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Sex assault trial to resume after HIV row

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A sex assault case returns to court today after the first trial was derailed over the judge's insistence that the HIV-positive complainant testify with a mask over his face or leave the courtroom.

A new trial date is expected to be set for Lee Wilde, charged with the sex assault of another man in March 2007 while they were jail inmates at the Central North Correctional Centre in Penetanguishene.

During a two-day trial last month, the male complainant, whose name is banned from publication, testified he is HIV positive and also has hepatitis C. He admitted he did not reveal his HIV status to Wilde, who he claims raped him three times in the prison cell.

But in midstream in the trial, on learning of his HIV status, trial judge Justice Jon Jo Douglas became alarmed and ordered the complainant be masked and/or testify electronically from another courtroom. "Either you mask your witness, and/or move us to another courtroom or we do not proceed."

Immediately following a break, his court staff came out in blue rubber gloves and enclosed paper exhibits the witness had touched in sealed plastic bags.

In a locking of horns, Crown attorney Karen McCleave refused to allow her key witness, who is no longer an inmate, to be treated with disdain and applied for a mistrial.

The judge refused and ordered the trial proceed with the witness masked. The Crown then provided an affidavit from Dr. Giulio DiDiodato, an expert in the field of infectious disease, who stated that neither HIV nor hepatitis C posed a risk of infection unless there is direct exposure to the infected blood, vaginal fluid or semen. Justice Douglas rejected the evidence. The Crown again applied for several more mistrials and the judge refused. The Crown then applied to a higher court to have the judge removed from the trial over concerns of bias. But the higher court dismissed the Crown's application, noting it is the trial judge's jurisdictional right to conduct safety precautions in the courtroom "even if his decision could be said to be wrong," wrote Superior court Justice Margaret Eberhard, who also noted "it might be wise not to continue," the trial under such conflicting circumstances. In the end, Justice Douglas voluntarily removed himself in the interests of the integrity of the trial. But to the end he maintained his concern, stating, "have we not learned from the SARS fiasco?" Now the trial will begin again under a new judge, but Wilde's defence lawyer, Angela McLeod, says she is not happy. "My client is innocent and he is being held in custody all this time

through no fault of his own," she said. "Meanwhile the complainant is out walking free in the community."

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