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# Recent Developments: United States v. Joseph: Unwarned Sexual Intercourse by an HIV-Infected Person Constitutes Aggravated Assault with or without Protection

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*United States v. Joseph*

**UNWARNED  
SEXUAL INTERCOURSE  
BY AN HIV-INFECTED  
PERSON CONSTITUTES  
AGGRAVATED ASSAULT  
WITH OR WITHOUT  
PROTECTION.**

A conviction of aggravated assault by means likely to produce death or grievous bodily harm was upheld based upon evidence that the accused had sexual intercourse without first informing his partner that he had tested positive for the Human Immunodeficiency Virus (HIV). In so holding, the United States Court of Military Appeals, in *United States v. Joseph*, 37 MJ 392 (CMA 1993), set new boundaries of accountability for carriers of HIV, and presumably other venereal diseases.

John Joseph, a journalist in the United States Navy was informed that he had tested positive for HIV in approximately June of 1988. He was counseled that the disease could be transmitted to another human being by sexual intercourse and advised that death or great bodily harm was the eventual consequence of infecting someone with HIV. Joseph acknowledged receiving information that sexual intercourse with a condom and nonoxynol-9 spermicide would be safer than sexual intercourse with no protection but that abstinence was the only guaranteed way to prevent spreading the virus.

On January 22, 1989, Joseph offered, and Petty Officer W. refused to participate in unprotected sexual intercourse. Joseph then purchased a condom which was subsequently used during consensual sexual intercourse with Petty Officer W, who was not informed that Joseph was an HIV carrier. There was conflicting testimony as to whether nonoxynol-9 was used, whether the condom was intact upon withdrawal and whether ejaculation occurred. Although this was the one and only time that Joseph and Petty Officer W had sexual intercourse, Petty Officer W contracted HIV.

Determining that Petty Officer W was infected by Joseph, Judge Tim S. McClain, sitting alone as a general court-martial in the Court of Military Justice, found Joseph guilty of aggra-

vated assault under Article 128 of the Uniform Code of Military Justice, 10 U.S.C. § 928(b)(1). Article 128(b)(1) provides that any person who commits an "assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm...is guilty of aggravated assault...." *Id.* at 395. This conviction was affirmed by the United States Navy-Marine Corps Court of Military Review, and Joseph appealed to the United States Court of Military Appeals.

Judge Cox, writing for the majority, began the analysis by considering whether there was sufficient evidence to conclude that Joseph's conduct constituted an assault. *Id.* Noting that the *actus reus* of assault included "any offensive touching of another, however slight," the court reasoned that a factfinder could rationally find "offensive touching when a knowingly HIV-infected person had sexual intercourse without informing his partner of the illness." *Id.* (citation omitted). The court determined this to be true, regardless of whether protective measures were utilized to safeguard against the transmission of HIV. *Id.* Therefore, the court held that "a rational trier of fact could find, beyond a reasonable doubt, that [Joseph's] conduct amounted to an assault consummated by a battery on Petty Officer W." *Id.*

The court then considered "whether the assault-by-unwarned-sexual-intercourse was a 'means or force likely to produce death or grievous bodily harm.'" *Id.* at 396. The court noted that intimate sexual contact is one of the two primary methods of HIV transmission. *Id.* The risks associated with condom use - breakage, spillage, defective workmanship, improper or careless usage, and even permeability - were found to be well documented and known by Joseph. *Id.* The court refused to sanction as a matter of law that use of a condom acted as a complete bar to prosecu-

tion. *Id.* The court opined that "any time a person willfully or deliberately exposes an unsuspecting victim to a deadly or debilitating disease or infection, such as HIV, polio, hepatitis B, or certain venereal diseases, the actor may be liable for an aggravated assault -- or worse." *Id.* (emphasis omitted).

Additionally, the court refused to construe the word "likely" as a statistical probability. *Id.* Analogizing HIV to a rifle bullet, the court stated that the salient question was whether a bullet is likely to inflict death or serious bodily harm if it hits the victim, not the statistical probability of the bullet hitting the victim. *Id.*

The evidence, which by law must be considered in the light most favorable to the prosecution, was that Petty Officer W. had not engaged in sexual relations for approximately one year prior to the encounter with Joseph, that the condom, which was reluctantly used by Joseph, was dry and therefore more likely to break, and that appellant knew condoms did not provide absolute protection. *Id.* at 397. Weighing the totality of the circumstances, the court found, as a matter of law, the evidence sufficient for the trier of fact to find that unwarned sexual intercourse by an HIV-infected person, even when a condom was used, was an assault with a means likely to cause death or grievous bodily injury. *Id.* Recognizing that this application of legal principles translated into a drastic reduction in the sexual freedom of HIV-infected persons, the court quoted an ancient legal maxim that "one's liberty to swing one's arms stops where another's nose begins." *Id.*

Noting that this was a case of first impression, Chief Judge Sullivan in his concurring opinion, agreed with the majority that sufficient evidence was admitted to enable a reasonable person to find beyond a reasonable doubt that Joseph assaulted Petty Officer W. with a "means or force

likely to cause ... grievous bodily harm." *Id.* (citation omitted). Rejecting the per se condom rule proffered by Joseph, Chief Judge Sullivan still expressed concern that the use of a condom may have precluded finding that Joseph had the requisite criminal intent for a conviction of aggravated assault under Article 128(b)(1) of the Uniform Code of Military Justice. *Id.* at 401. He determined that Joseph was guilty of committing a culpably negligent battery and declared that "it was well established that it is a negligent act for a person with a communicable disease to engage in sexual intercourse without disclosing that medical condition to the partner." *Id.* at 400. Chief Judge Sullivan additionally found that Joseph could reasonably have been convicted of aggravated assault for offering to have sexual intercourse without a condom, thereby attempting to expose his partner to HIV under Article 128(a). *Id.*

Regretting that the courts cannot entirely avoid political determinations of what conduct should be criminalized as socially unacceptable, Judge Wiss concurred in the result. *Id.* at 401-02. Although critical of Chief Judge Sullivan's "attempt theory" and creative interpretation of Article 128 to include culpably negligent battery, he nonetheless found adequate evidence upon which a reasonable factfinder could determine that Joseph specifically intended to injure Petty Officer W. by being willing and prepared to have sexual intercourse, devoid of protection and informed consent. *Id.* at 403-06.

This case addressed a significant problem that is beginning to plague our courts. Because AIDS is incurable and fatal, its spread has become a major problem in America and indeed throughout the world. The difficult task of balancing the rights of the HIV carrier with the rights of potential victims has become more difficult due to the lack of malice of the ac-

cused. Somewhere between demanding that HIV carriers wear a scarlet letter and allowing HIV carriers total freedom to carry out fateful encounters lies the awkward and difficult task of protecting the public. The court opted not to discuss whether Joseph was guilty primarily because of his partner's ignorance or his own knowledge. The assault was not the sexual intercourse, but the deliberate physical touching with Joseph's HIV-infected semen. This leaves the unanswered question of liability concerning sexual relations where the HIV carrier is unaware of his condition or where the victim has knowingly consented. Questions of liability and responsibility concerning non-sexual conduct which may lead to AIDS also remain unanswered. Thus, in holding an HIV carrier criminally liable for aggravated assault for infecting an unwarned partner with HIV, *United States v. Joseph*, made a dramatic and far reaching finding, and yet touched only the tip of a troublesome social dilemma.

- Sandra G. Pike