two precluded any realistic possibility of transmission of HIV, with the result that failure to disclose HIV status in such circumstances did not amount to fraud vitiating the complainant's consent under s 265(3)(c). A 'significant risk of serious bodily harm' depended both on the degree of harm and the risk of transmission and connoted a position between the extremes of no risk (which was adopted by the trial judge) and high risk (which was adopted by the Court of Appeal)."*

**[37]** The Court in **Mabior** approved the decision of **R v Cuerrier** [1998] 2 S.C.R. 371 which established that failure to advise a partner of one's HIV status may

constitute fraud vitiating consent, amounting to aggravated assault contrary to s265 of the Criminal Code, and clarified the precise circumstances under which this could be so, particularly what would amount to 'significant risk of serious bodily harm' [para.84]. The Court reiterated the test laid down in ***Cuerrier*** that the Crown must establish as elements of the offence (1) a dishonest act, and (2) deprivation (beyond a reasonable doubt) [para. 105], where the *dishonest act* is the failure to disclose, and *deprivation* is the denial to the complainant of knowledge (that he was HIV positive) that would have caused her to refuse sexual relations, where sexual contact posed a significant risk of or caused actual serious bodily harm [**Mabior**, para. 104]. The Court in ***Mabior*** found that 'a significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV, that could be negated by evidence that the accused's viral load was low at the time of intercourse and that condom protection was used'. [para. 104]. The Court also noted that HIV clearly rises to a level constituting 'serious bodily harm' as HIV is 'indisputably serious and life-endangering', and 'though it can be controlled by medication, remains an incurable chronic infection that, if left untreated, can result in death' [para. 91-92].

**[38]** Ms. Gallin avers that the evidence in the case at hand reveals that Mr. Flowers did not disclose his HIV status to any of the complainants before having sex with them, and each complainant gave evidence that she would not have consented to sexual intercourse with him had she known that he was HIV-positive. The evidence also shows, prima facie, that Mr. Flowers did not consistently use a condom with the complainants, his viral load was not low, and that 3 out of the 4 complainants subsequently tested positive for HIV.

**[39]** Exhibit "E" of the affidavit of Detective Constable Nancy Johnston of the Toronto Police Service, lead Investigator in this matter, provides evidence that inter-alia, Mr. Flowers tested positive for HIV on February 7, 1996, and that he was ordered on March 13, 2002, pursuant to the Health Protection and Prohibition Act (Canada) to abstain from sexual contact unless he informed his partners of his HIV status and wore a latex condom during sexual intercourse. Exhibit "F" of the

said affidavit notes that order dated April 9, 2002 amended the previous order to allow Mr. Flowers to have unprotected sex with one partner, that is one Linda Thomas, and exhibit “G” which contains progress notes from Mr. Flowers’ contact with the Public Health Department between May 29, 1996 and October 29, 1996, indicates that Mr. Flowers was aware of the need to wear condoms to avoid spreading the HIV infection [para. 11].

**[40]** Further, Ms. Johnston avers in paragraph 16 of her affidavit, that on the basis of her assessment of the complainant’s evidence and the viral load information obtained from public health records (which are exhibited to paragraph 13 as Exhibits “H” - “L”), as well as the use of the test for ‘low viral load’ laid out in ***Mabior,*** ‘none of the counts charged involved a situation where Mr. Flowers had a low viral load and used condoms.

**[41]** It must be noted that the conduct complained of in the various counts against Mr. Flowers, all similarly read: “...did in committing a sexual assault, endanger the life of ...thereby committing an aggravated sexual assault contrary to the criminal code”. [Exhibit “A” –Nancy Johnston’s Affidavit]

**[42]** Based on the foregoing, and the formulation of the conduct test as outlined above, the essence of Mr. Flowers’ conduct that forms the basis of the charges against him can be stated as follows:

a) Failure to disclose his HIV status, and

b) Denying the complainants knowledge which would have caused them to refuse sexual relations that exposed them to a significant risk of serious bodily harm (the significant risk being the failure to use condoms when his viral load was not consistently low).

**[43]** It is to be noted that there is no requirement that the complainant actually be infected with the HIV virus subsequent to the relevant sexual activity. Therefore

regardless of whether the complainant contracted the disease subsequent to the relevant sexual activity, the charge could be sustained.

*Is this conduct capable of amounting to an offence in Jamaica?*

**[44]** While there is no such offence in Jamaica as *Aggravated Sexual Assault*, counsels for theRespondents submitted that the conduct of Mr. Flowers is capable of falling within the scope of **Sections 20** and/or**22** of the **Offences against the Persons Act of Jamaica**, amounting to the offences of assault occasioning grievous bodily harm and unlawfully and maliciously inflicting grievous bodily harm respectively. By the end of the hearing the focus seemed to be on section 22.

Section 20 (1) provides:

> *"…whosoever, shall unlawfully and maliciously, by any means whatsoever, wound, or cause any grievous bodily harm to any person…with intent…to maim, disfigure or disable…or to do some other grievous bodily harm…shall be liable, to be imprisoned for life…"*

Whilst section 22 provides:

> *"whosoever shall unlawfully and maliciously wound or inflict grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding three years…"*

**[45]** Mr. Taylor in his submissions cited several English cases, commencing with **R v Clarence** (1880) 22 Q.B.D. 23 tracing the history and reasoning behind the development of UK law in this area. However, his main contention, as well as that of Ms. Jarrett's, were supported primarily by the English Court of Appeal decisions of **R v Mohammed Dica** [2004] 3 All ER 593 and **R v Konzani** [2005] EWCA Crim 706.

**[46]** Conversely, Mr. Foote for the Claimant argued that the **Offences against the Persons Act of Jamaica (OAPA)** is inapplicable .Mr. Foote made heavy weather of the term 'sexual' in the Canadian offence of *aggravated sexual*

*assault*, and its absence from any established crime in Jamaican law. He argued that the only legal provision that comes close to criminalizing the communication of a disease in Jamaica is section 5 of the Sexual Offences Act which deals with married persons, and that is not applicable in these circumstances. According to Mr. Foote, the fact that the legislature saw it fit to promulgate an Act to specifically deal with sexual offences, repealing offences of a sexual nature in the **OAPA,** is indicative that the Sexual Offences Act was intended to operate exclusively. Further, the fact that the legislature had in its contemplation the communication of sexually transmitted diseases and only criminalized it in respect of a husband and wife context is indicative that it had no intention for communication of those diseases to be a crime in other contexts.

**[47]** Mr. Taylor argued on the other hand, that the fact that Parliament has passed an Act that pieces together sexual offences into one piece of legislation does not preclude other offences being found on the same facts which may not be sexual even though sex is the context in which the offence was committed. Under section 22, in these circumstances, the harm inflicted would be HIV and sex would be the tool used to inflict the harm.

**[48]** It is undisputed that there is no precedent in Jamaican law in which an accused has been charged and convicted of an offence of this nature. Indeed, Mr. Taylor mentioned as coming closest, the case of **R v Alfred Mitchell** (1995) 32 JLR 48, in which the accused who was charged with carnal abuse of a 10 yr old girl, was also charged with inflicting grievous bodily harm for knowingly infecting her with HIV. However, that charge was not dealt with by the Court, as the defendant pleaded guilty to Carnal abuse and the crown offered no evidence in respect of the charge for grievous bodily harm. Mr. Taylor highlighted that the Court had made no adverse finding as it related to that charge on the indictment.

**[49]** In my view, the **Sexual Offences Act** indeed has no applicability in the circumstances at hand. Though it only criminalizes the communication of disease in relation to spouses, I do not believe that this precludes a finding that same is

criminal in other contexts by virtue of some other law. I do not believe that the mere absence of a provision in the Sexual Offences Act criminalizing an act of a sexual nature, without more, precludes this Court from finding that such act is a crime under other legislation and/or Common Law, particularly in light of the judgment in **Dica** (which was handed down well before the **SOA** was passed). Similarly to Mr. Foote's submission, the legislature quite probably would have had these developments also in contemplation when drafting the **SOA**. In my view, a more plausible explanation for the absence of a provision dealing with this issue is that the law in this area was still unsettled and in a state of development across different jurisdictions and so the legislature omitted that, leaving room for the law to develop. On the other hand, the law criminalizing the communication of disease in relation to a spouse in certain circumstances has been settled by common law for a considerable amount of time. The **Sexual Offences Act** simply codifies Common Law in that regard. Furthermore, and importantly, section 40(1) of the **Sexual Offences Act** provides that the Act shall be reviewed from time to time by a specially appointed Committee of both Houses of Parliament, which clearly in my mind shows the legislature's contemplation of the fluidity of sexual offence law and its intent to update the legislation as becomes necessary.

**[50]** In ***Dica***, the defendant who was HIV positive and knew of his status, had unprotected consensual sex with the two complainants over the course of long-term relationships with both, without advising them of his status and resulting in both complainants contracting HIV. The UK Court of Appeal had to grapple with the issue of whether these actions could amount to the criminal offence of inflicting grievous bodily harm contrary to section 20 of the UK Offences Against the Person Act of 1861 as outlined in the charge. The prosecution did not allege that the appellant had raped or intentionally set out to infect the complainants, but rather, that he was reckless as to whether they might become infected. Since it was not in dispute that on the majority of occasions intercourse with both complainants was unprotected, recklessness was not an issue.

Section 20 of the UK Act provides:

> *"Whosoever shall unlawfully and maliciously wound or inflict grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding three years, with or without hard labour…"*

**[51]** The Respondents argue the applicability of **Dica** to the case at hand based on the similarity of the aforementioned section to the comparable section of the Jamaican Offences Against the Person Act, section 22, which provides:

> *"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 a misdemeanour, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding three years, with or without hard labour".*

**[52]** Ultimately, the Court of Appeal in ***Dica*** found that a defendant could be convicted of inflicting grievous bodily harm contrary to section 20 of the UK Act where he was found to be *'reckless as to the risk of another person contracting a sexually transmitted disease from him through consensual sexual intercourse, and the other person contracted that disease through such intercourse'*. This could be so 'even when no physical violence had been applied, directly or indirectly to the victim's body'. The Court quashed the reasoning of the majority in **R v Clarence**, finding that it had no continuing application. To the extent that **Clarence** suggested that consensual sexual intercourse by itself was to be regarded as consent to the risk of consequent disease, the Court found that it is no longer authoritative. There is a defence, however, if the victim consents to that risk, but unless one is prepared to take whatever risk of sexually transmitted infection there may be, the Court found it was unlikely that they would consent to a risk of major consequent illness if they were ignorant of it [para. 59].

**[53]** The elements of the conduct required to satisfy the offence in ***Dica*** can be found in para. [59] of that judgment. They are:

a) Knowing that one is suffering from HIV or some other serious sexual disease

b) Recklessly transmitting it through consensual sexual intercourse

c) Lack of consent from the victim to the risk of being infected, whereby consent to sex alone is not consent to infection and where lack of knowledge of the risk/concealment of risk amounts to lack of consent to said risk.

**[54]** The reasoning in ***Dica*** was approved by the UK Court of Appeal in **R v Konzani** [2005] EWCA Crim 706, which went on to emphasize why in its own view the judgment in **Dica** was sound. The Court noted that for the defence of consent to succeed, the consent required had to be an informed consent [41], and on any view, the concealment of the fact of an HIV positive status almost inevitably meant that the sexual partner was deceived; consent was not properly informed, and the person could not give an informed consent to something of which said person is ignorant [para. 42].

**[55]** Further in **R v B 2007** WLR page 1567 paragraph 17 it is pointed out by Latham L.J that :-

> Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexually transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity,

merely by virtue of that consent, because such consent did not include consent to infection by the disease.

**R V B** recognises that harm can be created by that sexual activity.

**[56]** In my estimation, ***Dica*** and ***Konzani*** are very persuasive authorities, the reasoning of which could very well inform/ground similar decisions in the Jamaican context. As such, I find that it would be open to a Jamaican Court of Law to find that the offence of inflicting grievous bodily harm could be made out in similar circumstances on the evidence.

**[57]** It is important to point out that the gravamen of the conduct being criminalized in ***Dica*** and ***Konzani***, whilst seemingly very similar, differs in a substantial respect from that in the Canadian case of ***Mabior***, as well as from what is being alleged in the charges against Mr. Flowers. ***Dica*** and ***Konzani*** require the '*infliction of grievous bodily harm*', that is, actual transmission of HIV, whilst **Mabior** does not. In Mabior, what was being prosecuted was the act of deception and deprivation of knowledge, thus putting the victim at risk without their consent. Whilst the fact of infection clearly provides evidence of the presence of that risk, actual transmission is not required for the accused in Canada to be found guilty of the crime. Thus, what is actually punishable in both countries are two different types of conduct: deception/deprivation/putting the victim at a significant risk of bodily harm in Canada, and on the other hand, the reckless transmission of HIV in Jamaica.

**[58]** In other words, if Mr. Flowers had carried out the same acts he is accused of in Jamaica and the complainants did not contract the disease, there would be no offence for which he could be charged, despite the heinousness of his conduct. Indeed, an essential element of **Section 22** of the **Offences Against the Person Act** is 'the infliction of grievous bodily harm'. Outside of that section, I am aware of no other provision of law, statute or otherwise, under which an accused could be properly charged solely for deceiving his/her partner as to his/her HIV status

and putting them at risk of contracting HIV. It is clear, that, in respect of the complainant that did not contract the HIV virus, no charge would be sustainable in Jamaica there would be no extraditable offence in that regard for which Mr. Flowers could be extradited. . Does it then follow that Mr. Flowers cannot lawfully be extradited in respect of the other complainants who did in fact contract the disease?

**[59]** In deciding the answer to that question it is crucial to decipher what is meant by 'conduct', when applying the conduct test.

**[60]** In ***Norris***, the House of Lords examined which '*conduct*' ought to be assessed in determining that which amounts to an 'extradition offence'. Is it only the acts or omissions necessary to establish the offence as asserted in the indictment or charge? Or, is it the totality of circumstances widely described in the extradition request materials that give rise to the charge? It seems to me that, if it is the former, the act complained of in the indictments would not amount to an offence under Jamaican law for the reason explained above; However, if it is the latter, it is arguable that, in relation to the complainants who did contract HIV, despite the difference in charge that would ensue in Jamaica as compared with that in Canada, Mr. Flowers could in fact be convicted of an offence under the laws of Jamaica. This is so, because, if Mr. Flowers did exactly what he did in Canada here, that is, having unprotected sex, knowing he was HIV positive and not informing the complainant of his positive status, and the complainant contracted the virus, he could be found guilty of an offence, that offence being inflicting grievous bodily harm.

**[61]** The House of Lords decided in ***Norris*** that the relevant conduct should be "that described in the documents constituting the request…ignoring in both cases mere narrative background but taking account of such allegations as are relevant to the description of the corresponding United Kingdom offence" [para.91]. As mentioned above, the Court considered inter-alia, that the broad conduct

approach, which would involve the examination of all the conduct on which the requesting state relies, is that almost universally followed [para. 90].

**[62]** Though the wording of the relevant provision of the **UK Extradition Act** (s137) now differs from ours, the Court considered the argument by the Appellant Mr. Norris, that the current wording 'an offence constituted by the conduct', were similar to the words used in the 1967 UK Act which spoke of 'the act or omission constituting the offence' (the same words as in the relevant provision of the JA Act), and that this meant that the focus was to be on that part of the conduct (the essential ingredients) that constituted the foreign offence and nothing more [para. 77].

**[63]** The Court rejected that argument, finding that the wording of section 137 is consistent with both the conduct and offence tests as with both interpretations the offence would still be 'constituted by it'. The Court reasoned at paragraph 88, as outlined above, that adopting such a wide construction was entirely in accordance with the underlying rationale of the double criminality rule 'that a person's liberty was not to be restricted as a consequence of offences not recognised as criminal by the requested state'.

**[64]** I am in agreement with the reasoning in **Norris** on this point and of the view that the conduct to be examined in the case at hand ought to be all the conduct relevant to the description of the offence on which Canada relies. To rely solely on the elements of the offence would simply be an application of the offence test, which, for reasons already outlined in this judgment, would be highly undesirable and would not be in the interest of justice for all involved. I hold that if Mr.Flowers did exactly what he did in Canada in Jamaica, in respect of the complainants that contracted the virus, the charge of inflicting grievous bodily harm could be sustained against him. Indeed, this would accord entirely with the rationale of double criminality, and it could hardly be said that there was any injustice to him. In my view, the fact of infection in respect of those three complainants is even more reprehensible since these women are now afflicted

with a life altering chronic illness that may eventually become terminal. It would be a travesty of justice for this Court to find that Mr. Flowers should not be extradited to answer to the charges simply because he may have done something more egregious, or caused more harm, than that for which the Canadian authorities are charging him, when in fact he could be charged with an offence under Jamaican law.

**[65]** Similar reasoning was employed by the Court of Appeal in **Norris** wherein the English offence similarly required an additional element than that required by the US offence for which extradition was sought {UK offence = A, B, C, D vs. US Offence = A, B, C}. The Court, in dismissing Lord Bridge's concern in ***Aronson*** that a wide construction would lead to startling results in cases where there was an extra ingredient, lamented that it would not be startling at all since the accused would have indeed committed an offence under English law.

**[66]** It may seem unfair that the accused will have to answer to charges in respect of only three of the four complainants, but in my estimation it is more unfortunate and indicative of a grave lacuna in Jamaican law than anything else. In my view there is simply no offence in Jamaica for which the acts alleged to be committed against the 4th Complainant correspond, whilst for the other three, there is. I can see no sound reason why the plight of the fourth complainant should be a legal impediment to the extradition of Flowers in respect of the other three.

**[67]** In relation to the concern raised by Mr. Foote that there is nothing to stop the Canadian authorities from bringing Mr. Flowers before the Court in respect of all four complainants where our government extradites only in respect of three, the international law *doctrine of specialty* applies. This doctrine, whereby an extradited person is to only stand trial for those offences in respect of which he was extradited, is addressed in section 7(3)(a) of our extradition Act, which provides that a person may not be extradited until arrangements to ensure same are secure. Section 7(4) then goes on to provide that arrangements are sufficient whether they are specific to the case or of a more general nature. There is in fact

provision in section 80 of the ***Extradition Act, Statutes of Canada, 1999***, that affords this protection to a person that has been extradited to Canada. There is no reason by way of evidence or otherwise to suggest that the Canadian authorities will not honour these provisions.

**[68]** From the foregoing, I find that Aggravated Sexual Assault contrary to section 273 of the Canadian Criminal code is an extraditable offence pursuant to the Extradition Act of Jamaica in circumstances where the conduct of the accused results in the infliction of grievous bodily harm to the complainant. Therefore the Applicant may be extradited to answer to charges only in respect of the three (3) complainants who contracted the HIV Virus.

**[69]** Application for Habeas Corpus denied.

**LAING, J**

**Introduction**

**[70]** On the 22nd August 2015, Mr George Flowers (the "Applicant") was committed to custody under section 10 (5) of the **Extradition Act** by a then Resident Magistrate for the parish of St. Andrew. He was duly informed of his rights and by Fixed Date Claim Form filed on the 26th September 2015, the Applicant sought a Writ of Habeas Corpus for his release from custody pursuant to section 11 of the **Extradition Act** (the "Application").

**[71]** The Application was founded on a number of bases, but at the hearing Mr. Don Foote, Counsel for the Applicant, indicated that he would be relying on one ground only, that is, that there is no corresponding offence in Jamaica to the offence of aggravated sexual assault for which the Applicant's extradition is sought.

**Background**

**[72]** The Government of Canada is seeking the extradition of the Applicant in order for him to face charges of aggravated sexual assault contrary to the **Criminal Code of Canada, Revised Statutes of Canada**, 1985 as amended ("the Criminal Code"), and in particular section 273 thereof. These charges are in respect of four separate complainants, with whom the Applicant had unprotected sexual intercourse without first advising them that he had tested positive for the Human Immunodeficiency Virus ("HIV").

**[73]** The evidence before the learned Magistrate was that the Applicant became aware of his positive HIV status on or about the 26th March 1996 and was therefore aware of his infection when he had unprotected sexual intercourse with the four complainants. All four complainants assert that had they known that the Applicant was HIV positive they would not have slept with him. Three of the complainants with whom the Applicant had repeated unprotected sexual relations have been tested positive for HIV infection since the instances of unprotected sexual intercourse with the Applicant. One complainant, with whom there was only one occasion of unprotected sexual intercourse, is currently HIV negative.

**[74]** One complainant was legally married to the Applicant on the 21st June 2002. On being advised by the Applicant in or about March 2000 of his positive HIV status, she got tested and was advised that she was HIV positive. She had formed the view (evidently mistakenly), that both herself and the Applicant had become infected with the HIV Virus during the summer of 1998 when they both got tattoos. The fact of the marriage is for purposes of this Application, irrelevant.

**The Applicable sections of the Canadian Criminal Code**

**[75]** Ms. Janet Gallin, a Lawyer for the Ministry of the Attorney General for the province of Ontario, Canada, who is an expert in the criminal laws and procedure of Canada, provided affidavit evidence in support of the extradition request.

Relevant portions of her evidence at paragraph 9 of her affidavit as to the applicable sections of the Criminal Code are reproduced as follows:

> *Assault*
>
> *265. (1) A person commits an assault when*
>
> *(a) without the consent of another person he applies force intentionally to that other person, directly or indirectly;*
>
> *(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or*
>
> *(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs,*
>
> *Application*
>
> *(2) This section applies to all forms of assault, including sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.*
>
> *Consent*
>
> *(3) For the purpose of this section, no consent is obtained where the complainant submits or does not resist by reason of*
>
> *(a) the application of force to the complainant or to a person other than the complainant;*
>
> *(b) threats or fear of the application of force to the complainant or to a person other than the complainant;*
>
> *(c) fraud; or*
>
> *(d) the exercise of authority...*
>
> *...Between January 1, 1996 and April 30, 2008, the offence of Aggravated Sexual Assault read as follows:*
>
> *Aggravated sexual assault*
>
> *273. (1) Everyone commits an aggravated sexual assault who, in committing a sexual assault wounds, maims, disfigures or endangers the life of the complainant.*
>
> *(2) Every person who commits an aggravated sexual assault is guilty of indictable offence and liable*

> *(a) where a firearm is used in the commission for the offence, to imprisonment for a term of four years; and*
>
> *(b) in any other case, to imprisonment for life.*
>
> *Since April 30, 2008, s. 273 (2) (a) of the Criminal Code has changed several times but only with respect to the applicable penalty if the offence is committed using a firearm. Since Mr. Flowers is not alleged to have used a firearm, the changes in the legislation do not affect him. Section 273 (1) and (2) (b) have remained the same throughout the time Mr. Flowers is alleged to have committed the offences and remain in force now."*

**[76]** Ms. Gallin stated in her affidavit that engaging in sexual activity while HIV positive can constitute the offence of aggravated assault and referred to the Canadian case of **R v Mabior,** 2012 SCC 47. In this case it was held that a failure to disclose one's HIV-positive status is a fraud vitiating consent where the complainant would not have consented to the sexual activity had she known of the accused's positive HIV status and where a "serious risk of bodily harm" is established by "a realistic possibility of transmission of HIV".

**[77]** Ms. Gallin also avers that in **Mabior** the Supreme Court of Canada noted that where the Crown proves a failure to disclose HIV infection and where the sexual contact poses a significant risk of serious bodily harm, a tactical burden may fall on the accused to raise a reasonable doubt by producing evidence that he had a low viral load at the time of the sexual contact.

**[78]** The viral load is the number of HIV particles (called "copies") that are in a millimetre of a person's blood and in **Mabior** the Supreme Court accepted that the transmissibility of HIV is proportional to the viral load.

**[79]** Each complainant has stated that they would not have consented to sexual intercourse with the Applicant if aware of his positive HIV status. Ms. Gallin suggests that the evidence discloses that the Applicant did not consistently use a condom during sexual intercourse with three of the four complainants. She submitted that as a consequence of this, regardless of his viral load, there is a *prima facie* case that in the appropriate court in Canada, a reasonable jury

properly instructed in the law could on the evidence find, on the requisite standard beyond a reasonable doubt, that the applicant is guilty of the offence of aggravated sexual assault in respect of each complainant. This finding or verdict would be possible in respect of all the four complainants including the complainant with whom there was one act of unprotected sexual intercourse which did not result in HIV infection. Furthermore, she states that in any event the evidence shows that the Applicant's viral loads were not consistently low during the time that he was sexually active with each complainant.

**The Principle of Double Criminality**

**[80]** The principle of double criminality is fundamental to modern extradition practice and it dictates that a person may be extradited only for conduct which is a crime in both the requested and requesting states. There was no dispute between the parties as to the applicability of this principle. Counsel for the Applicant submitted that the starting point for any analysis for purposes of his client's application in relation to double criminality is section 5(1) of the **Extradition Act** which provides as follows:

> *5.-(1) For the purposes of this Act, any offence of which a person is accused or has been convicted in an approved State is an extradition offence, if –*
>
> *(a) in the case of an offence against the law of a designated Commonwealth State-*
>
> *(i) it is an offence which is punishable under that law with imprisonment for a term of two years or any greater punishment; and*
>
> *(b) the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Jamaica if it took place within Jamaica (or in the case of an extraterritorial offence, in corresponding circumstances outside Jamaica) and would be punishable under the law of Jamaica with imprisonment for a term of two years or any greater punishment...*

**[81]** Counsel for the Applicant did not challenge the fact that Canada is a designated Commonwealth State by virtue of The Designated (Commonwealth States) Order, 1991, nor was there any challenge to the fact that aggravated sexual assault is punishable in Canada by imprisonment for a term of two years or greater.

**Submissions on behalf of the Applicant in relation to the applicability of the Sexual Offences Act**

**[82]** The fulcrum of Counsel's submissions on behalf of the Applicant was that aggravated sexual assault is not an extraditable offence because the act or omission constituting the offence or the equivalent act or omission would not constitute an offence against the law of Jamaica if it took place within Jamaica.

**[83]** Counsel placed reliance on the **Sexual Offences Act**, 2009 in support of his argument. In essence, Counsel argued that the clear intention of Parliament in enacting the legislation can be observed from the Governor General's assent which provides as follows;

> *AN ACT to Repeal the Incest (Punishment) Act and certain provisions of the Offences Against the Person Act; to make new provision for the prosecution of rape and other sexual offences; to provide for the establishment of a Sex Offender registry; and for connected matters."*

**[84]** Counsel submitted that the act or omission of the Applicant which is being complained of is a "*sexual act*", and if it took place in Jamaica, prosecutors would have to look to the **Sexual Offences Act** of which sections 3 (Rape), section 4 (Grievous Sexual Assault), section 5 (Marital Rape) and section 6 (Penalty for Rape and Grievous Sexual Assault) would be the only possible relevant sections.

**[85]** Counsel argued that the act or omission of the Applicant would not fall within any of these offences under the Sexual Offences Act, and because of the sexual nature of the alleged act or omission, the Applicant could not be successfully convicted under any other legislation. For that reason, Counsel submitted that the **Offences Against the Person Act**, which was referred to and relied upon at the committal proceedings, is for purposes of the extradition of the Applicant, irrelevant.

**Submissions on behalf of the First Respondent in relation to the applicability of the Sexual Offences Act**

**[86]** On the issue of whether the **Sexual Offences Act** was the only relevant legislation within which the acts or omissions of the Applicant ought to be considered, Mr. Jeremy Taylor representing First Respondent, conceded that the acts and/or omissions of the Applicant that are being complained of do not fall within and cannot constitute any of the offences under the **Sexual Offences Act**. There is no issue joined as between the Applicant and the First Respondent on this point and the Court agrees that the **Sexual Offences Act** is irrelevant for purposes of this Application.

**[87]** Mr. Taylor further submitted however that although the **Sexual Offences Act** provides for the creation of certain sexual offences, it does not preclude alternative offences being found on the same facts which may not be sexual, even though sexual intercourse, (or a sexual encounter) provided the context in which the offence was committed. In other words, the sexual component of the activity may be the vehicle by which the harm is committed, as in the case of an offence contrary to section 22 of the **Offences Against the Person Act**, which Mr Taylor submitted was applicable. Mr. Taylor conceded and so did Ms. Jarrett who represented the Second Respondent, that section 20 of the **Offences Against the Person Act** would not be applicable since on the evidence, there was no intent on the part of the Applicant to "maim, disfigure or disable" any of the complainants.

**Submissions on behalf of the 2nd Respondent in relation to the applicability of the Sexual Offences Act**

**[88]** Ms. Jarrett Counsel for the Second Respondent, submitted that there was another reason why the **Sexual Offences Act** was inapplicable. Counsel referred the Court to the notation in the **Sexual Offences Act** that Parts I to VI and Part VIII and the schedules are in operation on 30th June 2011, with Part VII

being in operation on 11th October 2011. Counsel referred the Court to **Jones on Extradition and Mutual Assistance** ("Jones") at page 45 (Chapter 2-018) which addresses the question of whether the criminality of the conduct is to be assessed at the time the conduct was committed or at the time of the extradition request. In the case of **R v Bow Street Magistrates Court, ex parte Pinochet (No. 3)** 2000 1 AC 147 the House of Lords held that the test was whether the conduct would have been punishable in the United Kingdom at the time the offences took place. Counsel submitted that a similar approach should be taken in these proceedings. If this is done, the issue of the criminality of the conduct of the Applicant which is being complained of took place before 30 June 2011 and would have to be assessed without reference to the **Sexual Offences Act**, the applicable parts of which first came into operation on that date.

**[89]** The Court notes that the conduct of the Applicant which is being complained of took place before the 30th June 2011 as it relates to the three complainants who tested positive for HIV infection. As it relates to the fourth complainant, the situation is somewhat uncertain since she met the Applicant in or around May or June 2011 and had a sexual relationship that lasted up to August 2011, but the date of the act of unprotected sexual intercourse is not clear.

**The applicable test for double criminality**

**[90]** In **Norris v Government of the United States of America and Others** [2008] 2 All ER 1103; UKHL 16 Lord Bingham of Cornhill in delivering the composite opinion of the committee examines the double criminality issue at page 1126 letter e where he states:

> *... it is useful to stand back from the detail and recognise the essential choice that the legislature makes in deciding just what the double criminality principle requires. It is possible to define the crimes for which extradition is to be sought and ordered (extradition crimes) in terms either of conduct or of elements of the foreign offence. That is the fundamental choice. The court can be required to make a comparison and to look for the necessary correspondence either between the offence abroad (for which the accused's extradition is sought) and an offence here, or between the conduct alleged against the accused abroad and an offence here. For convenience these may be called respectively the offence test and the conduct test. It need hardly be pointed out that if the offence test is*

> *adopted the requested state will invariably have to examine the legal ingredients of the foreign offence to ensure that that there is no mismatch between it and the supposedly corresponding domestic offence. If however the conduct test is adopted, it will be necessary to decide, as a subsidiary question, where, within the documents emanating from the requesting state, the description of the relevant conduct is to be found.*

**[91]** In the Privy Council case of **Rey v Government of Switzerland** [1999] 1 AC 54; UKPC 17, which originated in the Commonwealth of the Bahamas, the Privy Council considered the provisions of The Bahamas **Extradition Act**. Counsel for Mr. Rey relying on the majority holding in **Government of Canada v Aronson** [1990] 1 AC 579, submitted that the words "the act or omission constituting the offence" refer to the ingredients of the Swiss offence in respect of which the Applicant's extradition was being sought and consequently section 5(1)(b)(2) is only satisfied if the definition of the offence in Swiss law corresponds with the ingredients of a Bahamian offence (the offence test). This submission, to the extent that it suggested the applicability of the offence test, was not accepted by the Court.

**[92]** Ms. Jarrett for the Second Respondent referred the Court to **Jones** and that author's analysis of **Rey's** case. Smith commented at page 50 (paragraph 2-026) as follows:

> *This statute is in all essential respects identical to the Jamaican Extradition Act 1991. Each distinguishes between commonwealth countries and foreign states, but each defines "extradition crime" as one that is punishable in the jurisdiction of the requesting state by two years' imprisonment or more, and each contains the same definition set out in section 3(1)(c) of the UK Fugitive Offenders Act 1967 cited above. Neither Statute, however, contains a section equivalent to section 3(2) of the 1967 Act. Lord Steyn, giving the judgment of the Board, construed the Bahamian provision in the context of other provisions of the same act, and concluded purposively that the statute in fact enacted a broad conduct approach. He held that it was not necessary that the elements of the Swiss offence should be identical or similar to those of the Bahamian offences put before the magistrate for the purpose of determining sufficiency of evidence".*

**[93]** There are some minor differences between the **Extradition Acts** of Bahamas and Jamaica, notably 5(3) but I am not of the view that these differences would affect the analysis in **Rey** if applied to the Jamaican **Extradition Act**.

**[94]** The Privy Council in **Rey** (1998 UKPC 17 at para 12) made the following observations which are worth quoting *in extenso*:

> *It is now necessary to consider the question from the broader perspective of the undoubted purpose of the Act of 1994, viz. To facilitate the extradition of persons accused of serious crimes. Two factors are of special importance. First, the ingredients test would often require a magistrate to hear and rule on evidence of foreign law. This consequence of the ingredients test complicates rather than facilitates extradition. Secondly, it must be taken into account that there are divergences between the common law system in The Bahamas and the civil law system in Switzerland. A result of the strict application of the ingredients test would be that extradition would sometimes be refused despite the fact that the conduct of an accused amounts to an offence not only in the requesting state (Switzerland) but also in the state from which extradition is being sought (The Bahamas). In any event there can be no doubt that the adoption of the conduct test facilitates extradition. And it is not unfair since an accused can only be extradited if his conduct amounts to an offence in the state from which extradition is sought. No doubt these are considerations which lead to the unambiguous adoption by parliament of the conduct test in England: see section 2 of the Extradition Act 1989. If the point was untrammelled by authority, their lordships would have had no difficulty in concluding that section 5(1)(b)(ii) of the Act of 1994 imposes a broad conduct test in order to determine what is an extraditable offence"*

**[95]** Having gone on to distinguish **Aronson** based on the differences in the legislation that were considered in that case, the Court concluded that section 5(1)(b)(ii) of the Act of 1994 does impose a broad conduct based test. I am of the firm view that that is also the appropriate test to be applied in order to determine what is an extraditable offence under our **Extradition Act**.

**The conduct test applied to the acts and omissions of the Applicant**

**[96]** In applying the conduct test the Court is required to examine the conduct of the Applicant that is being complained of in order to determine whether there has been the commission of an "extradition offence". Reference has been made earlier to the evidence of Ms. Janet Gallin as to what are the elements of the Canadian offence in respect of which extradition is being sought and to her evidence of the leading case of **Mabior**. In **Mabior** the Court accepted that the earlier decision of **R v Cuerrier** [1998] 2 S.C.R.371, established that sex without consent is an aggravated assault under s. 265 of the **Criminal Code** R.S.C.

1985 and that the failure to disclose that one has HIV may constitute fraud vitiating consent to sexual relations.

**[97]** In **Cuerrier**, the accused was infected with HIV and was advised by a public health nurse to inform his prospective sexual partners of his status and to use a condom whenever he engaged in sexual intercourse. He nevertheless engaged in unprotected sexual intercourse with two complainants without informing them of his status. They each testified that although they had consented to unprotected sexual intercourse they would not have done so if they had been aware of the accused's positive HIV status. Mr. Cuerrier who had been charged with 2 counts of aggravated assault contrary to section 268 of the **Criminal Code**, was acquitted by the trial judge and his acquittal upheld by the Court of Appeal. However the Supreme Court of Canada upheld the appeal and ordered a new trial. It was highlighted by the Supreme Court that it was not necessary to be established that the complainants were infected with HIV.

**[98]** The Court in **Mabior** expressed the view that because HIV poses a risk of serious bodily harm, the operative offence is one of aggravated sexual assault, contrary to s. 273 of the **Criminal Code** which attracts a maximum sentence of life imprisonment.

**[99]** In **Cuerrier**, the Supreme Court in analysing the issue of fraud vitiating consent, condensed it to two main elements - (1) a dishonest act (either falsehoods or failure to disclose HIV status) and (2) deprivation (denying the complainant knowledge which would have caused her to refuse sexual relations that exposed her to a significant risk of serious bodily harm). The Court in **Mabior** accepted that the **Cuerrier** test raised uncertainty as to what constitutes "significant risk" and what constitutes "serious bodily harm". However the Court concluded that the **Cuerrier** approach, although difficult to apply, was in principle valid and should not be jettisoned.

**[100]** In the context of the s. 273 offence of aggravated sexual assault, the acts or omissions alleged in relation to the Applicant and which are complained of in summary are that:

> *(1) He failed to disclose his positive HIV status;*
>
> *(2) he exposed the complainants to a significant risk of serious bodily injury by having unprotected sex when his viral load was not consistently low.*

**[101]** The offence does not require proof that the Applicant infected the complainants with HIV. In fact, it is important to note that one of the complainants is HIV negative and she had protected sexual intercourse with the Applicant save for one single encounter.

**Is the transmission of HIV by sexual relations capable of amounting to an offence in Jamaica**

**[102]** A considerable portion of the submissions of the Respondents involved addressing the issue as to whether the sexual transmission of infections is an assault. Mr. Taylor traced the development of the law in this area beginning with the case of the **R v Clarence** (1888) 22 Q.B.D. 23. In **Clarence** the accused knew that he was suffering from gonorrhoea but did not advise his wife of this fact. He had sexual intercourse with her and this resulted in the disease being transmitted to her. Had she been aware of this fact she would not have consented to the sexual intercourse. The majority of the Court of Crown Cases reserved held that his conduct did not amount to an assault and his conviction was quashed.

**[103]** Mr. Taylor then referred to the case of **R v Mohammed Dica** [2004] 3 All ER 593 decided by the English Court of Appeal, Criminal Division, which he submitted reflects what is, or ought to be, the current position of the law of Jamaica, there being no locally decided cases on this issue. In **Dica** the defendant, who was HIV positive, and who knew of his status, had unprotected consensual sexual intercourse with the two complainants on several occasions. Both complainants contracted HIV. The defendant was charged with inflicting grievous bodily harm

on the complainants contrary to section 20 of the **Offences Against the Person Act** 1861 the applicable portion of which is reproduced in the judgment as follows:

> *"Whosoever shall unlawfully and maliciously would or inflict grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof shall be liable ...to imprisonment ...for not more than five years."*

**[104]** By way of comparison section 22 of the Jamaican **Offences Against the Person Act** which Mr. Taylor submits is applicable provides as follows:

> *"Whosoever shall unlawfully and maliciously would or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof**,** shall be liable to be imprisoned for a term not exceeding three years, with or without hard labour.."*

**[105]** An accurate summary of the Court's finding in **Dica** is contained in the head note which is extracted hereunder:

> *"Where a defendant was reckless as to the risk of another person contracting a sexually transmitted disease from him through consensual sexual intercourse, and the other person contracted that disease through such intercourse, he could be convicted of inflicting grievous bodily harm contrary to s 20 of the 1861 Act notwithstanding that there had been no assault on the victim. Even when no physical violence had been applied, directly or indirectly, to the victim's body, an offence under s 20 could be committed. Putting it another way, if the remaining ingredients of s 20 were established, the charge was not answered simply because the grievous bodily harm suffered by the victim did not result from direct or indirect physical violence. It followed in the instant case that the judge had been correct that, notwithstanding the nineteenth-century authority, it had been open to the jury to convict the defendant of the offences on the indictment (see, [30], [31], below); R v. Wilson (Clarence), R v. Jenkins (Edward John) [1983] 3 ALL ER 448 and R v. Ireland, R v. Burstow [1997] 4 All ER 225 applied; R v. Clarence (1889) 22 QBD 23 disapproved."*

**[106]** The case of **Dica** was placed in its appropriate context where Lord Justice Judge stated:

> *The appeal raises issues of considerable legal and general public interest about the circumstances in which a defendant may be found guilty of a criminal offence **as a result of infecting another person with a sexually transmitted disease**.' (emphasis supplied).*

**[107]** The learned Lord Justice went on to make the following observation:

> *"It is perhaps important to emphasize at the outset that the prosecution did not allege that the appellant had either raped or deliberately set out to infect the complainants with disease. Rather, it was alleged that when he had consensual sexual intercourse with them, knowing that he himself was suffering from HIV, he was reckless whether they might become infected. Thus, in the language of the counts in the indictment, he had "inflicted grievous bodily harm" on them both."*

**[108]** **Dica** has been followed in subsequent cases such as **R v Konzani [2005]** EWCA Crim 706 in which the English Court of Appeal (Criminal Division) upheld the conviction of the appellant on three counts of inflicting grievous bodily harm on three women contrary to the **Offences Against the Person Act** 1861. Knowing that he was infected with the HIV virus he repeatedly had unprotected sexual intercourse with them and infected them with HIV and the Court found that he thereby inflicted grievous bodily harm on them.

**[109]** Since there is no locally decided case on the issue of transmission of sexual infections such as HIV, cases such as **Dica** and **Konzani** would be considered to be persuasive authorities on this point. It is my view that if this issue fell to be decided by a Court in Jamaica today, such Court would take a similar approach to their Lordships in **Dica** and **Konzani**. Accordingly it would be open for the Court to find that a person who knows that he is infected with a the HIV virus and who recklessly infects another may be guilty of inflicting grievous bodily harm contrary to section 22 of the **Offences Against the Person Act**. This would of course be subject to all the ingredients of the offence being established.

**[110]** As has been pointed out in **Dica**, one issue which would be live would be whether the complainant who became infected was prepared to take whatever risk of sexually transmitted infection there might have been, but it is unlikely that such a person would be found to have consented to a risk of contracting HIV if he or she was unaware of the risk because the infected partner did not disclose the infection. Issues as to whether the defendant was or was not reckless, and whether the victim did or did not consent to the risk of contracting HIV, will always be one of fact and will have to be considered and resolved on a case by case basis.

**The difference between the acts and omissions required for aggravated sexual assault and the acts and omissions constituting the offence of inflicting grievous bodily harm contrary to section 22 of the Offences Against the Person Act.**

**[111]** What is patently clear from **Dica** and **Konzani** and which appears to be beyond dispute as a matter of law, is that where a person who knows that he is infected with HIV has unprotected sexual intercourse or other sexual relations with another, it is critical that the accused must have infected that other person with HIV in order for a conviction contrary to section 22 of our **Offences Against the Person Act** to be sustained. The gravamen of the section 22 offence is "inflicting" grievous bodily harm and that is satisfied by evidence that the complainant contracted HIV as a result of the conduct of the accused. The mens rea will be established if the accused was reckless, (in the **R v Cunningham** [1957] 2 QB 396, sense), as to the risk of the complainant contracting the disease. The issue as to whether the complainant gave informed consent sufficient to constitute a defence to the charge, will of course turn on whether the accused disclosed his positive HIV status or whether the complainant came by this information through some other source or in some other manner. The example given in **Konzani** is of the individual with HIV developing a relationship with someone who knew him while he was in hospital receiving treatment for that infection.

**[112]** As has been addressed earlier in this judgment, the acts and omissions of the Applicant which are complained of in Canada are:

> *(1) engaging in sexual activity while HIV positive;*
>
> *(2) failing to disclose his HIV-positive status (which is a fraud vitiating consent because the evidence of the complainants is that they would not have consented to the sexual activity had they known of the accused's positive HIV status).*

This being in circumstances where a serious risk of bodily harm is established by "a realistic possibility of transmission of HIV"- where the Applicant has had unprotected sexual intercourse when his viral load was not consistently low during such period of activity.

**[113]** The evidence of Ms. Gallin, when taken together with a reading of the section 237 of the **Criminal Code** and a detailed analysis of the case of **Mabior,** all demonstrate that the offence of aggravated sexual assault contrary to section 273 of the **Criminal Code** does not require the Applicant to have infected the complainants with HIV to establish guilt. This is a factor to be considered. In **Mabior** none of the complainants contracted HIV. It has already been pointed out and bears repeating that one of the complainants against the Applicant is HIV negative.

**[114]** The positive HIV infection of the other three complainants is evidence of actual harm. Actual harm is of value to the prosecution in the Canadian case since it is capable of establishing that there was realistic possibility of transmission of HIV. A significant risk which in fact materialised and is evidenced in the three complainants actually having contracted the virus. The fact that the fourth complainant did not, would not in principle affect the charge in respect of this fourth complainant who did not contract the virus because she was nevertheless exposed to the significant risk without her informed consent. The infection of a complainant with HIV is clearly not an essential element of which proof is required in order for the offence of aggravated sexual assault to be made out.

**[115]** Section 273 of the Canadian Code addresses the “risk” of bodily harm and does not require the “inflicting” of bodily harm as does section 22 of the **Offences Against the Person Act**. On the other hand section 22 of the **Offences Against the Person Act** does not criminalize exposure to HIV absent actual transmission of the virus to a complainant. It follows then, that if the Applicant were to be charged in Jamaica only for the exact primary acts and omissions for which he is being charged in Canada, that is, exposing the four complainants to the “risk” of bodily harm, a conviction pursuant to section 22 of our **Offences Against the Person Act** would be unsustainable as a matter of law. However I will demonstrate below that this does not necessarily mean that the Applicant cannot be extradited to face prosecution in Canada.

**The consequences of the application of the offence test or the application of Conduct test**

**[116]** The difference in the consequences of the application of one or the other of the two tests can be seen by examining the cases **Aronson and Norris** (supra). In **Aronson** Lord Lowry offered this analysis:

> *"The 'act or omission constituting the offence' cannot in my opinion mean 'the conduct, as proved by evidence, on which the charge is grounded,' because the evidence of such conduct could prove something more than what has been charged. In such a case the conduct proved would not be the act or omission constituting the offence of which the fugitive is accused in the Commonwealth country . . .*
>
> *... One may paraphrase the effect of section 3(1)(c) by asking: 'what is the essence of the Commonwealth offence? And would that be an offence against the law of the United Kingdom?' That is quite a different thing from looking at the course of conduct revealed by the evidence and asking whether that conduct (as distinct from the conduct of which the person is accused) would constitute an offence against the law of the United Kingdom."*

**[117]** In **Aronson** By a majority of three to two (Lord Griffiths and Lord Jauncey of Tullichettle dissenting), the House of Lords held that section 3(1)(c) of the United Kingdom (UK) **Extradition Act** provided for the application of the offence test. If one were to apply the offence test as adopted in **Aronson**, then there would be merit in the submission of Counsel for the Applicant that the essence of the crime of aggravated sexual assault would not be an offence against the law of Jamaica. To put it another way, there would be no "*necessary correspondence between the offence abroad (for which the accused's extradition is sought) and an offence here*" since all the elements of section 22 of our **Offences Against the Person Act**, (in particular HIV or other infection caused or inflicted by the Applicant) are not present in or required for the offence of aggravated sexual assault.

**[118]** In **Aronson** Lord Bridge of Harwich expressed reservations as to risk of injustice that could arise from adopting the conduct test by using the following example which also conveniently and graphically illustrates the issues to be decided as it relates to the Applicant's position:

> *"The issue arises when the Commonwealth offence may be established by particularising and proving ingredients A, B and C, but the nearest corresponding United Kingdom offence requires that the prosecution prove ingredients A, B, C and D. It is submitted for the Government of Canada . . . that if, in a particular case, the evidence relied on to prove the Commonwealth offence would be sufficient, if accepted, to establish ingredient D in addition to ingredients A, B and C, this is sufficient to satisfy the requirements of section 3(1)(c). Whether the extra ingredient necessary to prove the United Kingdom offence, over and above the ingredients which constitute the Commonwealth offence, is a physical or mental element, the wide construction leads to startling results. Two men are accused of the identical Commonwealth offence particularised against them in identical terms. The committing magistrate must decide whether the offence with which each is charged is a 'relevant offence': section 7(5). If the evidence establishes ingredients A, B and C against both men but ingredient D against the first man only, the magistrate must commit the first man, but not the second, to custody to await his return to the designated Commonwealth country. Yet so much of the evidence that is relied on to establish ingredient D or any inference drawn from the evidence to establish ingredient D, will be irrelevant to his trial for the Commonwealth offence after his return."*

**[119]** In **Norris** the extradition of the applicant was being sought in respect of a number of counts, count 1 of which related to participation in a cartel. He argued that participation in a cartel, in the absence of aggravating conduct such as dishonesty, (which for purposes of our discussion it is the “D ingredient” in Lord Bridge’s analysis), was not at the material time a criminal offence at common law or under the statute law of the UK. He therefore argued that since the conduct of which he is accused in the United States would not, at the time, have been criminally punishable in the UK then the double criminality requirement of the UK **Extradition Act** 2003 was not satisfied and he should not be extradited under the Act. The Court ultimately found that the conduct test should be applied consistently throughout the 2003 Act

**[120]** In **Norris** the Court did not share Lord Bridges’ concern and addressed it as follows:

> *Lord Bridge's illustration neatly raises the situation postulated in this very case. Ingredient D (here dishonesty) is required to prove the English offence but is not an ingredient of the United States offence. Applying the conduct test (as would have applied under the 1870 Act) he, but not a notional co-accused against whom dishonesty was not alleged, would have fallen to be extradited. Is that, however, really so "startling"? He, after all, would have committed an offence under English law whereas his co-accused would not.*

**Conclusion**

**[121]** Based on my conclusion expressed earlier in this judgment that the conduct test is applicable in our jurisdiction, I take into account the fact that in the documents constituting the request, the requesting state of Canada has produced evidence which is capable of supporting the conclusion that the Applicant has caused the HIV infection of three of the four complainants. This evidence is not necessary to sustain a charge in Canada of aggravated sexual assault contrary to section 273 of the Criminal Code (it may for convenience be viewed as the additional "ingredient D" using Lord Bridge's example referred to earlier) but the infection would be a necessary ingredient were the Accused to be charged in Jamaica for the offence of section 22 of our Offences Against the Person Act. Accordingly, I have considered this evidence in my assessment of whether the Applicant is extraditable.

**[122]** For the reasons herein it is my conclusion that the acts or omissions of the Applicant constituting the offence for which his extradition is being sought (including the additional ingredient of causing HIV infection in respect of three of the complainants) would constitute an offence against the law of Jamaica if it took place within Jamaica since he would have "inflicted" grievous bodily harm in respect of these three complaints. Consequently the Applicant is being accused of having committed three counts of an "extradition offence". The position of the fourth complainant who was not infected with the HIV virus is clearly distinguishable.

**[123]** I am therefore of the view that the Court should refuse to grant the application for Habeas Corpus and that the Applicant should be extradited to face prosecution in respect of the three complainants in respect of whom evidence has been produced that they have been infected with HIV.