



Case in Brief: ***R. v. Kirkpatrick***

Judgment of July 29, 2022 | On appeal from the Court of Appeal for British Columbia  
Neutral citation: 2022 SCC 33

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***The Supreme Court rules that when someone is required by their partner to wear a condom during sex but they do not, they could be guilty of sexual assault.***

In March 2017, Ross Kirkpatrick and a woman met online and then in person in British Columbia. The woman agreed to have sex with Mr. Kirkpatrick, but only if he wore a condom. They had sexual intercourse twice one night. Mr. Kirkpatrick wore a condom the first time. The second time, Mr. Kirkpatrick did not wear a condom, which she only realized after intercourse ended. Based on these events, Mr. Kirkpatrick was charged with sexual assault.

Section 273.1(1) of the *Criminal Code* defines consent as a person's voluntary agreement to "engage in the sexual activity in question". At trial, the complainant testified that she had not consented to the sexual activity in question — in this case, intercourse without a condom. When the Crown finished presenting its case, Mr. Kirkpatrick asked the judge to dismiss the charge against him due to lack of evidence. He claimed the Crown did not prove the absence of consent, because the complainant consented to the sexual intercourse, regardless of condom use.

Specifically, Mr. Kirkpatrick said the judge should apply the Supreme Court's 2014 ruling in *R. v. Hutchinson*, which established a test for analyzing consent. That case also involved a complainant who said she consented to having sex but only if the accused wore a condom. The accused pierced holes in the condom without the complainant knowing. The Supreme Court decided that the complainant consented to the "sexual activity in question" in that case because she agreed to sexual intercourse. However, the Supreme Court found that the accused obtained the complainant's consent by fraud, contrary to section 265(3)(c) of the *Criminal Code*, since the accused had tampered with the condom. In the present case, Mr. Kirkpatrick said the complainant agreed to have sexual intercourse, like in *Hutchinson*, but he said there was no evidence of fraud, unlike in *Hutchinson*.

The judge dismissed the sexual assault charge against Mr. Kirkpatrick due to lack of evidence. The judge applied *Hutchinson* and found that because the complainant agreed to have sex with Mr. Kirkpatrick, she consented to "the sexual activity in question" under section 273.1(1), although no condom was worn. And, the judge also determined that there was no evidence that Mr. Kirkpatrick's failure to wear a condom was fraud under section 265(3)(c). The Crown then appealed to British Columbia's Court of Appeal. The Court of Appeal ordered a new trial, finding that the first judge should not have dismissed the sexual assault charge based on a lack of evidence. Mr. Kirkpatrick then appealed to the Supreme Court of Canada.

The Supreme Court has dismissed Mr. Kirkpatrick's appeal and has confirmed a new trial is needed.

**When condom use is a condition for sexual intercourse, it becomes part of the sexual activity to which the person consented.**

Writing for a majority of the judges of the Supreme Court, Justice Sheilah L. Martin said that when condom use is a condition for sexual intercourse, "there is no agreement to the physical act of intercourse without a condom". The condom is part of the "sexual activity in question" to which a person consented under section 273.1(1) of the *Criminal Code*. "Since only yes means yes and no means no, it cannot be that 'no, not without a condom' means 'yes, without a condom'", Justice Martin wrote.

There is therefore no need to decide whether the failure to wear a condom in this particular case was fraud. And *Hutchinson* does not apply to the present case, but it still applies in cases involving condom sabotage and fraud.

**There was evidence of the complainant's lack of consent to sex without a condom.**

The complainant provided evidence that she would not have had sex with Mr. Kirkpatrick without a condom. Accordingly, there was some evidence the complainant did not consent to the sexual activity in question. The trial judge made an error in concluding there was no evidence and in dismissing the sexual assault charge. A new trial is therefore required.

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**Breakdown of the decision:** *Majority:* Justice [Martin](#) dismissed the appeal (Justices [Moldaver](#), [Karakatsanis](#), [Kasirer](#) and [Jamal](#) agreed) | *Concurring:* Justices [Côté](#), [Brown](#) and [Rowe](#) dismissed the appeal but would have applied *Hutchinson* (Chief Justice [Wagner](#) agreed)

**More information (case # 39287):** [Decision](#) | [Case information](#) | [Webcast of hearing](#)

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