

Case Name:

R. v. Aziga

Between

**Her Majesty the Queen, Respondent, and
Johnson Aziga, Applicant**

[2008] O.J. No. 2431

78 W.C.B. (2d) 87

Court File No.: 07/1122

Ontario Superior Court of Justice
Hamilton, Ontario

T.R. Lofchik J.

Heard: June 10, 2008.

Judgment: June 18, 2008.

(24 paras.)

Criminal law -- Procedure -- Jury -- Challenges for cause -- Questioning prospective jurors -- Application by the accused Aziga to challenge prospective jurors for cause in his trial for murder and sexual assault allowed -- Aziga, a black Canadian citizen from Uganda, was HIV positive -- The Crown claimed that, between 2000 and 2003 he had unprotected sexual intercourse with 13 complainants -- Seven complainants contracted HIV and two had died -- The accused would be allowed to ask prospective jurors about their attitudes toward blacks, sexual relations between black men and white women, and about biases relating to pre-trial media coverage.

Application by the accused Aziga to challenge prospective jurors for cause in his trial for murder and sexual assault. The accused, a black Canadian citizen from Uganda, was diagnosed as HIV positive in 1996. The Crown claimed that, between 2000 and 2003 he had unprotected sexual intercourse with 13 complainants. Seven complainants contracted HIV; two had died. The accused sought to challenge prospective jurors for cause on the basis of racial bias, bias concerning HIV, and attitudes about sexual relations between black men and white women. He also sought to ask if prospective jurors could be impartial in the face of media coverage of the case. The Crown argued that the accused had not established any widespread bias concerning HIV or that prospective jurors would have formed an opinion based on media coverage.

HELD: Application allowed. The accused would be permitted to challenge for cause for pre-trial publicity and racial bias. However, there was no evidence that a widespread bias existed with respect to HIV status and prospective jurors would not be challenged on that basis.

Counsel:

T.K. Power and K.A. Shea, counsel on behalf of the Crown.

S. **Pieters** and D. Bagambire, counsel on behalf of the Accused.

**REASONS FOR RULING --
CHALLENGE FOR CAUSE APPLICATION**

1 T.R. LOFCHIK J.:-- The accused, Johnson Aziga, is charged in an Indictment with two counts of first degree murder and 13 counts of aggravated sexual assault. The offences involved 13 named complainants and are alleged to have been committed between June 1, 2000 and May 19, 2004.

2 The applicant was diagnosed and advised that he was HIV Positive on December 10, 1996. It is alleged that, between June 1, 2000 and August 30, 2003, the applicant engaged in unprotected penetrative sexual activity with 13 named complainants and failed to disclose to them that he was HIV Positive. It is alleged that as a result of the applicant's unprotected penetrative sexual activity with the 13 named complainants, seven of the complainants have become HIV Positive. Two of the complainants, Sylvia Barnes and Heather Cook, died as a result of complications associated with their HIV infection. Sylvia Barnes died on December 7, 2003; Heather Cook died on May 19, 2004.

3 The accused is a black Canadian citizen who was born in Uganda.

4 The applicant applies for an order allowing a challenge to prospective jurors for cause on the basis of racial bias, HIV bias and media publication pursuant to s. 638(1)(b) of the *Criminal Code*. The applicant asks that jurors be asked four questions:

1. Would your ability to judge the evidence in the case at bar without bias, prejudice or partiality be affected by the fact that there has been recent newspaper, television, radio, or internet broadcasts, regarding criminal transmission of Human Immunodeficiency Virus ("*HIV*"), the cause of AIDS (Acquired Immunodeficiency Syndrome)?
2. Do you have an inflated sense of the risks of HIV transmission and a tendency toward HIV-phobia or panic (as opposed to a healthy fear of possible infection, based on a realistic assessment of risks associated with various acts, that can be part of prompting sensible, informed precautions)?
3. Do you have any fears, assumptions and prejudices about HIV Virus period, which may feed into your judgments and assumptions about the accused and also your ability to assess the evidence in a calm rational fashion?

4. Would your ability to judge the evidence in the case at bar without bias, prejudice or partiality be affected by the fact that the individual charged is a black Canadian citizen who was born in Uganda, has HIV and the alleged victims, including the two deceased women, are white?

5 Regarding question 4, on which counsel for the Crown and accused agree, this question is consistent with **R. v. Parks** (1993), 84 C.C.C. (3d) 353 (Ont. C.A.); **R. v. Williams** (1998), 124 C.C.C. (3d) 481 (S.C.C.), paras. 31 and 32. This question may be put to prospective jurors as part of a challenge for cause.

6 It is the position of the respondent Crown, that the applicant has failed to establish that there is a realistic potential for juror partiality as a result of pretrial publicity and public perceptions relating to HIV. They argue that there is no evidence before the court to support an assertion that: (i) a widespread bias exists in the community; (ii) some jurors may be incapable of setting aside this bias despite trial safeguards, to render an impartial decision.

7 Notwithstanding the applicant's failure to establish that such a potential for partiality exists, the respondent consents to the following questions being put to prospective jurors pursuant to section 638(1)(b) of the **Criminal Code of Canada**:

- (1) do you have any previous knowledge of this case (or other recent cases involving criminal HIV transmission) through the newspaper, radio, television or the internet?
- (2) Given your knowledge of this case (or other recent cases involving criminal HIV transmission), are you able to decide this case based on the evidence you hear in the courtroom and the judge's directions on the law?
- (3) Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the individual charged is a black Canadian citizen who was born in Uganda, has HIV (Human Immunodeficiency Virus), and the alleged victims, including the two deceased women, are white?

THE LAW RELATING TO CHALLENGE FOR CAUSE

8 Our criminal law is premised on the ability of 12 jurors to do their job with "*indifference*" as between the Crown and the accused. We do not start with the idea that it is up to the potential juror to demonstrate his or her impartiality. Our procedures in this respect differ from the American approach. In this country, people called for jury duty benefit from a presumption that they will do their duty without bias or partiality. In **R. v. Spence**, [2005] S.C.J. No. 74, Binnie J., on behalf of the Court, concluded:

Our collective experience is that when men and women are given a role in determining the outcome of a criminal prosecution, they take the responsibility seriously: they are impressed by the jurors' oath and the solemnity of the proceedings; they feel a responsibility to each other and to the court to do the best job they can; and they listen to the judge's instructions because they want to decide the case properly on the facts and the law.

Reference: **R. v. Spence**, [2005] S.C.J. No. 74, at paras. 21 to 22.

9 The presumption of impartiality may be rebutted by satisfying the trial judge that "*on a ground sufficiently articulated in the application*", there is in the case of some potential jurors a "*realistic potential for ... partiality*" (**R. v. Sherratt**, [1991] 1 S.C.R. 509). In **Sherratt**, the articulated ground was pre-trial publicity. The Court stated the rule as follows:

*The threshold question is not whether the ground of alleged partiality **will** create such partiality in a juror, but rather whether it **could** create that partiality which would prevent a juror from being indifferent as to the result. In the end, there must exist a **realistic potential for the existence of partiality**, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed.* (Emphasis added)

Reference: **R. v. Sherratt**, [1991] 1 S.C.R. 509, at 536.

10 Establishing a realistic potential for juror partiality generally requires satisfying the court on two matters:

- (1) that a widespread bias exists in the community; and
- (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision.

Reference: **R. v. Find**, [2001] S.C.J. No. 34, at para. 32.

11 The two components of the test involve distinct inquiries. They are not "*watertight compartments, but rather guidelines for determining whether on the record before the court, a realistic possibility exists that some jurors may decide the case based on preconceived attitudes or beliefs, rather than the evidence placed before them*". Reference: **R. v. Find**, *supra* at para. 33.

PRE-TRIAL PUBLICITY REGARDING CRIMINAL HIV TRANSMISSION

12 The real question to be determined in a case involving challenge for cause for pre-trial publicity is whether such publicity could potentially have the effect of destroying the prospective juror's indifference between the Crown and the accused. (**R. v. Zundel** No. 1) (1987), 31 C.C.C. (3d) 97 at p. 132, approved in **R. v. Sherratt**, *supra*, at para. 63.

13 Looking at the reports of this matter in the printed media, I have concerns that such coverage could create a partiality that would prevent a juror from being indifferent in the result. The press coverage includes not only factual coverage of court appearances, but also discussions as to the manner of funding the accused's defences, discussions about the accused having dismissed a number of lawyers, discussion with respect to delays in this matter, and discussions about the prevalence of HIV and spread of AIDS in our community. I take judicial notice that similar coverage has been given to this matter in the broadcast media.

14 Where a realistic potential for partiality is shown to exist, the right to challenge must follow. If in doubt, the judge should err on the side of permitting challenges (see **R. v. Fine**, *supra*).

15 I would allow a challenge for cause on the basis of pretrial publicity. The Crown and defence disagree on the form of question to be put in this regard. Guidance as to the nature of the question is set out in **R. v. Park**, *supra*, at page 362 as follows:

The questions must go to the issue which is relevant to the jurors' potential partiality, that is the answers to the question or questions must provide a rational basis upon which the triers may assess partiality.

16 Applying this test, I prefer a version of the question similar to that proposed by the Crown. The question relating to pre-trial publicity should be put to a prospective juror in the following form:

- (1) Do you have any previous knowledge of this case (or other recent cases involving criminal HIV transmission) through the newspaper, radio, television or the internet?
- (2) Given your knowledge of this case (or other recent cases involving criminal HIV transmission), are you able to decide this case based solely on the evidence you hear in the courtroom and the judge's directions on the law?

BIAS REGARDING HIV POSITIVE INDIVIDUALS

17 I can find no evidentiary basis to support an assertion that there exists within the community a widespread bias against HIV Positive individuals that would render jurors incapable of delivering an impartial decision despite trial safeguards. A 2003 survey relied upon by the applicant in support of this assertion reflects that only six percent of respondents were "*uninformed and uncomfortable*" in relation to attitude and knowledge regarding HIV and AIDS. There is no evidence that these respondents would be unable to set aside their opinion when provided with evidence in the courtroom and the trial judge's instructions to the jury and direction on the law.

18 The effect of the accused's HIV status and the effect of the allegation of transmission of HIV by the accused on a potential juror are covered by the form of the *Parks* question which both parties have agreed should be put to a prospective juror.

19 The theory of "*generic prejudice*" against persons who are HIV Positive or accused of transmitting the Human Immunodeficiency virus, has not been proved nor could judicial notice be taken of the proposition that such prejudice exists. In the absence of evidence that strongly held beliefs or attitudes may affect judicial behaviour in an unfair manner, it is difficult to conclude that they could not be cleansed by the trial process.

20 Finally, absent evidence, it is highly speculative to suggest that the emotions surrounding HIV and AIDS and their transmission will lead to prejudicial and unfair juror behaviour. The safeguards of the trial process and the instructions of a trial judge are designed to replace emotional reactions with rational, dispassionate assessment.

JURORS' APPROACH TO SCIENCE

21 At the hearing of this application counsel for the respondent proposed a further question to be put to prospective jurors on a challenge for cause as follows:

Are you one of those men or women who are so adverse to discussing issues of science and/or mathematics, that you would have a mental block in relating to the evidence of science that the Crown is likely to present against the accused in this case?

22 The fifth question goes to the personal qualities of the prospective jurors and is irrelevant to the issue of partiality which the cases say opens the door to a challenge for cause. Questions which seek to do no more than establish that a potential juror has mindsets, beliefs, opinions or bias which may operate for or against a party, do not establish partiality (see *R. v. Park*, *supra*, at p. 364).

23 Challenges for cause stray into illegitimacy if used merely, without more as "*fishing expeditions*" in order to obtain personal information about a prospective juror, which may be used by a challenger to exercise the right to challenge peremptorily in the event of an unsuccessful challenge for cause or to over or under represent a certain class in society (see *R. v. Sherratt*, *supra*, para. 59). The proposed question falls into this category and will not be allowed.

24 In the result the following questions will be permitted to be put to prospective jurors in a challenge for cause:

- (1) do you have any previous knowledge of this case (or other recent cases involving criminal HIV transmission) through the newspaper, radio, television or the internet?
- (2) Given your knowledge of this case (or other recent cases involving criminal HIV transmission), are you able to decide this case based solely on the evidence you hear in the courtroom and the judge's directions on the law?
- (3) Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the individual charged is a black Canadian citizen who was born in Uganda, has HIV (Human Immunodeficiency Virus), and the alleged victims, including the two deceased women, are white?

T.R. LOFCHIK J.

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